

#441-06

OAL DKT. NO. EDU 9413-06
 AGENCY DKT. NO. 282-8/06

M.M. and T.M., on behalf of minor child, E.M., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
 NORTHERN HIGHLANDS REGIONAL :
 SCHOOL DISTRICT, :

RESPONDENT. :

_____ :

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

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

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09413-06

AGENCY DKT. NO. 282-8/06

M.M. and T.M. on behalf of minor, E.M.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
NORTHERN HIGHLANDS REGIONAL
SCHOOL DISTRICT,**

Respondent.

George J. Cotz, Esq., for petitioner

Linda G. Ott, Esq., for respondent (Apruzzese, McDermott, Mastro, & Murphy, attorneys)

Record Closed: November 27, 2006

Decided: November 27, 2006

BEFORE IMRE KARASZEGI, JR., ALJ

On August 15, 2006, the Commissioner of Education received Petitioner's application for emergent relief regarding the revocation of Petitioner's senior parking privileges on the school campus. On August 23, 2006, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a

contested case. On August 29, 2006, oral argument was presented in the Newark offices of the Office of Administrative Law before this Judge and, after hearing the arguments of counsel and any other documentation submitted, Petitioner's motion for emergent relief was denied. A hearing date was scheduled for October 27, 2006 at the OAL in Newark. Prior to the hearing, under letter dated October 18, 2006, counsel for the Board submitted the attached Settlement Agreement.

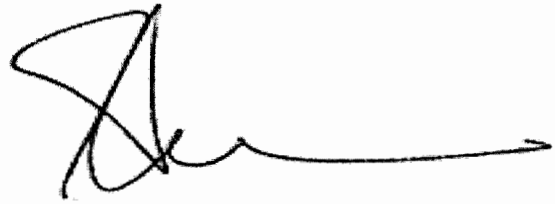
Having reviewed the record and the terms of the settlement I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **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 27, 2006

DATE

IMRE KARASZEGI, JR., ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

db

RECEIVED
2008 OCT 19 Aft: 4b
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No.: EDU-00-00000000-00
Agency Ref. No.: 282-8/00000000-00

: OAL Docket No.: EDU
: Agency Ref. No.: 282-8

: OAL Docket No.: EDU
: Agency Ref. No.: 282-8

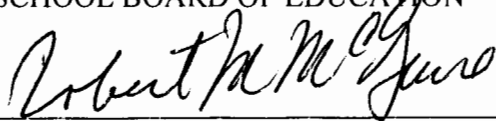
: STIPULATION OF SETTLEMENT

• • • • •

2. This Agreement settles a disputed claim and is not an admission of liability or wrongdoing by any party. Respondent expressly denies that it has violated any law, statute, policy, duty or obligation whatsoever.

3. Petitioners agree that this Stipulation of Settlement settles any and all claims against Respondent, its officers, employees, agents and assigns relating to the suspension of the senior parking privileges of E.M.

NORTHERN HIGHLANDS REGIONAL
HIGH SCHOOL BOARD OF EDUCATION

By: 
Dr. Robert McGuire, Superintendent

Dated:


Mark Manahan

Dated: 10-3-06


Toni Manahan

Dated: 10-2-06

EXTRACT FROM THE MINUTES OF A MEETING OF
THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL
BOARD OF EDUCATION, BOROUGH OF ALLENDALE
BERGEN COUNTY, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Northern Highlands Regional High School, Borough of Allendale, in the County of Bergen, New Jersey, convened in Regular session on October 9, 2006 at 8:00 p.m. in the Northern Highlands Regional High School, 298 Hillside Avenue, Allendale, New Jersey.

The following member(s) of the Board of Education were present: Mrs. Aversa, Mrs. Garand, Mrs. Gravina, Dr. Hands, Mrs. Kashishian, Mr. Kohn, Mr. Pessolano, Mrs. Trumbetti, Mrs. Winning

The following member(s) of the Board of Education were absent: Mrs. Loughnane

The following resolution was offered by Mrs. Winning and seconded by Mrs. Aversa and adopted by the Board of Education by the following Roll Call Vote:

RESOLVED: That the Board of Education approves the following Resolution of Pending Legal Matter:
WHEREAS, there is currently pending a matter before the Office of Administrative Law, M.M. and T.M. o/b/o E.M. v. Northern Highlands Regional School District, EDU 9413-06;
and
WHEREAS, a proposed settlement has been negotiated between counsel for the Northern Highlands Regional High School Board of Education and counsel for Petitioners that would fully resolve all outstanding claims, issues and disputes involving the parties; and
WHEREAS the proposed settlement would avoid a significant expenditure of time and resources on the part of the Board and its officials that would be necessary for the continuation of the pending litigation; and
WHEREAS, no expense will be incurred by the Board pursuant to the proposed settlement.
NOW, THEREFORE BE IT RESOLVED that the Board approves the Stipulation of Settlement and authorizes the Superintendent to execute the written Stipulation of Settlement.

ROLL CALL: Ayes: 9 Nays : 0 Abstain: 0

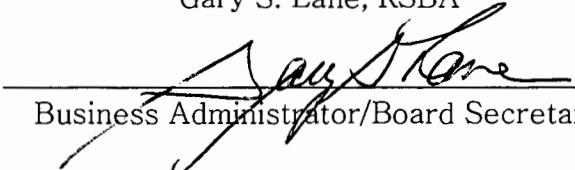
STATE OF NEW JERSEY)

)ss

COUNTY OF BERGEN)

I, Gary S. Lane, Secretary of the Board of Education of the Northern Highlands Regional High School, Borough of Allendale, in the County of Bergen, 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 October 9, 2006, has been compared by me with the original minutes as officially recorded in my office in the minute book of said the Northern Highlands Regional High School Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 17th day of October, 2006.

Gary S. Lane, RSBA


Business Administrator/Board Secretary

LAURIE COLES, KAREN JIMENEZ,	:	
LINDA LYNCH, DAVID MILLER AND	:	
TRACIE MILLER, PATRICIA MURPHY,	:	
TRACIE LUCARELLO, FRANK DALY,	:	
JANET CONWAY, MARIE LIPSITZ,	:	
TARA SMALLZE AND DARREN SMALLZE,	:	
ELIZABETH BEVAN, KELLY BOUSHAY,	:	
LENNY HARRIS, CYNTHIA CRESCENZO,	:	
LISA DOWNEY AND MARK DOWNEY,	:	
CHERYL BUTLER, RUSSEL KING AND	:	
PATRICIA KING, MICHAEL LAROCCO AND	:	
ROBIN LAROCCO AND LAURA DEPINTO,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF BAYONNE, HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged respondent Board's mandatory school uniform policy, which became effective September 25, 2006, and sought emergent relief for an order to declare the policy invalid. An emergent hearing was held on October 19, 2006. Respondent argued that petitioners cannot meet the criteria for emergent relief, and that the petition was untimely filed.

On November 2, 2006, the ALJ issued an Order on emergent relief, finding, *inter alia*, that the petitioners failed to timely file their claims under the 90-day rule, and sufficient justification was not demonstrated to relax the rule. The ALJ dismissed the petition.

The Commissioner found that the ALJ had conclusively resolved this matter on procedural grounds of untimeliness, notwithstanding that her decision was issued in the form of an Order. Therefore, the Commissioner treated this matter as an Initial Decision pursuant to *N.J.A.C.* 1:1-18.3, and afforded the parties 13 days from the date of notice of such to submit exceptions and reply exceptions. Petitioner's exceptions were subsequently late filed, and not considered in reaching a final decision. The Commissioner concurred with the ALJ that the petition was untimely, and accordingly adopted the decision of the OAL dismissing the matter.

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

OAL DKT. NO. EDU 10535-06
 AGENCY DKT. NO. 365-10/06

LAURIE COLES, KAREN JIMENEZ,	:	
LINDA LYNCH, DAVID MILLER AND	:	
TRACIE MILLER, PATRICIA MURPHY,	:	
TRACIE LUCARELLO, FRANK DALY,	:	
JANET CONWAY, MARIE LIPSITZ,	:	
TARA SMALLZE AND DARREN SMALLZE,	:	
ELIZABETH BEVAN, KELLY BOUSHAY,	:	
LENNY HARRIS, CYNTHIA CRESCENZO,	:	
LISA DOWNEY AND MARK DOWNEY,	:	
CHERYL BUTLER, RUSSEL KING AND	:	
PATRICIA KING, MICHAEL LAROCCO AND	:	
ROBIN LAROCCO AND LAURA DEPINTO,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF BAYONNE, HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter – which included the audiotape of proceedings conducted at the Office of Administrative Law (OAL) on October 19, 2006 – and the Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, it was evident that the ALJ had conclusively resolved this matter on the procedural grounds of untimeliness of the petition, notwithstanding that her decision was issued in the form of an Order. Therefore, by letter dated November 21, 2006 – transmitted by facsimile and regular mail – the Director of the Bureau of Controversies and Disputes advised the parties that the Commissioner would be treating this matter as an Initial Decision, pursuant to *N.J.A.C.* 1:1-18.3 and, as such, they would be afforded 13 days from the date of this letter to submit exceptions and reply exceptions – in accordance with

N.J.A.C. 1:1-18.4 – to the ALJ’s conclusion that this matter was untimely filed.¹ Petitioners’ exceptions – dated and filed by facsimile on December 5, 2006 – were untimely and, thus, are not considered herein.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ, for the reasons detailed on pages 4-7 of her decision, that this matter is appropriately dismissed as it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(d) and petitioners have provided no factual or legal justification which would warrant relaxation of this rule.

Even assuming, *arguendo*, that untimeliness had not barred consideration of the instant petition, the Commissioner agrees with the ALJ that petitioners’ request for emergent relief must be denied as they have failed to satisfy any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). She further agrees – again for the reasons set forth in the decision – that the collateral “as applied” claims of the LaRocco’s and Miller’s must also be dismissed. Finally, the Commissioner would decline to award any relief to parent D.G., as this individual is not a party to this matter.

Accordingly, the Commissioner adopts the decision of the OAL dismissing this matter as untimely pursuant to *N.J.A.C.* 6A:3-1.3(d). By copy of this decision, the Commissioner requests that any vestiges of this matter remaining at the OAL be returned to the Agency.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06

¹ *N.J.A.C.* 1:1-12.6 makes no provision for the filing of exceptions or reply exceptions to an emergent relief Order.

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



State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor
December 8, 2006

LUCILLE E. DAVY
Commissioner

Karen R. White Morgen, Esq
Robert A. Vort, LLC
2 University Plaza, Suite 200
Hackensack, New Jersey 07601

Robert J. Merryman, Jr., Esq.
Apruzzese, McDermott, Mastro & Murphy
25 Independence Boulevard
P.O. Box 112
Liberty Corner, NJ 07938

Dear Parties:

LAURIE COLES, KAREN JIMENEZ, LINDA LYNCH, DAVID MILLER AND TRACIE MILLER, PATRICIA MURPHY, TRACIE LUCARELLO, FRANK DALY, JANET CONWAY, MARIE LIPSITZ, TARA SMALLZE AND DARREN SMALLZE, ELIZABETH BEVAN, KELLY BOUSHAY, LENNY HARRIS CYNTHIA CRESCENZO, LISA DOWNEY AND MARK DOWNY, CHERYL BUTLER, RUSSEL KING, ROBIN LAROCCO AND LAURA DEPINTO V. BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, AGENCY DKT NO. 365-10/06, OAL DKT NO. EDU 10535-06, COMMISSIONER DECISION NO. 440-06

We are enclosing a copy of the decision of the Commissioner of Education dated December 8, 2006, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C. 6A:4-1.4(a)*, the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/pp:o/dec ltr/lcoles-440-06
Enclosure

c: Jones Addo, State Library
Mumtaz Bari-Brown, Adm. Law Judge
OAL Clerk

www.nj.gov/education



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO EDU 10535-06
AGENCY DKT. NO. 365-10/06

**LAURIE COLES, KAREN JIMENEZ,
LINDA LYNCH, DAVID MILLER and
TRACIE MILLER, PATRICIA MURPHY,
TRACIE LUCARELLO, FRANK DALY,
JANET CONWAY, MARIE LIPSITZ,
TARA SMALLZE, and DARREN SMALLZE,
ELIZABETH BEVAN, KELLY BOUSHAY,
LENNY HARRIS, CYNTHIA CRESCENZO,
LISA DOWNEY, and MARK DOWNEY,
CHERYL BUTLER, RUSSELL KING and
PATRICIA KING, MICHAEL LAROCCO and
ROBIN LAROCCO and LAURA DEPINTO,**

Petitioners,

v

BAYONNE BOARD OF EDUCATION,

Respondent.

Karin R. White Morgen, Esq., and Robert A. Vort, Esq., for petitioners
(Robert A. Vort, LLC, attorneys)

Robert J. Merryman, Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

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

STATEMENT OF THE CASE

On October 16, 2006, the Commissioner 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. On October 19, 2006, an emergent hearing was held and subsequent to presenting oral argument, the parties submitted a post argument summary.

Board of Education ("Board" or "Respondent") from enforcing a mandatory school uniform policy and to declare the policy invalid.

Petitioners David and Tracie Miller claimed a religious exemption from the school uniform policy for their children.

Petitioners Michael and Robin LaRocco claimed a medical exemption from the school uniform policy for their child.

Parent D.G. submitted a certification dated October 18, 2006, and appealed the denial of her application for a medical exemption from the school uniform policy for her child, M.G. D.G. is not listed as a party in this matter. Notwithstanding the omission, her request shall be addressed.

Respondent opposes the petition and application for emergent relief. The Board argues that petitioners cannot meet the elements for emergent relief. Further, the Board contends that the petitions are untimely under N.J.A.C. 6A:3-1.3(i).

FACTS

Based on the petition and certifications I **FIND** the following relevant **FACTS**.

1. Petitioners, parents of children who attend the Bayonne School District grades Pre-K to 8, seek emergent relief for an order to restrain respondent Bayonne. On June 19, 2006, the Board adopted a mandatory School Uniform Policy No. 5511. ("Policy") pursuant to N.J.S.A. 18A:11-8.

2. The Policy became effective September 25, 2006.
3. On June 28, 2006, the Board adopted the Regulations, "Dress and Grooming-Elementary School R. 5511.1", providing for implementation, procedures and consequences for non-compliance of Policy 5511.
4. On July 26, 2006, the Board amended the regulation, which it originally adopted on June 28, 2006.
5. The June 28, 2006 regulation required student compliance within three (3) school days of a Policy violation, and included as potential discipline, detention, in-school suspension, and loss of privileges such as playing for school sports teams, and participation in school sponsored activities.
6. The regulation as amended on July 26th, required compliance within five (5) school days of a violation, and included discipline or detention and loss of privileges. The provision allowing suspension was removed.
7. On August 29, 2006, the Board amended Policy 5511 to delete in school suspension for repeated violations of the Policy.
8. The Policy contains opt-out provisions for students on religious and medical grounds.

ISSUES

The issues are whether Petitioners have timely filed their petitions and if, so, have they met all requirements for emergent relief.

DISCUSSION

90-DAY RULE

The N.J. Administrative Code provides that a Petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of N.J.A.C. 6A:3-1.4. See N.J.A.C. 6A:3-1.3(a) and (i). In addition to serving the petition upon each Respondent, the petition 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.

In Kaprow v. Berkeley Twp. Bd. of Educ., the N.J. Supreme Court held that 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. 131 N.J. 572, 587 (1993). Specifically, the 90-day period begins to run when the Petitioner “learns or reasonably should learn [of] the existence of that state of facts which may equate in law with a cause of action.” Id. at 587 (citing Burd v. N.J. Tel. Co., 76 N.J. 284, 291 (1978)). Therefore, the 90-day period begins to run when a Petitioner knows or reasonably should know of facts that would enable him to file a timely claim.

Here, the Board took action on June 19, 2006. The parents had a right to know about the Board’s action. The Board adopted the resolution at a public meeting, which the Petitioners were permitted to attend, and notice that the Policy had been adopted was disseminated shortly thereafter. Subsequently, on June 26, 2006, the Board enacted regulations implementing the policy, which it later amended on July 26, 2006. On August 29, 2006, the Board amended the Policy to remove in school suspension as a potential discipline for chronic non-compliance.

I am persuaded that Petitioners' challenge is based upon the Board's initial action in implementing the mandatory school uniform policy. See Petition at 1. Indeed, Petitioners do not challenge the subsequent regulation amendments, nor do they challenge the change in wording that was adopted on August 29th. Therefore, the Petitioners had notice that the Policy had been adopted on or about June 19th, and the 90-day period began to run on that date. The Petitioners filed their petition with the Bureau of Controversies and Disputes on October 10, 2006, approximately 113 days after the dress code was amended to become the uniform Policy. Consequently, unless good cause exists to justify relaxation of the rule, Petitioners claim is fatally time-barred, and must be dismissed.

The 90-day rule has been strictly followed, and applied almost without exception. In Dreher v. Jersey City Bd. of Educ., Petitioner filed his petition two days out of time, and the matter was dismissed as untimely. OAL Dkt. No. EDU 2777-87 (December 18, 1987), adopted Comm'r (February 2, 1988), aff'd St. Bd. of Educ. (July 8, 1988). Regardless of whether the board complies with statutory or administrative requirements, the Petitioner is required to file the petition no later than 90 days after receipt of notice. Portee v. Newark Bd. of Educ., 94 N.J.A.R.2d (EDU) 381, 383. But see Eisenberg v. Fort Lee Bd. of Educ., 2003 WL 23643569 (St. Bd. of Educ.) (holding that because the Petitioner learned of new facts that gave rise to an additional claim, the 90-day rule did not start running until the date of notice of those facts). Moreover, attempts to resolve a dispute with a school board through avenues other than litigation will not serve to toll the 90-day rule. Wise v. Trenton Bd. of Educ., 2000 WL 34401734 (Requests to a board of education for reconsideration of its final determination do not toll the 90-day rule). See also Pacio v. Lakeland Regional School District Bd. of Educ., 1989 S.L.D. 2060, 2069. Here, the 90-day rule must be applied to the Petitioners claims.

Petitioners received notice of the Policy on or about June 19, 2006, but took no action until October. They assert that the "final action" of the board took

place on August 29, 2006. However, the finality of the Board's action is not the standard. Considering that the rule specifically includes "final orders", "rulings" or "other actions", and specifically refers to "notice of" any of those actions, the proper standard is when Petitioners had or reasonably should have had notice of the Board's action. N.J.A.C. 6A:3-1.3i. Petitioners' assertion that the Board did not comply with statutory and administrative requirements in adopting the Policy, and that the policy is facially defective because it does not contain a provision for low income students is unsupported. Procedural and statutory non-compliance does not exempt petitioners from the rules' requirement. Moreover, the amendments and any ongoing dialogue between the Board and parents are of no moment in terms of when the 90-day period began to run. The rule cannot be tolled. The facial challenge does not fall within the purview of Eisenberg because no new facts that would give rise to additional claims that have come to light since the Board's action on June 19, 2006. Therefore, the facial challenge to the Policy for all Petitioners is out of time.

I have considered the circumstances presented and N.J.A.C. 6A:3-1.16, which allows relaxation of the rule in exceptional cases. DeMaio v. New Providence Bd. of Educ., held that the authority to relax or waive the rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur. 96 N.J.A.R.2d (EDU) 449, 453 (citing Gordon v. Passaic Bd. of Educ., 1985 S.L.D. 1929, 1931, aff'd, A-3294-84 (App. Div. May 27, 1986), certif. denied, 105 N.J. 534 (1986)). Brunetti v. Borough of New Milford, further exempted three types of cases from the 90-day rule; (1) cases involving important and novel Constitutional questions, (2) informal or *ex parte* determinations of legal questions by administrative officials, and (3) important public, rather than private, interests which require adjudication or clarification. 68 N.J. 576, 586 (1975). None of these exceptions applies in this case.

There is no novel Constitutional question over which this tribunal has jurisdiction. "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 (Lefelt, Miragliotta and Prunty) (2d Ed. 2000). “Pure legal questions are reserved for the courts. Accordingly, an agency has no power to determine the Constitutionality of a statute on its face.” Ibid. The Commissioner of Education and ALJs do not have authority to strike down statutes, rules, etc. Ibid. Thus, there is no jurisdiction for an ALJ to consider a facial Constitutional challenge.

On the other hand, in “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. Ibid. Here, it would appear that the Petitioners assert that the statute enabling public schools to enact uniform policies is unconstitutional, and as such, any action taken under the authority of the statute is tainted. Petitioners also question whether the Board’s actions in implementing the Policy were in violation of the statute and applicable school laws. A challenge of this sort does not justify relaxing the 90-day rule. Alleged school board violations of applicable statutes and regulations are the reason the 90-day rule exists; to obtain prompt resolution of school Board malfeasance, and to provide a measure of repose to parties. See Kaprow, 131 N.J. at 582. Therefore, in order to challenge the Board’s actions as unconstitutional, Petitioners must challenge the statute authorizing its’ action in Superior Court. Had Petitioners timely filed this petition, they could have challenged the Board’s actions as unconstitutionally violative of applicable statutes and regulations. However, those claims are barred by the 90-day rule.

Additionally, there was no informal or ex parte rulemaking. All proceedings in this matter were open to the public and were formal, regardless of whether the Petitioners attended. The interests here, though not purely private, are not justifiable in this forum for the above noted reasons. As a result, no valid reason exists that would justify relaxation of the 90-day rule.

EMERGENT RELIEF

The standard for granting emergent relief is set forth in N.J.A.C. 6A:3-1.6, and Crowe v. DeGioia;

1. The Petitioner will suffer immediate and irreparable harm if the requested relief is not granted;
2. The legal right underlying the Petitioner's claim is settled;
3. The Petitioner has a substantial 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 would the Respondent if the relief is not granted. 90 N.J. 126 (1982); N.J.A.C. 6A:3-1.6; See also W.L.B. and K.B. v. Bd. of Educ. of Woodbury Sch. Dist., 96 N.J.A.R.2d (EDU) 695 (1996).

Emergent relief is awarded as an "extraordinary equitable remedy ... [and] must be administered with sound discretion and always upon the considerations of justice, equity, and morality." Zoning Bd. of Adj. v. Service Electric Cable Television, 198 N.J. Super. 370, 379 (App. Div. 1985). Assuming, arguendo, that the challenge were not time barred, Petitioners must satisfy the applicable standards.

First, Petitioners' contend that if the students continue in non-compliance with the Policy, they will suffer irreparable harm, i.e., detentions, exclusion from school sponsored activities, and potential ostracism. I reject Petitioners' argument. No irreparable harm results if students are temporarily required to comply with the Policy, and wear the school uniform, pending the outcome of this case.

Second, Petitioners must demonstrate they are entitled to relief. Notwithstanding the 90-day rule, Petitioners have not demonstrated that they have a legal right to demand a moral opt-out provision in the Policy. The statute does not require any opt-out provisions, nor does it prescribe or proscribe what provisions, if any, a school may include.

Third, as to the likelihood of success on the merits, Petitioners have not shown that they have a substantial likelihood of success.

Finally, when the balance of equities is weighed, the Board's need to implement and to enforce a school uniform policy outweighs Petitioners' desires not to have their children wear the school uniform. Temporary compliance with the Policy will not be unduly burdensome. Therefore, assuming arguendo that the 90-day rule has not barred the filing, Petitioners would not have been able to satisfy the standard.

As to Petitioners LaRocco, Miller and parent D.G., whose collateral "as applied" claims remain, only D.G. satisfies the emergent relief standard.

PETITIONERS MICHAEL AND ROBIN LAROCCO

Petitioners Michael and Robin LaRocco have requested their child be granted an exemption from the school uniform policy. Their petition must be dismissed under N.J.A.C. 6A:3-1.3(a) and (i). The Board must have taken action in order for a petitioner to bring a challenge. Ibid. Petitioners LaRocco have requested a medical exemption. However, they concede that the Board has not acted on their application. The LaRocco's have failed to assert any action by the Board that would constitute a denial of their request. Therefore, the requirements of N.J.A.C. 6A:3-1.3(a) and (i) have not been met, and their petition must be dismissed as premature.

PETITIONERS DAVID AND TRACIE MILLER

Petitioners David and Tracie Miller have requested that their children be exempted from the Policy on the grounds that a mandatory uniform policy irreconcilably conflicts with their religious beliefs. They claim that the Board acted in violation of their First Amendment free exercise rights when it requested more information from them in response to their application.

First, the Miller's claim is premature because the Board has taken no formal action as to their application. See discussion of N.J.A.C. 6A:3-1.3(a) and (i) supra. No further documentation has been submitted indicating that the Board has formally denied the exemption. The Millers asserted that the school Principal verbally informed David Miller that the application would be denied for failure to complete the application process. Petition at 7. The Board has not disputed the assertion. However, the Principal's alleged statement does not constitute action by the Board. The Principal does not speak on behalf of the school Board, nor is she authorized to make decisions on the Board's behalf. The Miller's petition is premature.

Assuming, arguendo, that the Miller's petition is timely, their claim requires that two threshold elements to be met before religious beliefs are accorded First Amendment protection. Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981). A court's task is to decide whether the avowed beliefs are (1) sincerely held, and (2) religious in nature. Ibid.; see United States v. Seeger, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed.2d 733 (1965); see also Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981). If either of these two elements is not satisfied, the Court need not reach the merits of whether a legitimate and reasonably exercised state interest outweighs the proffered First Amendment claim. Africa 622 F.2d at 1030. It is inappropriate for any court to attempt to assess the verity of an asserted religious belief. The U.S. Supreme Court held, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Hicks v. Halifax County

Bd. of Educ., 93 F. Supp. 2d 649, 657 (E.D.N.C. 1999), citing Thomas v. Review Board of Indiana Employment Sec. Div., 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). However, the truth of an asserted belief may not be questioned by a governmental entity. 380 U.S. at 185. Whether the belief is truly religious in nature, and whether it is sincerely held remains a threshold question into which the government may inquire. Ibid. Without some sort of required showing of sincerity from the individual seeking protection, the First Amendment would become a limitless excuse for avoiding all unwanted legal obligations. Africa, 622 F.2d at 1030.

Indeed, the courts have consistently allowed governmental entities to inquire into the actual religiousness of the asserted views, and the sincerity with which they are held. However, inquiries must be undertaken with extreme caution. I/M/O Alan Paul Sherr, 672 F. Supp. 81, 95 (E.D.N.Y. 1987) (An investigation by the school district found that the “temple” to which Petitioners claimed that they belonged was a sham because it held no services, had no organization or structure, operated out of the founder’s home, and was essentially a “mail order church”; The school’s actions in investigating were not questioned by the Court); See United States v. Ballard, 322 U.S. 78, 64 S. Ct 882 (1944); Wilkins v. Penns Grove-Carney’s Point Reg. Sch. Dist., 123 Fed. Appx. 493, 2005 U.S. App. LEXIS 2491 (3d Cir. 2005); International Society for Krishna Consciousness v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

As to the Miller’s application, the Board has not asked whether the Millers’ beliefs are truly religious. Rather, it is constitutionally permissible for the Board to verify the sincerity of the applicant’s belief. Indeed, the Board is prepared to exempt any student provided the parents document the sincerity of their religious beliefs.

The Board used the questionnaire to verify the sincerity of the Miller’s asserted beliefs. The Millers claimed that it was “onerous” and “intrusive” and they refused to answer the questionnaire. Bearing in mind that a school district

may not inquire as to the verity or reasonableness of the Miller's beliefs, but only whether the beliefs are sincere and "religious" in nature, the questionnaire was reasonable. It asked nothing more than twelve "yes" or "no" questions related to whether the Millers or their children currently wore, or ever had worn, a uniform for any purpose; professional, recreational, educational or religious. A governmental entity such as a school board is entitled to make an inquiry when an individual subject to their authority makes a request for religious exemption. Perhaps more importantly, unless required by statute, governmental entities are not bound to grant exemptions based on bald assertions. Therefore, the Bayonne Board of Education would be completely within its rights in refusing to grant the application on this basis.

Consequently, in addition to being premature, the Miller's claim must be dismissed because the Board acted within its rights by making further inquiries into the applicants conduct.

PARENT D.G.

Parent D.G. has requested a medical exemption for her son, M.G., which the Board denied on or about October 13, 2006. The July 26, 2006 regulation provides that a student may wear a uniform of alternative material or non-uniform clothing, "upon presentation of proper medical documentation, approved by the Chief Medical Inspector of the school district". D.G. claims that her son has "fine motor incoordination, Asperger's Syndrome, and tactile hypersensitivity". Further, M.G. is physically unable tolerate wearing any clothing with collars, snaps, buttons or zippers. The uniform for boys requires either pants or shorts, and a collared polo shirt with three buttons. Sweat pants and district logo T-shirts may only be worn for physical education class. George Mellendick, M.D. and Chief Medical Inspector, denied the exemption as a whole.¹ Unlike Principal

¹ Dr. Mellendick permitted D.G. to dress her son in sweat pants instead of regular pants or shorts.

Quinn's alleged comments to Mr. Miller Dr. Mellendick's denial of the exemption was on behalf of the Board, and was sanctioned by the Board.,

The standard for emergent relief has been satisfied. M.G. cannot wear collared shirts or clothing with buttons, the school polo has both. M.G.'s educational progress and medical wellbeing are likely to suffer irreparable harm if the policy is enforced as to him. The school uniform policy contains an exemption for medical reasons. Therefore, the legal right underlying D.G.'s claim is settled. Given the uncontested facts, D.G. has a substantial likelihood of success on the merits. When the balance of equities is weighed, the child's interests (medical condition) outweigh the interest of the Board in enforcing the policy as to him. Therefore, D.G. has satisfied both the timeliness standard, and the standards governing emergent relief.

CONCLUSIONS

I **CONCLUDE** that Petitioners have not timely filed their claims under the 90-day rule. N.J.A.C 6A:3-1.3i. I further **CONCLUDE** that petitioners have not demonstrated sufficient justification to relax the rule the 90-day

Therefore, Petitioners' challenge to the Policy is hereby **DISMISSED**.

I **CONCLUDE** that even if the 90-rule did not apply, Petitioners would not have satisfied the stands for emergent relief. Therefore, Petitioners' application would be **DENIED** and their petitions would be **DISMISSED**.

I **CONCLUDE** that the claim of Petitioners Michael and Robin LaRocco for a n exemption is not ripe for adjudication. Therefore, their claim is **DISMISSED**.

I **CONCLUDE** that the Miller's claim is premature because the Board has not acted upon petitioners' request for religious exemption. Additionally, I

CONCLUDE that the Board acted reasonably regarding the application. Therefore, the Miller's claim is **DISMISSED**.

I **CONCLUDE** that D.G. has satisfied the standard for emergency relief, provided she file a motion to amend the petition and be a named party to this case.

It is so **ORDERED**.

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 (title of agency head) 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.

November 2, 2006

DATE

sej/nd



MUMTAZ BARI-BROWN, ALJ,

OAL DKT. NO. EDU 9568-06
(EDU 1320-06 ON REMAND)
AGENCY DKT. NO. 302-10/05

B.L.E. on behalf of minor child I.L.W., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY, :
RESPONDENT. :

The record in this matter, the proposed settlement agreement, a resolution by respondent authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The petition and respondent's counter claims are hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL Dkt. No. EDU 09568-06N

Agency Ref. No. 302-10/05

B.L.E. ON BEHALF OF MINOR CHILD, I.L.W.

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF WEST ORANGE ESSEX COUNTY**

Respondent.

Brenda L. Ellis., *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: September 26, 2006

Decided: November 16, 2006

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

On January 12, 2006, this matter was transmitted to the Office of Administrative Law by way of an application for due process filed by petitioners B.L.E. on behalf of I.L.W., challenging the Board of Education's residency determination. (Docket Number EDU 1320-06N)

A hearing was scheduled on May 8, 2006 at the OAL, 33 Washington Street, Newark, New Jersey, during which time the parties reached a settlement. On May 23, 2006, the parties prepared and submitted a settlement and the undersigned rendered an Initial Decision/Settlement on May 24, 2006.

On August 31, 2006 this matter was remanded to the Office of Administrative Law because the settlement did not contain a copy of the Board's resolution approving the settlement nor did it was signed by the Board's attorney.

September 26, 2006 the Board's attorney forwarded a copy of an extract of the Board minutes, certified by the Board Secretary, from its May 22, 2006 meeting wherein the settlement was approved by the Board which are incorporated herein by reference.

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 authorized representatives and/or as further evidenced by the recording of the official minute book as attached hereto.
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.

November 16, 2006
DATE



CARIDAD F. RIGO, ALJ

Receipt Acknowledged:

11-22-06
DATE



DEPARTMENT OF EDUCATION

Mailed to Parties.



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW ADJUDICATOR
OFFICE OF ADMINISTRATIVE LAW

NOV 27 2006
DATE
ljb

Stephen J. Christiano, Esq.
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

RECEIVED
STATE OF NEW JERSEY
2006 MAY 24 P 1:15

**BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 1320-2006
AGENCY REF. NO. 302-10/05**

**B.L.E., ON BEHALF OF MINOR
CHILD, I.L.W.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,**

Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

- (1) Petitioner withdraws her petition of appeal.
- (2) Respondent withdraws its counterclaim for tuition charges.
- (3) Petitioner shall pay respondent the sum of \$300 in full settlement of all tuition charges. Payment shall be made within 15 days of the approval of this settlement by the Commissioner of Education.

(4) If petitioner does not make payment within 15 days of the Commissioner's approval of the settlement, respondent shall be entitled to the entire amount of tuition for the period of I.L.W.'s school attendance in West Orange.

(5) The settlement is subject to approval by the Commissioner of Education. If the Commissioner rejects this settlement, any tuition payment previously made by petitioner shall be refunded by respondent.

(6) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated:

Brenda L. Ellis
Brenda L. Ellis, Petitioner

Mrs. Rachel D. Woodson
Rachel Woodson, Parent

Attest:

Mark C. Henry
Secretary

Board of Education of
The Township of West Orange
By: Harold L. Ferguson
President

**EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK**

RECEIVED
2006 SEP 26 A 4:01

STATE OF NEW JERSEY
Orange, in the County of Essex

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on May 22, 2006 at 8:00 P.M., at Edison Middle School, 75 William Street, West Orange, NJ.

The following members of the Board of Education were present:

Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

The following motion was offered by Mrs. Garnes, and seconded by Mr. Petigrow, and adopted by the Board of Education by the following roll call vote:

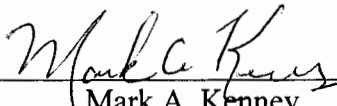
Stipulation of Settlement: B.L.E. v. West Orange Board of Education.

ROLL CALL: Ayes: Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow,
 Mrs. Kyle, Mrs. Casalino

Abstain: None

CERTIFICATE

I, Mark A. Kenney, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, 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 May 22, 2006, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 13th day of July 2006.



Mark A. Kenney
Business Administrator/Board Secretary

BOARD OF EDUCATION
WEST ORANGE, NEW JERSEY 07052
TELEPHONE: 973-736-1636
FAX : 973-243-0505

RECEIVED
2006 SEP 26 A 4:00
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STEPHEN J. CHRISTIANO
BOARD ATTORNEY

49 MOUNT PLEASANT AVENUE

September 25, 2006

Hon. Caridad F. Rigo, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: B.L.E. o/b/o I.L.W. v. Board of
Education of the Township of
West Orange
OAL Docket No. EDU 01320-06

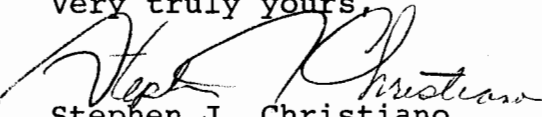
Dear Judge Rigo:

Relative to the above remanded case, I enclose
an extract of the Board minutes, certified by the
Board Secretary, from its May 22, 2006 meeting
wherein the settlement was approved by the Board.

I trust this will satisfy the Commissioner and
Your Honor can resubmit her Initial Decision with
the stipulation of settlement.

Please advise as to whether the October 2 telephone
conference will still be necessary.

Very truly yours,


Stephen J. Christiano
Board Attorney

SJC:mpc
Enc.

cc: Brenda L. Ellis

#437-06 R

OAL DKT. NO. EDU 9569-06
 (EDU 9292-05 ON REMAND)
 AGENCY DKT. NO. 130-5/05

MITCHELL VITIELLO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ORANGE, ESSEX COUNTY,	:	
	:	
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 such review, the Commissioner observes that the seventh paragraph of the agreement states that the settlement "is conditioned upon approval of the board." In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement, nor, in the alternative, is the agreement executed (as opposed to witnessed) 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 supplementation of the record and/or revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*


 COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/08/06

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



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09569-06
AGENCY DKT. NO. 130-5/05

MITCHELL VITIELLO,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF ORANGE,
ESSEX COUNTY,**

Respondent.

Timothy R. Smith, Esq., for petitioner (LaRocca, Feeley, Smith & Rosellini, attorneys)

Marvin L. Comick, Esq., for respondent (Love and Randall, attorneys)

Record Closed: October 19, 2006

Decided: October 23, 2006

BEFORE EDITH KLINGER, ALJ:

This matter was transmitted to the Office of Administrative Law on August 31, 2006, 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 settle this matter and have prepared the attached Stipulation of Settlement and Release indicating the terms of settlement, which was received by the undersigned on October 19, 2006

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
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 23, 2006
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

10/25/06
DATE

M. J. Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

Laure Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OCT 26 2006
DATE
pb

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 211
South Orange, NJ 07079
Attorney for Petitioner, Mitchell Viteillo

_____	:	BEFORE THE COMMISSIONER OF
MITCHELL VITIELLO	:	EDUCATION OF NEW JERSEY
Petitioner,	:	OFFICE OF ADMINISTRATIVE LAW
_____	:	OAL DOCKET NO.: EDUOR-09292-2005N
ORANGE BOARD OF EDUCATION,	:	
_____	:	Agency Reference No.: 130-5/05
Respondent.	:	STIPULATION OF SETTLEMENT
	:	AND RELEASE

This Stipulation of Settlement and Release is made by and between the Orange Board of Education (the "Board") with administrative offices located at 451 Lincoln Avenue, Orange, New Jersey, 07050 and Mitchell Vitiello (the "Petitioner"), whose address is 5 Roland Road, Peaquannock, New Jersey 07440. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on March 8, 2004, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on March 8, 2004, while Petitioner was in the employ of the Board; and

WHEREAS, on February 25, 2005, the criminal complaint against Petitioner was dismissed pursuant to a not-guilty verdict after trial; and

WHEREAS, Petitioner filed a Petition of Reimbursement with the Commissioner of Education on or about May 18, 2005, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement

from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on July 25, 2005, the board filed its answer to the Petition of Reimbursement with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

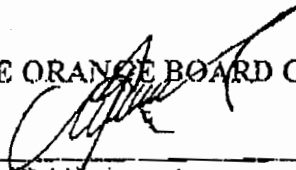
NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Twelve Thousand Dollars (\$12, 000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

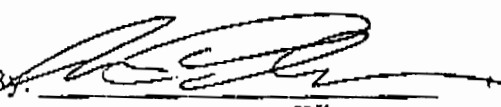
4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Reimbursement.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE ORANGE BOARD OF EDUCATION:

By: 

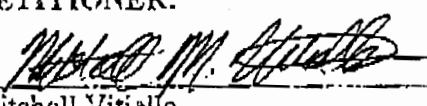
ADEKUNLE JAMES, BUSINESS ADMINISTRATOR

By: 

, Witness

Date: 4-11-06

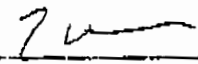
PETITIONER:


Mitchell Vitiello

Date: 4-21-06

Sworn and subscribed to before me this

25 day of April, 2006


Notary Public

ZINOVIA HATZIPETROS
A Notary Public of New Jersey
My Commission Expires APRIL 13, 2009

Love & Randall
ATTORNEYS AT LAW

MELVIN C. RANDALL

MARVIN L. COMICK

RECEIVED JOHN C. LOVE - 1964-1989
STATE OF N.J.
OFFICE OF ADJUTANT GENERAL
57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
October 17, 2006
2006 OCT 19 P 3:43
TEL: (973) 674-6000
FAX: (973) 674-8813

loveandrandallesqs@verizon.net

Timothy R. Smith and Associates, LLC
Attorneys-at-Law
76 South Orange Avenue
Suite 211
South Orange, New Jersey 07079
Attn.: Timothy R. Smith, Esq.

**RE: MITCHELL VITIELLO vs. ORANGE BOARD OF
EDUCATION**

Mr. Smith:

Enclosed please find amended Stipulation signed by Board President. I apologize for delay. Kindly have your client sign and forward same to court.

If you have any questions or concerns, please advise.

Very Truly Yours,

LOVE & RANDALL, ESQS.

BY Marvin L. Comick/as
MARVIN L. COMICK

MLC:as

Enc.

CC: Judge Edith Klinger, A. L. J.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE ORANGE BOARD OF EDUCATION:

By: Patricia Arthur
PATRICIA ARTHUR, BOARD PRESIDENT

Date: 10/13/06

By: [Signature], Witness
MARVIN L. COMICK
Attorney at Law
State of New Jersey

PETITIONER:

Mitchell Vitiello

Date: _____

Sworn and subscribed to before me this
_____ day of _____, _____

Notary Public

#436-06SEC

IN THE MATTER OF CARMELO GARCIA, :
HOBOKEN BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
HUDSON COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent, a member of the Board of Education of the City of Hoboken, committed two separate violations of *N.J.S.A.* 18A:12-24(c) at a Board meeting in August 2005 when he voted for: 1) the appointment of his brother to a paid position with the school district; and 2) the approval of a contract with a public relations firm owned by a Hudson County Freeholder, when respondent was an employee of Hudson County. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand upon the respondent.

Upon a thorough review of the record, the Commissioner, whose decision is restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurs with the Commission's recommendation. The Commissioner thus orders that Carmelo Garcia be 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 8, 2006

IN THE MATTER OF CARMELO GARCIA, :
HOBOKEN BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
HUDSON COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission (“Commission”), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon respondent – a member of the Board of Education of the City of Hoboken – based upon the Commission’s finding that he committed two separate violations of *N.J.S.A.* 18A:12-24(c) at a single Board meeting on August 30, 2005. Upon issuance of the Commission’s decision, respondent was provided thirteen days from the mailing of such decision to file written comments on the Commission’s recommended penalty for consideration by the Commissioner. No such comments were filed.

Upon review, the Commissioner initially emphasizes 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 herein. Rather, the Commissioner’s jurisdiction is limited to review of the sanction recommended by the Commission following its finding of violation.

In light of that standard, the Commissioner determines to accept, for the reasons expressed in the Commission’s decision, the recommendation that reprimand is the appropriate penalty in this matter. In so holding, the Commissioner notes that the Commission considered

the facts presented and took the operative circumstances into account, reasonably concluding that its recommended penalty was commensurate with the violations found. Therefore, the Commission's recommendation will not be disturbed by the Commissioner.

Accordingly, IT IS ORDERED that Carmelo Garcia be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06
Date of Mailing: 12/08/06

* 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.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

DECISION

The parties were advised that the Commission would discuss this matter at its meeting on February 28, 2006 and further advised that they could present witnesses and testimony. Complainant Theresa Burns appeared with her attorney, Christopher Farella, Esq. At its public meeting on that date, the Commission voted to table the matter for additional information. The matter was not discussed at the March 28, 2006 meeting because only five Commission members were present and one of the five recused himself. Thus, the Commission did not have a quorum to discuss the case. At the next meeting of the Commission on April 25, 2006, the Commission voted to find probable cause to credit the allegations that Mr. Garcia violated N.J.S.A. 18A:12-24(c) when he voted for his brother's appointment and voted in favor of the Fitz Media contract. The Commission found no probable cause and dismissed the charges that respondent had attempted to intimidate a District employee in violation of N.J.S.A. 18A:12-24(b). The

Commission did not find any evidence that respondent exerted any pressure on any administrator in connection with the hiring of his brother or the subsequent request to have his vote changed to an abstention.

The Commission found that the material facts were not in dispute regarding the conduct on which it found probable cause and therefore, invited respondent to provide a written submission within 30 days from receipt of the decision setting forth why Mr. Garcia should not be found in violation of N.J.S.A. 18A:12-24(c) of the Act. The decision was sent on July 17, 2006.

Respondent submitted a timely response through his attorney, David Rubin, on August 10, 2006. Therein, he argues that there should be no distinction drawn between a board member changing a vote publicly during a meeting and waiting until after the meeting and leaving a note to that effect. In addition, Respondent argues that the meeting had not yet concluded when he left the note because the Board was still in closed session deliberating over a controversial appointment. Therefore, he argues that it is unreasonable to conclude on these facts that respondent acted unethically in connection with the vote on his brother. With regard to the Fitz Media contract, respondent argues that he is not employed by Freeholder Fitzgibbons, but by the county, which assigned him to work with the Freeholder closest to his residence. Therefore, he argues this charge should either be dismissed or, if the Commission's finding is based on a direct employment relationship, he should be entitled to a plenary hearing on the issue of whether such a relationship exists. Further, he argues that a material issue of fact exists regarding his contention that he received legal advice that he could vote on the Fitz Media contract.

FACTS

The Commission was able to discern the following facts based on the pleadings and documents submitted. The Commission found these facts to be undisputed.

At all times relevant to this complaint, respondent has served on the Board. Also, at all times relevant to this complaint, respondent has been employed by Hudson County. He is assigned as an aide to Freeholder Maurice Fitzgibbons, for which he receives a stipend.

On August 30, 2005, Mr. Garcia voted to appoint his brother to a paid position with the Board. His brother had been employed as a custodian in the Hoboken Public Schools. He applied for a position posted in the maintenance department. The Director of Facilities, Tim Calligy, interviewed him and recommended to the superintendent that he be transferred to the position of maintenance employee. The superintendent made the recommendation to the Board.

The hiring of Mr. Garcia's brother was one item in a 55-item consent agenda on which he voted. He set forth that he did not realize at the time of voting that his brother's appointment was in the agenda. Later, however, when he realized that his brother's appointment had been on the agenda, before leaving the meeting, he left a written request for the Acting Board Secretary to change his vote to show an abstention. The meeting had not yet concluded when he did so. Rather, the Board was still in Executive Session. Mr. Calligy researched the subject of changing

a vote and determined that it had to be done in a public meeting. The matter was addressed at the next public meeting and Mr. Garcia was allowed to change his vote.

Also, on August 30, 2005, Mr. Garcia voted in favor of a contract with Fitz Media, Inc. which is local public relations firm owned by Maurice Fitzgibbons. Mr. Fitzgibbons is an elected Freeholder in Hudson County. Mr. Garcia has been an employee of the County of Hudson since before he joined the Board in 2002. More particularly, he has served as an Aide to Freeholder Fitzgibbons since 1998, having been assigned to him based on his residence. He also serves as Director of Health and Human Services for the City of Hoboken.

ANALYSIS

The Commission found probable cause to credit the allegation that Mr. Garcia's conduct violated N.J.S.A. 18A:12-24(c), which sets forth:

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 set forth in its probable cause finding that, although Mr. Garcia's brother is not a member of his immediate family pursuant to N.J.S.A. 18A:12-23, he is a "relative" under this provision, the definition of which includes siblings. The Commission has previously held that a board member has a personal involvement in a matter concerning his relative such that his or her objectivity might reasonably be expected to impair his or her objectivity or independence of judgment. See In the Matter of Russo and Scarano, C12-97, (January 27, 1998); Commissioner Decision #22-1/98, (April 16, 1998). N.J.S.A. 18A:12-24(c) requires a showing of "some benefit to the school official." The Commission finds that there is an intrinsic benefit to a school official whose brother is appointed to a position within the district such that he should recuse himself from voting.

Respondent argues in his submission in response to the probable cause finding that, since the Commission accepted that he inadvertently voted for his brother's appointment, there should be no distinction between whether he corrected his vote during the public meeting or left a note asking for his vote to be changed. He refers to it as "a distinction without difference." The Commission disagrees. As the Commission set forth in the probable cause decision, regardless of respondent's claim that there were distractions at the meeting that led to his inadvertently voting for his brother's employment, it was his duty as a board member to know the items on the agenda and recuse himself from voting on an issue in which he has a conflict at the time of the vote, or to immediately correct the mistake during the open public meeting. The difference is that if the vote is corrected immediately, the public is made aware of the conflict and the change in the vote, which the Open Public Meetings Act requires for accurate minutes. See N.J.S.A. 10:4-14. Therefore, a vote occurring during a public meeting cannot be changed outside of a

public meeting. Mr. Calligy correctly guided respondent in the correct protocol for changing his vote in the next public meeting. The fact that the meeting had not yet concluded does not change the fact that the vote was not changed during the public session at which it was made. Therefore, the Commission concludes that respondent acted in his official capacity in a matter in which he had a personal involvement in violation of N.J.S.A. 18A:12-24(c).

Last, the Commission found probable cause to credit the allegation that respondent violated N.J.S.A. 18A:12-24(c), when he voted in favor of the Board's contract with Fitz Media, Inc. a corporation owned by Freeholder Fitzgibbons. In his response, respondent answered that Board Counsel told him "his status as a County employee does not preclude him from voting on a Board contract with a company owned by an elected County Freeholder, since the respondent is not employed by that Freeholder or his company." However, a Personnel Officer at the County of Hudson provided a written verification that Respondent has been employed with the County of Hudson, Department of Freeholders as an Aide to Freeholder Maurice Fitzgibbons from November 9, 1998 to the present. Further, Board Counsel Matthew Giacobbe certified that respondent never sought any type of legal guidance from him regarding this matter. Mr. Giacobbe admits that it is possible that Respondent sought advice from one of the other Special Counsels for the Board; albeit Respondent referenced Board Counsel, not Special Counsel. Respondent argues that this discrepancy creates a genuine issue of material fact that should require a hearing before the Office of Administrative Law. The Commission disagrees because, even if it was unrefuted that Respondent received such advice, it would only mitigate against the penalty, but not negate the fact that the violation occurred.

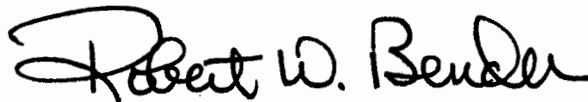
The Commission concludes that, although Respondent was at all times an employee of Hudson County and not a direct employee of Freeholder Fitzgibbons, respondent nonetheless had an indirect financial involvement with Freeholder Fitzgibbons, having worked as his aide since 1998. That involvement might reasonably be expected to impair his objectivity when voting for the Board to contract with the Freeholder's company. Therefore, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c) when he voted in favor of the contract with Fitz Media, Inc.

For the foregoing reasons, the Commission finds that Mr. Garcia violated N.J.S.A. 18A:12-24(c) when he voted for his brother's appointment and voted for Fitz Media, Inc. to receive a contract with the Board.

PENALTY

The Commission notes that there are two separate violations of N.J.S.A. 18A:12-24(c) in the present case. Clearly, by itself, the vote on respondent's brother would warrant nothing more than a reprimand. See I/M/O Dino Pettinelli, Commissioner's Decision, Agency Docket No. 266-7/04 (September 8, 2004). However, when coupled with the vote on the Fitz Media contract, the Commission believes that a censure would be more appropriate. Two factors mitigate against such a penalty, though. First, is the fact that the votes occurred at the same time leaving no additional time for reflection or consideration of whether one or both may have been in error before the next. Second, is that the Commission could not determine as fact that respondent did not receive legal advice that he could vote on the Fitz Media contract. The Commission would have to transmit this matter to the Office of Administrative Law for such a determination and it declines to use the OAL for such a limited purpose. Therefore, the Commission recommends that the Commissioner of Education impose a sanction of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 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.



Robert Bender
Acting Chairperson

Resolution Adopting Decision – C41-05

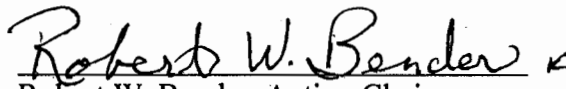
Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, prior to its meeting of October 24, 2006, the Commission read the written submission of the respondent and reviewed its probable cause decision; and

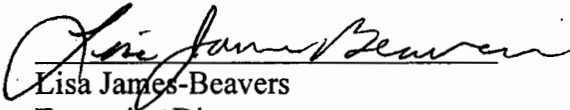
Whereas, at its meeting of October 24, 2006, the Commission found that Carmelo Garcia violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended that the Commissioner of Education impose a sanction of reprimand*; and

Whereas, the Commission reviewed the draft decision recommending a reprimand against Mr. Garcia and agrees with the 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.


Robert W. Bender, Acting Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 24, 2006.


Lisa James-Beavers
Executive Director

* Chairperson Paul Garbarini and Commissioner Robert Copeland abstained from this decision.

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF MEDFORD, BOARD OF	:	
EDUCATION OF THE TOWNSHIP OF	:	
EVESHAM, BOARD OF EDUCATION	:	
OF THE LENAPE REGIONAL HIGH	:	
SCHOOL DISTRICT, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	
LUMBERTON, BOARD OF EDUCATION	:	DECISION
OF THE NORTHERN BURLINGTON	:	
COUNTY REGIONAL SCHOOL DISTRICT,	:	
AND BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF WOODLAND,	:	
BURLINGTON COUNTY,	:	
PETITIONERS,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT	:	
OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning boards of education alleged that insufficient levels of State aid had negatively impacted their ability to provide a thorough and efficient system of education (T&E) and sought individualized needs assessments by the Commissioner comparable to those ordered by the State Board for the party districts in *Bacon v. New Jersey Department of Education*. The Department moved to dismiss the petition for failure to state a claim upon which relief could be granted.

The ALJ denied the Department's motion, finding that *Bacon* created a new cause of action enabling any board of education believing itself underfunded – not only those alleging educational inadequacy and poverty – to claim entitlement to a *Bacon*-type needs assessment. The Department requested, and was granted, interlocutory review of the ALJ's decision.

The Commissioner rejected the Initial Order, finding that the ALJ misconstrued *Bacon* by confusing the specific relief crafted for the parties – rural districts demonstrating educational inadequacy and poverty comparable to *Abbott* districts but unlike their urban counterparts in important respects – with the State Board's call for systemic change in the definition, assessment and funding of T&E statewide. The Commissioner held that *Bacon* neither created a new cause of action for public school districts nor eliminated alleged educational inadequacy and poverty as prerequisites to T&E claims, and thus found that petitioners failed to present a cognizable basis for contested case proceedings. The Commissioner further noted that petitioners' concerns were appropriately addressed through implementation of the newly enacted Quality Single Accountability Continuum system for evaluation of public school districts together with the school funding formula presently being developed by the Legislature, both based on principles fully consistent with the State Board's pronouncements in *Bacon*. 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.

OAL DKT. NO. EDU 8762-05
AGENCY DKT. NO. 98-4/05

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF MEDFORD, BOARD OF	:	
EDUCATION OF THE TOWNSHIP OF	:	
EVESHAM, BOARD OF EDUCATION	:	
OF THE LENAPE REGIONAL HIGH	:	
SCHOOL DISTRICT, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	
LUMBERTON, BOARD OF EDUCATION	:	DECISION
OF THE NORTHERN BURLINGTON	:	
COUNTY REGIONAL SCHOOL DISTRICT,	:	
AND BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF WOODLAND,	:	
BURLINGTON COUNTY,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	
	:	
NEW JERSEY STATE DEPARTMENT	:	
OF EDUCATION,	:	
	:	
RESPONDENT.	:	
_____	:	

This matter comes before the Commissioner by way of a request – filed by the respondent Department of Education (Department) and granted in accordance with *N.J.A.C. 1:1-14.10* – for interlocutory review of an Order of the Office of Administrative Law (OAL) denying the Department’s motion to dismiss petitioners’ appeal for failure to state a claim upon which relief can be granted.

In its request, the Department contends that the Administrative Law Judge (ALJ) erred in concluding that the State Board’s decision in *Bacon, supra*, created a new cause of action enabling any local district board of education believing itself underfunded – not only those alleging educational inadequacy and poverty by the standards of *Abbott, supra* – to claim entitlement to a needs assessment of the type

ordered for the petitioners in that matter (*Bacon* districts). The Department reiterates that: 1) no *Bacon* assessment presently exists, the Commissioner having previously recommended to the State Board that such assessment await implementation of the Quality Single Accountability Continuum (QSAC) monitoring system and anticipated new funding formula currently in development; and 2) even if a *Bacon* assessment did exist, financial need remains a determinative factor and petitioners have not pled the requisite educational inadequacy and poverty to place themselves in the same posture as the *Bacon* districts. (Department's Brief in Support of Request for Interlocutory Review at 8-15)

In reply, petitioners counter that the ALJ correctly found *Bacon* to have created a new standard for determination of thoroughness and efficiency (T&E) in New Jersey public school districts – one linked to educational rather than fiscal considerations – so that, even if the relief sought by petitioners must await development of appropriate standards, they are still entitled to claim it through the present proceeding.

Petitioners state:

It has never been contested by petitioners that there can be no assessments until standards are developed. If that development must await the QSAC standards, so be it. All that means is the relief sought will not be rendered until some undetermined time in the future. It does not mean it will never be available or that the cause of action recognized by [the ALJ] should be rejected. At most, the claim should be for (*sic*) labeled as one for a QSAC evaluation instead of a *Bacon* assessment. That is nothing more than semantics. (Petitioners' Reply at 2)

In urging the Commissioner to “give direction to the parties” as requested by the ALJ, petitioners assert that “this case presents a new chapter in New Jersey School funding [growing] out of the State Board’s pronouncements in *Bacon*. Rather than dismiss the petition, the Commissioner should seize this opportunity to give the New Jersey

educational community *** needed direction on the future course of education in this state, as envisaged in *Bacon*.” (*Id.* at 3)

Upon review, the Commissioner cannot concur with the findings and conclusions of the ALJ and, consequently, rejects the recommended Order in its entirety. Instead, the Commissioner agrees with the Department that the State Board neither created a new cause of action through its direction of individual needs assessments in the *Bacon* districts nor eliminated allegations of poverty and educational inadequacy as prerequisites to cognizable T&E claims.

Initially, the Commissioner finds that the *Bacon* decision embodies two separate directives: one an order of relief arising from the State Board’s adjudication of the claims and record before it on appeal, and the other a call for systemic change arising from the Board’s concomitant exercise of its authority over the general supervision and control of public education statewide. In his reading of *Bacon*, however, the ALJ has erroneously conflated these related but distinct directives, grafting the Board’s pronouncements on the need for change in State mechanisms for definition, assessment and funding of T&E onto the particularized relief granted to the parties in the specific matter on appeal.

Properly construed, *Bacon* leaves no doubt that the individualized needs assessments granted to the party districts, and now sought by petitioners herein, represent a relief crafted in direct response to the State Board’s finding that the *Bacon* litigants – rural districts making a bid for “special needs” status akin to that of the *Abbott* districts – had demonstrated comparable levels of educational deprivation and poverty, but were sufficiently unlike their urban counterparts to have their deficiencies appropriately

addressed by programs, standards and funding levels developed in response to the needs and circumstances of the latter. Nothing expressed or implied in its decision suggests that the Board, in fashioning relief tailored to the unique situation of the parties in *Bacon*, had any intent whatsoever to establish a new, generalized cause of action whereby any district in the State might petition the Commissioner for comparable relief without even *alleging* a comparable degree of educational deprivation and poverty, instead relying – as petitioners here have done – solely on claims of negative impact resulting from an insufficient level of State aid.

Rather, it is the State Board's second directive that addresses the concerns underlying petitioners' appeal in this matter. As subsequently discussed, ongoing effectuation of this directive will – by operation of law – afford petitioners precisely the relief they are attempting to seek through the present litigation: individualized assessment of the thoroughness and efficiency of their districts in accordance with standards to be determined by the Commissioner consistent with *Bacon*, and a consequent level of support appropriate to their circumstances.

As the ALJ and parties recognize, regulations and performance indicators are currently being developed to implement QSAC, the Legislature's newly enacted framework for a uniform system of evaluating public school districts and assisting with their identified needs. In the Commissioner's view, the State Board's proposed rules at *N.J.A.C.* 6A:30 and the attendant quality performance indicators to be developed pursuant to them (see 38 N.J.R. 3378(a)) will work, in their final form and in conjunction with the State's anticipated new funding law, *infra*, to effectuate exactly the result directed by the Board in *Bacon*: identification of the "educational components essential

to the establishment of a unified system for public education that ‘will equip all of the students of this state to perform their roles as citizens and competitors in the same society’ ” (*Bacon, supra*, slip opinion at 71, citing *Abbott II, supra*) and insurance of their provision through a comprehensive mandate for district-specific assessment, assistance and targeted intervention.¹

Moreover, as the ALJ and parties further recognize, the State has committed to development of a new funding formula and has now formally articulated, through the report of the Joint Legislative Committee on Public School Funding,² the foundational principles that should underlie such a formula regardless of its ultimate configuration. Review of these principles – substantially embodied in the Committee’s first five recommendations³ – shows them to be fully congruent with the State Board’s directive for abolishment of a “fragmented system” that meets the needs of some students while “not produc[ing] educational adequacy for all,” and replacement of it with a system

¹ Petitioners themselves recognize the congruence of the relief they are seeking and implementation of QSAC; see Petitioners’ Brief in Opposition to Motion to Dismiss at 5-7 and Petitioners’ Brief in Support of the ALJ’s Order at 2-3.

² Available online at http://www.njleg.state.nj.us/PropertyTaxSession/OPI/jcsf_Report111506.pdf. Recommendations at 63-77, and in the Executive Summary at 2-3.

³ The referenced recommendations read as follows:

- *Recommendation 1:* State aid for every school district should be based on the characteristics of the student population and the individual district’s ability to pay.
- *Recommendation 2:* Aid calculations should be simplified to ensure transparency, thereby eliminating the need for multiple additional aid categories.
- *Recommendation 3:* A new school aid formula should be developed based upon the nationally-recognized professional judgment panels (PJP) model for determining the resources necessary to meet educational standards.
- *Recommendation 4:* The formula should be based on “costing-out” calculations developed through the PJP model to determine the base per pupil cost of a thorough and efficient education, as well as the additional weights for special education, at-risk, and limited English proficiency students. This should also include use of the geographic cost of education index to accurately reflect differences in the cost-of-living throughout the State.
- *Recommendation 5:* A district’s share of State education funding should be based on up-to-date measures of a district’s ability to pay. The formula for calculating the ability to pay should be based equally on a district’s relative property wealth and income. Property wealth should be calculated by considering the equalized property valuation per capita relative to the State median. A district’s income should be calculated based upon income per capita relative to the State median.

that “ensures the provision of a constitutionally adequate education and equal educational opportunity for all students in New Jersey regardless of the district in which they live and the economic circumstances under which they were born.” (*Bacon, supra*, slip opinion at 65-66, 69)

The Commissioner thus finds that – taken together – these legislative enactments and their implementation by the Commissioner, State Board and local district boards of education will “effectuate the changes that are necessary to establish a unified system for public education that fulfills the constitutional mandate both with respect to the substantive education that must be provided and the resources necessary to support such a system.” (*Bacon, supra*, slip opinion at 72) Indeed, it is the fulfillment of this promise through coordinated action at all levels of government – not Commissioner rulings issued through a perpetual cycle of district-specific contested cases as would be enabled by petitioners’ and the ALJ’s reading of *Bacon* – that represents “the future course of education in this state, as envisaged in *Bacon*.”

Accordingly, for the reasons set forth above, the Commissioner rejects the Initial Order of the OAL and dismisses the Petition of Appeal for lack of a cognizable cause of action. Consistent with this holding, the Commissioner concurrently requests return of the file from the OAL pursuant to *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.⁴


COMMISSIONER OF EDUCATION

Date of Decision: 12/05/06

Date of Mailing: 12/05/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 8762-05

AGENCY DKT. NO. 98-4/05

**MEDFORD TOWNSHIP BOARD OF
EDUCATION; EVESHAM TOWNSHIP
BOARD OF EDUCATION; LENAPE
REGIONAL HIGH SCHOOL DISTRICT;
HAINESPORT TOWNSHIP BOARD
OF EDUCATION; LUMBERTON
TOWNSHIP BOARD OF EDUCATION;
NORTHERN BURLINGTON COUNTY
REGIONAL SCHOOL DISTRICT AND
WOODLAND TOWNSHIP SCHOOL
DISTRICT,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
EDUCATION,**

Respondent.

James Schwerin, Esq., for petitioners (Parker McCay, attorneys)

Carolyn G. Labin, Deputy Attorney General, for respondent (Stuart Rabner,
Attorney General of the State of New Jersey, attorney)

BEFORE **BRUCE M. GORMAN**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On April 28, 2005, a Petition of Appeal was filed with the Commissioner of Education ("Commissioner") against the New Jersey Department ("Department") requesting an increase in State aid for several school districts. See Initial Petition, Wherefore Clause. The listed petitioners were two different types of entities: the school districts, Medford Township School District ("MTSD"), Evesham Township Board of Education ("ETSD"), Lenape Regional High School District ("LRHSD"), and the Board of Education of the Township of Hainesport ("HTSD"), and the township councils, Medford Township Council and Evesham Township Council (collectively referred to as the "Township Councils").

Within the Petition of Appeal, the parties alleged that the Department had not correctly applied the Comprehensive Educational Improvement and Financing Act, N.J.S.A. 18A:-7F-1, et seq. (CEIFA), and that the amount of State aid should be adjusted for the 2003-2004 school year to confirm with the formula found within CEIFA. See Initial Petition, Count One, ¶¶ 7, 16. Beyond the request for an increase in State aid for the 2003-2004 school year, the Districts also claimed that their ability to provide their students with a thorough and efficient education ("T&E") as required by the New Jersey Constitution, Art. VIII, §4, ¶1¹, had been "negatively impacted" because of the Department's failure to increase their State aid for the 2003-2004 school year. See Initial Petition, Count Two. Moreover, the petition alleged that the Township Councils would have to restore money to the school budgets if the budgets for ETSD and MTSD were defeated. See Initial Petition, Count Three, ¶2. On June 3, 2005, the Department filed a motion to dismiss the petition of appeal in lieu of an answer.

On June 6, 2005, the petitioners filed an Amended Petition. The Amended Petition added Northern Burlington County Regional School District Board of Education

¹ The thorough and efficient clause of the New Jersey Constitution provides: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. Art. VIII, § 4, ¶1.

("NBCRSD"), Lumberton Township Board of Education ("LTSD"), and the Woodland Township Board of Education ("WTSD") as parties to the matter (the school districts listed in the petition are hereinafter collectively referred to as the "Districts"). The Amended Petition also amended the counts brought against the Department.

In Count One, the Districts and Township Councils alleged that the Department had failed to increase State aid to the Districts as required by CEIFA and that therefore, the amount of State aid being provided for the 2005-2006 school year had to be increased to conform with the formula set forth within CEIFA. See Amended Petition, Count One, ¶22. The Districts and the Township Councils asserted that the Districts' State aid had not increased in accordance with the increases in the Districts' student enrollments. See Amended Petition, Count One, ¶¶12, 13, 14, 15, 16, 17, 19, 20, 21.

Furthermore, the Districts and the Township Councils alleged that because of the Department's failure to increase the Districts' State aid in accordance with the increases in their student enrollment, their ability to provide their students with a T&E had been "negatively impacted." See Amended Petition, Count Two. ¶¶2-8. In support of the alleged negative impact, the Districts made few specific assertions.

On July 5, 2005, the Department filed a second motion to dismiss in lieu of an answer. Oral argument occurred on March 9, 2006, before myself as trial judge. During the argument, counsel for petitioners attempted to orally amend the Districts' legal position claiming that, due to the State Board decision in Bacon v. New Jersey Dep't. of Educ., Docket No. #4-03, (State Board January 4, 2006), the Districts were no longer requesting additional State aid under CEIFA but rather, the educational assessment discussed in the Bacon decision.

On June 6, 2006, the Districts filed a Second Amended Petition of Appeal (hereinafter referred to as the "Petition") changing their requested relief from additional State aid to the educational assessment discussed in the Bacon decision.

The Department now moves to dismiss the amended petition.

LEGAL ANALYSIS

The Department offered two arguments in support of its motion. The more significant is its contention that petitioners have failed to state a cause of action upon which relief can be granted.

Petitioners base their cause of action upon the State Board of Education's decision in *Bacon v New Jersey Department of Education*, State Board Dkt. No. 4-03 (January 4, 2006) (hereinafter "*Bacon*"). Petitioners assert that as a result of *Bacon*, they are entitled to "needs assessments" for their respective districts in order to determine whether they are receiving funding sufficient to comply with the Thorough and Efficient ("T&E") provision of the State Constitution.

By asserting that petitioners have failed to state a cause of action, the Department renders a specific interpretation of the State Board's holding in *Bacon*. The Department's position is summarized on page ten of its brief, wherein it states:

However, the claims raised here are dissimilar to the claims raised in *Bacon*. In *Bacon*, the school districts alleged that they were failing to provide their students with a T&E and did not have the local resources to correct their educational deficiencies. See *Bacon*, *supra*, at 4. By contrast, the Districts merely assert that their ability to provide their students with a T&E has been "negatively impacted." Thus, unlike the *Bacon* districts, the Districts have not asserted a constitutional deprivation of a T&E.

In so arguing, the Department asserts that the applicable standard is that petitioners must lack the local resources necessary to correct educational deficiencies. That standard was argued by the petitioners in *Bacon*, and the Department attempts to impose it here.

That contention is misplaced. The above referenced rule was utilized in *Bacon* at the trial level because *Bacon* was an effort by the petitioners therein to attain "Abbott"

status, that is attain the status of Special Needs District as promulgated by the line of cases known as Abbott v Burke I, II, III and IV. Consequently, the Abbott standard was used in Bacon at the trial level.

But petitioners herein do not seek Abbott status. Instead they seek a special needs assessment based upon language contained in the State Board's decision in Bacon. In essence, petitioners claim a new right based upon that decision.

The questions therefore become, does Bacon create a new cause of action, and if so, what role, if any, does the Abbott standard play in deciding the claim? In order to answer those questions, we must review the State Board's decision in Bacon.

The State Board concluded Bacon by stating its dissatisfaction with the limitations the Abbott process places upon achieving thorough and efficient education, as well as the failure of the Comprehensive Educational Improvement and Financing Act ("CEIFA") to adequately promote that end. The Board stated, at 58:

We have concluded that despite the gains made under CEIFA, its implementation has not resulted in the provision of a thorough and efficient education to the students of the districts involved in this appeal either in terms of absolute adequacy or in comparison with the wealthier suburban districts. We have also concluded, as did the Court in Abbott II, that a new approach is needed if the students of these districts are to be afforded an educational opportunity that satisfies the mandate of the New Jersey Constitution. *However, our conclusions in this regard do not lead to the relief that the appellant districts are seeking.*

The final sentence is telling. It states that, although petitioners therein were seeking Abbott status, relief other than that sought was appropriate. In differentiating the Bacon districts from the Abbott districts, the State Board wrote, 59:

We do not believe that merely providing the appellant districts with the same fiscal resources that are provided to the Abbott Districts will ensure that the students of these districts are in fact afforded the educational opportunity to which they are entitled. While poor, the districts involved

here are not identical to the districts that have been classified as Abbott Districts. The very fact that they are not urban means that they face a unique set of circumstances that are different from those confronting the poor urban districts.

* * *

...in many instances, different approaches will be required than those utilized in poor urban districts if the deficits in education now being provided by the appellant districts are to be corrected. Hence, regulatory requirements to ensure accountability may differ from those applicable to the Abbott Districts, and the fiscal resources to support the necessary educational inputs may not be the same. In our view, an assessment of the educational needs and the identification of the approaches that will successfully address those needs is a prerequisite to ensuring that adequate resources, including fiscal resources, are provided and appropriate accountability for their use is guaranteed.

In so holding, the State Board began the process of crafting a new cause of action. The Board elaborated, 62:

...we have found that ensuring that the students in these districts are provided with a thorough and efficient education cannot be accomplished merely by granting monetary relief to the appellant school districts. To the contrary, the starting point for remedying the educational deficits shown by the record is to assess the educational needs of the students in each district and identify the approaches that will effectively address those needs.

...in many instances, different approaches will be required than those utilized in poor urban districts if the deficits in the education now being provided by the appellant districts are to be corrected. Hence, regulatory requirements to ensure accountability may differ from those applicable to the Abbott districts, and the fiscal resources to support the necessary educational inputs may not be the same. In our view, an assessment of the educational needs and the identification of the approaches that will successfully address those needs

is a prerequisite to ensuring that adequate resources, including fiscal resources, are provided and appropriate accountability for their use is guaranteed.

The Board then defined the new remedy and directed the Commission to implement same, 63:

We therefore direct that, under the Commissioner's supervision, the Department of Education begin immediately to develop a design for a needs assessment to be performed in each of the districts involved in the litigation before the Commissioner. In addition to assessing the adequacy of the educational inputs and programming currently being provided, we direct that the design proposed to us include elements that will identify the unique educational needs of the students in those districts requiring additional programs to address them.

Accordingly, the State Board fashioned a new remedy for the Bacon districts. But was the remedy to be exclusive to that case and to those districts? The State Board answered that question, 64-65:

In deciding this appeal, we cannot ignore the fact that there are students in other school districts not involved in this litigation who are suffering similar educational inadequacies and whose communities we do not have adequate resources to address those inadequacies. To do so would be a denial of our obligations under the New Jersey Constitution and our responsibility for the supervision of public education in this state. N.J.S.A. 18A:4-10. See Englewood Cliffs v. Englewood, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993). See also Bd. of Educ. V. Bd. of Educ., 170 N.J. 323 (2002). Furthermore, awarding piecemeal relief to some districts while ignoring others would be to contribute to the perpetuation of a fragmented system that does not conform to the constitutional mandate.

In so holding, the State Board expressed a clear intention to extend its new remedy to other school districts. Consequently, I **FIND and CONCLUDE** that the State

Board of Education has created a new remedy for school districts who believe they are underfunded, namely, a Needs Assessment.

Respondent's second argument is that petitioners have failed to state a claim under the T&E clause of the New Jersey Constitution. In so arguing, the Department attempts to impose upon petitioners the burden of meeting the standards required for Abbott qualification.

The problem with this argument is that the State Board specifies in Bacon that the concept of Thorough and Efficient Education is in flux and must be reevaluated. The Board stated, 68:

In short, it is essential at this point to reexamine the meaning of a thorough and efficient education and to establish a unified system for the provision of such an education. We believe that, as the head of the Department of Education and the body responsible for education policy, we must take responsibility for redefining the meaning of a thorough and efficient education in educational rather than financial terms.

Accordingly, the Abbott analysis the Department offers has no relevance to this proceeding. While the State Board did note that poverty will play a role in the reconfigured concept of Thorough and Efficient Education (Bacon, 66), the economic analysis utilized in Abbott cases is no longer dispositive. As the Board stated, monetary relief is not enough (Bacon, 62).

The State Board left it to the Commissioner to redefine the educational system (Bacon, 69). In so doing, the Board charged the Commissioner with developing, inter alia, the qualifying standards for a Needs Assessment. I make no finding at this time what standards would be applied in determining the petitioners are entitled to a Needs Assessment. Indeed, the Commissioner may well still be in the process of developing such standards. I also make no determination as to what such a Needs Assessment would consist of. That matter likewise must await regulatory action.

I **FIND** and **CONCLUDE** only that in Bacon, the State Board created a cause of action for a Needs Assessment that exists outside the Abbott process. Nothing in the record before me shows that the right to a Needs Assessment is limited at this time. Absent appropriately promulgated regulatory limitations and/or further action by the State Board and/or a Court of appropriate jurisdiction, I **FIND** that any school district believing it cannot provide its students with a T&E education because of inadequate local resources may seek a Needs Assessment.

Accordingly, the petition sets forth a cause of action upon which relief may be granted, and the Department's motion to dismiss must be **DENIED**.

ORDER

I **ORDER** that respondent Department of Education's Motion to Dismiss be **DENIED**.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

10/17/06
DATE


BRUCE M. GORMAN, ALJ

/sd

TOWNSHIP OF HOWELL, MAYOR
OF HOWELL AND COUNCIL OF
THE TOWNSHIP OF HOWELL,
MONMOUTH COUNTY,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE
FREEHOLD REGIONAL SCHOOL
DISTRICT, AND JAMES WASSER,
SUPERINTENDENT OF SCHOOLS,
MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner sought a determination by the Commissioner declaring null and void the establishment by respondent Board of revised school attendance boundaries which took effect in September 2006. Petitioners alleged that the school district has been arbitrary and capricious in their establishment of attendance areas; that attendance areas were not determined in accordance with standards set forth in the district's policy; and because the attendance plan has resulted in an arbitrary and inefficient transportation operation and plan. Respondent Board filed motion to dismiss the petition for lack of standing and for failure to comply with the 90-day rule. Petitioners filed a motion to amend the petition to include additional parties who are parents and students within the school district.

The ALJ identified standing as the threshold issue in this matter, and found that Howell Township – and the Mayor in his official capacity – lack standing to challenge the respondent's school attendance boundaries. Further, the ALJ found that: petitioners' appeal of the current Board policy on attendance – adopted in May of 2004 – and the Student Attendance Plan for 2006-2007 – approved by the Board in September of 2005 – were filed out of time; petitioners have presented no evidence to justify relaxation of the 90-day rule in this case; and petitioners' February 2006 challenge to a November 2005 revision of the Student Attendance Plan for 2006-2007 should be dismissed as moot. The ALJ denied petitioners' motion to amend the petition to include additional petitioners, and dismissed the appeal.

The Commissioner adopted the Initial Decision and dismissed the Petition of Appeal.

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

12/05/06

OAL DKT. NO. EDU 2427-06
 AGENCY DKT. NO. 79-3/06

TOWNSHIP OF HOWELL, MAYOR	:	
OF HOWELL AND COUNCIL OF	:	
THE TOWNSHIP OF HOWELL,	:	
MONMOUTH COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE	:	
FREEHOLD REGIONAL SCHOOL	:	
DISTRICT, AND JAMES WASSER,	:	
SUPERINTENDENT OF SCHOOLS,	:	
MONMOUTH COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioners' exceptions and respondents' reply, both duly filed in accordance with *N.J.A.C. 1:1-18.4* following extensions granted pursuant to *N.J.A.C. 1:1-18.8*.

In their exceptions, petitioners urge the Commissioner to reject the conclusions of the Administrative Law Judge (ALJ), reiterating their prior arguments that: they have standing to pursue this matter; their petition is not time-barred; and their motion to amend the petition by adding new parties should have been granted. Petitioners renew their contention that they are themselves citizens and taxpayers; that they have in their official capacity a *parens patriae* interest in protecting the general public; and that they – together with the parents and students who sought to be added to the petition – were prepared to present evidence of negative educational impact on

students and neighborhoods as well as detrimental impact on taxpayers. (Petitioners' Exceptions at 4-6) They further repeat that the 90-day rule – which in the ALJ's view barred both the initial petition and the attempted addition of new parties – must be relaxed where its strict application would effectively insulate from Commissioner review the adoption, implementation or continuation of a policy that implicates students' constitutional right to a thorough and efficient education, and constitutes a matter of fundamental concern to the public.¹ (*Id.* at 2-4, 6).

In reply, respondents urge adoption of the Initial Decision in its entirety, likewise renewing their prior arguments before the ALJ. Specifically, respondents counter that the 90-day rule should not be relaxed in this instance due to the nature of the matter in dispute, the absence of unusual or compelling circumstances justifying petitioners' late filing, and the prejudice that would inure to the district if it were forced to litigate at this point in time (Respondents' Reply at 2-4). They again contend that petitioners should not be allowed to amend their petition to add new parties, citing the resulting prejudice to the district; the fact that the proposed parties and their claims could and should have been identified long ago; and the lack of specificity in the proposed parties' supporting certifications so as to demonstrate the requisite standing (*Id.* at 6-8). Finally, they reiterate that petitioners lack standing to pursue this matter – and hence to claim entitlement to a plenary hearing – because: they have alleged no actual or

¹ During the course of their discussion, petitioners also object to the ALJ's dismissal of their challenge to the revised 2006-07 attendance plan as moot, contending that the revised plan *did* affect school attendance and the ALJ should not have ruled as he did based solely on exhibits submitted with the Motion to Dismiss. (Petitioners' Exceptions at 3-4)

imminent harm to the Township of Howell or its Mayor² or Council; they have demonstrated no right to pursue the interests of third parties, the arguments they raise to this effect having already been rejected in *Carteret, supra*, and *Stubaus, supra*; and their claims are far too speculative, conjectural and unsubstantiated to establish the detrimental impact judicially required to confer standing.³ (*Id.* at 8-11)

Upon careful review and consideration, the Commissioner concurs with the ALJ that this matter must be dismissed. Like the ALJ – for the reasons expressed in the Initial Decision – the Commissioner finds that the named petitioners lack standing to pursue the matter, and cannot now attempt to cure this deficiency by adding new petitioners who – even assuming the requisite standing – could and should have brought their claims long ago. The Commissioner further agrees with the ALJ – for the reasons stated and in the interest of prudence in the event of a reversal on appeal on the question of standing – that the petition is filed well out of time, with no relaxation of the filing deadline warranted, as to all aspects of the 2006-07 attendance plan other than the limited revision adopted on November 21, 2005; and that petitioners’ challenge to that revision, although timely, is moot because no meaningful relief could result from it even if petitioners were to prevail. Finally, the Commissioner concurs that, in light of these holdings, it is unnecessary to reach respondents’ motion to dismiss the petition with respect to claims against the district superintendent.

² Respondents note that the petition was brought by the Mayor in his official capacity and contains no allegation of harm to him as an individual taxpayer, urging that he not be allowed to infer such a claim at this point in proceedings. (Respondents’ Reply at 9)

³ In reply to petitioners’ statements regarding the ALJ’s dismissal of their challenge to the revised 2006-07 attendance plan as moot, respondents point out that none of the students named in the certifications submitted in support of petitioners’ motion to amend the petition are affected by the narrow revision to the 2006-07 attendance plan adopted on November 21, 2005, so that petitioners have additionally not alleged any facts in support of their claim. (Respondents’ Reply at 4-5)

Accordingly, for the reasons well and fully expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.⁴



COMMISSIONER OF EDUCATION

Date of Decision: 12/05/06

Date of Mailing: 12/05/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2427-06

AGENCY DKT. NO. 79-3/06

**TOWNSHIP OF HOWELL, MAYOR
OF HOWELL AND COUNCIL OF THE
TOWNSHIP OF HOWELL,**

Petitioners,

v.

**FREEHOLD REGIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY AND
JAMES WASSER, SUPERINTENDENT
OF SCHOOLS,**

Respondents.

Thomas G. Gannon, Esq., for petitioner (Hiring, Hoffman & attorneys)

Nathanya G. Simon, Esq., and Marc H. Zitomer, Esq., for respondents

(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 21, 2006

Decided: October 5, 2006

BEFORE JOSEPH F. MARTONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioners, Township of Howell and its Mayor, Joseph D. DiBella, representing the residents and students who attend respondent Freehold Regional High School District schools, request the Commissioner of Education to enjoin and declare null and void the actions of respondents establishing school attendance boundaries to take effect in September 2006. Petitioners allege that the school district regulation and the attendance areas are arbitrary and capricious since they were not determined in accordance with standards set forth in the district's policy and because the attendance plan has resulted in an arbitrary and inefficient transportation operation and plan. Petitioners filed their Petition of Appeal with the Commissioner of Education on February 7, 2006, and the matter was transmitted to the Office of Administrative Law (OAL) on April 12, 2006, for hearing as a contested case. The matter was assigned to the undersigned on April 27, 2006, and a prehearing conference was scheduled for May 25, 2006. At that prehearing conference, the parties identified threshold legal issues to be addressed by motions and a schedule for the submission of such motions was agreed to by both parties.

Respondents filed a Motion to Dismiss the Petition of Appeal on June 16, 2006 (R-1, R-2 and R-3). Petitioners filed a Motion to Amend the Petition of Appeal on July 12, 2006 (P-1 and P-2), seeking to name additional petitioners as parties. Petitioners also filed a response to respondents' Notice of Motion to Dismiss on July 18, 2006 (P-3). Petitioners then filed Opposition to Respondent's Motion to Dismiss (R-4) as well as Opposition to Amend the Petition of Appeal on August 3, 2006 (R-5 and R-6). Even though oral argument was requested, I concluded that it was not necessary and I closed the record with respect to this matter on August 21, 2006.

FACTUAL DISCUSSION

The petitioners in this matter are the Township of Howell, a municipal corporation of the State of New Jersey located in Monmouth County, and its Mayor, Joseph D.

DiBella. In their Petition, which was filed with the Commissioner of Education on February 17, 2006, the petitioners contend that they represent the residents and students who attend Freehold Regional High School District schools.

The petitioners seek a determination by the Commissioner declaring null and void the establishment by respondent Board of Education of school attendance boundaries which are to take effect in September 2006.

For purposes of deciding the various motions, I accept the following facts as undisputed based on the submissions of the parties.

Respondent school district is the largest high school district in the state with six high schools and over 1,500 employees educating approximately 12,000 students. The school district consists of the Townships of Colts Neck, Freehold, Howell, Manalapan and Marlboro, and the Boroughs of Englishtown, Farmingdale and Freehold. Respondent operates Freehold High School, Howell High School, Manalapan High School, Marlboro High School, Freehold Township High School and Colts Neck High School.

Petitioners assert that students who live in the Township of Howell comprise 28% of the total district enrollment, and that presently over 600 students who are residents of the Township of Howell attend Colts Neck High School. Petitioners contend that the Attendance Area Plan, which is the subject of this proceeding, will maintain Howell Township students at Colts Neck High School for a minimum of the next four school years.

On or about June 15, 2006, respondents filed a Motion to Dismiss the Petition of Appeal for lack of standing on the part of the petitioners and for failing to comply with the 90-day rule (R-1, R-2 and R-3). On or about July 11, 2006, the petitioners filed a Motion to Amend the Petition to include additional parties who are parents and students within the Freehold Regional High School District and who allege they are affected by respondents' 2006-2007 Student Attendance Boundary Plan (P-1 and P-2).

The Board of Education of respondent school district has adopted a policy known as Policy 8110 (R-3, Exhibit A), which requires the Board to establish school attendance boundaries annually upon the recommendation of the superintendent. Policy 8110 was last revised on May 10, 2004.

The respondent Board of Education adopted the Attendance Boundary Plan for the 2006-2007 school year at its meeting on September 12, 2005. This changed some of the attendance boundaries from those established for the prior school year. Because of questions raised about some of the projected numbers utilized, the Board approved a revision to the student attendance plan on November 21, 2005, only as to those students in a specific section of Howell Township who will remain in the attendance area for Freehold Township High School.

The 2006-2007 Student Attendance Boundary Plan only affects incoming ninth grade students and students already in attendance at a particular high school will remain in that high school for the duration of their high school education (R-3, Exhibit C, para 7).

LEGAL DISCUSSION AND ANALYSIS

I will address the motions of the parties in the order in which they were received.

1. Respondents' motion to dismiss the petition for lack of standing.

Respondent contend that the Township of Howell and its Mayor lack standing to pursue this matter on behalf of third parties who are residents of the Township of Howell. In order to have standing, a party must have a sufficient stake in the outcome of the litigation such that there is a substantial likelihood that the party will suffer harm in the event of an unfavorable decision. N.J.A.C. 6A:3-1.2 is consistent with this holding, stating that interested persons who may bring a complaint before the

Commissioner are those who will be substantially, specifically and directly affected by the outcome of a controversy.

Petitioners rely on a series of cases holding that the concept of standing should be liberally construed, particularly in public interest and group litigation, referring to South Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158 (1983); Booth v. Township of Winslow, 193 N.J. Super. 637 (App. Div. 1984). In the Mount Laurel Township case, the court observed that the need for a "liberal approach" to standing is especially important in Mount Laurel litigation, and held that any organization that has the objective of securing lower income housing opportunities in a municipality has standing. Id. at 337. In the Booth case, the court held that where the question of standing is at least debatable, rather than debate that issue it is "preferable in the public interest to settle the constitutional questions presented on their merits." Id. at 637. However, I was unable to find any case which supported the applicability of these holdings to the types of claims being made by the petitioners herein.

Respondents rely on Borough of Carteret v. Department of Education, OAL Dkt. No. EDU 8564-04 (Aug. 26, 2005) affirmed by the Commissioner (Dec. 27, 2005) www.state.nj.us/njded/legal/index.html. In that case, it was specifically held that the Mayor and Borough lacked standing to challenge the refusal of the Department of Education to designate the school district as an Abbott district. This allegedly resulted in a disparate and burdensome tax levy on the borough's taxpayers.

As stated in Stubaus v. Whitman, 339 N.J. Super. 38 (App. Div. 2001), in order for a party to have a standing, the party must have a sufficient stake in and real adverseness with respect to the subject matter, and be harmed by an unfavorable decision. The court also stated that litigants, generally, do not have standing to assert the rights of third parties. Ibid. Further, in Stubaus, the court stated that a government agency's parens patriae interest in protecting the general public, standing alone, is insufficient to support standing to challenge and exercise of power by another agency of the government. Id. at 49.

I agree with the respondents that the Borough of Carteret case presented a more compelling scenario than that of the present petitioners in this matter. In that case there were allegations of a direct and specific impact upon the borough's taxpayers. In the present case, the petitioners allege in the Petition of Appeal that the student attendance plan results in a negative impact on all students attending Howell and Colts Neck High Schools, frequent student and neighborhood dislocation, lack of stability and continuity for neighborhood residents, students suffering a lack of identity and sense of community, overcrowding in Howell High School and overenrollment in Colts Neck High School, inefficient transportation and operation plan and detriment to the students' educational experience. Respondents contend that these alleged impacts are speculative and are limited to a very small portion of the taxpayers and residents of the Township of Howell. What is more significant for deciding this motion is that there is no allegation of any actual or imminent harm caused to the Township or its Mayor.

Therefore, based on the foregoing discussion, and for the reason that the petitioners will suffer no harm as a result of the complained-of actions by respondents, I **FIND** that the petitioners, Township of Howell, and its Mayor, Joseph D. DiBella, lack standing to pursue this matter and their petition should be dismissed.

2. Respondent's motion to dismiss the petition as time-barred.

Since my initial decision is a recommendation to the Commissioner, and a since there is the possibility that the Commissioner may disagree with my determination regarding petitioners' lack of standing, I believe it is prudent to address the other motions in this matter.

N.J.A.C. 6A:3-1.3(i) provides as follows:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order

provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The 90-day rule is a regulatory provision which has the effect of a statute of limitations. It has been reviewed and approved by the courts as an essential element in the proper and efficient administration of the school laws because it provides a measure of repose and stability. See, Kaprow v. Bd. of Educ. of Berkeley Tp., 131 N.J. 572, 582 (1993). The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days.

In Count III of the Petition of Appeal, the petitioners challenge the Board of Education's Policy 8110. This policy, in its present form, was revised and adopted on May 10, 2004, and has remained unchanged since that date. It is clear that the petitioners' challenge to Policy 8110, filed with the Commissioner on February 17, 2006, is far out of time, and I so **FIND**. Therefore, I **CONCLUDE** that petitioners' challenge to Policy 8110 contained in the Petition of Appeal should be dismissed.

The Student Attendance Plan for the 2006-2007 school year was approved by the Board of Education on September 12, 2005 (R-3, Exhibits C and D). On November 21, 2005, the Board of Education approved a revision to the Student Attendance Plan for the 2006-2007 school year (R-3, Exhibit F). That revision changed the plan by reverting to the status quo for students from certain limited areas of Howell Township attending Freehold Township High School. The November 21, 2005, revision of the Student Attendance Plan for the 2006-2007 school year had no impact on the remainder of the plan. Therefore, I **FIND** that petitioners' February 17, 2006, challenge to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on September 12, 2005 (R-3, Exhibits C and D), is out of time and should be dismissed.

Petitioners contend that if it is determined that the Petition of Appeal was not timely filed, this is a matter of significant public interest and there is no prejudice to respondent by allowing this matter to proceed. However, this regulatory limitation will

only be relaxed pursuant to N.J.A.C. 6A:3-1.16 where unusual or compelling circumstances exist causing injustice. See Raymond v. River Edge BOE, 94 N.J.A.R. 2d (EDU) 203, *affd*, 94 N.J.A.R.2d (EDU) 431. If this matter is of significant public interest, why is it that no parents filed a petition of appeal challenging the Student Attendance Plan within the 90-day period? The prejudice to the respondent school district caused by the delay in pursuing this matter is also obvious.¹ This matter is the very type of situation where the policy of repose and stability is critical for the proper administration and operation of the school district. I **FIND** that petitioners have presented no unusual or compelling circumstances, the existence of which would cause injustice, so as to justify the relaxation of the 90-day time period of N.J.A.C. 6A:3-1.3(i).

With respect to the petitioners' February 17, 2006, challenge to the revision to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on November 21, 2005 (R-3, Exhibit F), I **FIND** that it was filed within the 90-day period specified by N.J.A.C. 6A:3-1.3(i). However, this revision has the effect of causing the Student Attendance Plan for the 2006-2007 school year to revert to the prior year's Student Attendance Plan with respect only to those students in a specific section of Howell Township who will remain in the attendance area for Freehold Township High School. Thus, if the petitioners are permitted to pursue their challenge to the November 21, 2005 revision, and if they were to succeed in their claim that Student Attendance Plan for 2006-2007 with this revision is void and of no effect, the Student Attendance Plan for the prior year would remain in effect and there would be no change.

In Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976), it was stated that there are two basic reasons for the doctrine of mootness.

First, 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. Second, it is a premise of the Anglo-American judicial system that a contest

¹ See the discussion of the issue of prejudice to the respondent school district in Section 3 of this initial decision.

engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court.

An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy and where the conflict between the parties has become merely hypothetical. In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983); Barshatky v. Freehold Regional High School District Board of Education, 95 N.J.A.R. 2d (EDU) 73. The courts and the Commissioner of the Department of Education ordinarily will refuse to review questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative resources. In re Conroy, *supra* at 459; Carolyn Henry v. Board of Ed. of the City Wildwood, 1975 S.L.D. 1, 3.

Therefore, I **CONCLUDE** that petitioners' February 17, 2006, challenge to the revision to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on November 21, 2005, should be dismissed as moot.

3. Petitioners' motion to amend to add new parties.

N.J.A.C. 1:1-6.2(a) provides:

Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.

In their moving papers, petitioners argue that a motion for leave to amend a pleading is to be liberally granted, especially in matters affecting the public interest. Finderne Mgmt. Co., Inc. v. Barrett, 355 N.J. Super. 170 (App. Div. 2002); Springfield Tp v. Board of Educ., 217 N.J. Super. 570 (App. Div. 1987). Petitioners assert that the

proposed amendment will provide for a representation of individual residents and parents of students who attend respondents' schools, and the relief sought is grounded on the same operative facts as set forth in the petition so there will be no prejudice to respondents with regard to addressing new issues or claims against it. Petitioners argue that the amended pleading will name parties whose claims arose out of the original occurrence or actions of respondent school board and accordingly the amendment should relate back to the date of the original pleading, citing Harr v. Allstate Ins. Co., 54 N.J. 287, 299-300 (1969).

In response to the motion, respondents contend that adding new parties would create undue prejudice to respondents. Respondents point out that the holding in the Finderne case makes it clear that the decision to grant or deny leave to amend is subject to the discretion of the trial court, and denial is required only when there would be prejudice to the other party or the movant was dilatory in prosecution of the claim. Finderne, supra, 355 N.J. Super. at 196.

Respondents further contend that they will be unduly prejudiced by an amendment to the pleadings at this late date, which is approximately five months after the filing of the petition and ten months after the adoption of the Attendance Boundary Plan for the 2006-2007 school year.

The difficulty I have with petitioners' motion to amend the pleadings is that the parties to be added are each asserting individual claims against the respondent school district that should have been asserted at a much earlier date, and which are now untimely if they were to be asserted in a new petition.

The New Jersey Administrative Code is silent as to the issue when an amended pleading relates back. N.J.A.C. 1:1-1.3(a) provides in relevant part:

This chapter shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. In the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are

compatible with these purposes.

R. 4:9-3 of the New Jersey Court Rules provides in relevant part:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading.

As was stated in Fraser v. Bovino, 317 N.J. Super. 23, 34 (App. Div. 1998), citing R. 4:9-3,

. . . [N]othing within the doctrine of relation back would permit claims asserted by litigants in one action to relate back to claims asserted by different litigants in a different action.

The claims of the proposed new petitioners are not new claims or claims that were recently discovered by them. Each of these claims existed on September 12, 2005, and on November 21, 2005, when the complained of actions were taken by the respondent Board of Education. The first notice to the respondents that these proposed petitioners were asserting these individual claims occurred on or about July 11, 2006, when the motion to add these individuals as petitioners was submitted by their attorney. This far exceeds the 90-day time limit specified by N.J.A.C. 6A:3-1.3(i) for filing challenges to the actions of a board of education. To allow these new claims to be made by way of an amended petition would be volative of the policy behind N.J.A.C. 6A:3-1.3(i) for expediency in asserting claims against the board of education and for stability and repose. Parents of any students who felt negatively impacted by this attendance plan had the opportunity to challenge the plan within 90 days of its adoption. They should not be given a second opportunity to challenge the plan eight months after its adoption.

In addition, I am satisfied that in light of the current factual situation, the motion to amend the petition should be denied because such an amendment to add new

parties would be prejudicial to the respondent. Respondents' attendance plan was adopted in September 2005, and modified in November 2005. No action was taken against the adopted plan within the 90-day period following its adoption. I **FIND** that the school district has expended significant time, money and resources in planning and budgeting for the 2006-2007 school year in reliance upon the attendance boundary plan. I am satisfied that it will be extremely onerous if not impossible for the district to accomplish and implement any change in the Attendance Boundary Plan for this current school year. Based upon the Certification of Dr. Wasser (R-6), the school district has established a master schedule, established all students' schedules for all of its students in six high schools, established all bus schedules, routes and bus stops, hired and assigned staff for all six high schools, established staff schedules for all six high schools, and allocated classroom and other facilities within each school building to meet the needs of the assigned students. These undertakings have actually begun in operation at the start of the school year and any change in the allocation of students would have a drastic effect and would cause a disruption in the educational process at this point.

In view of the foregoing, and after considering all of the surrounding circumstances, I **CONCLUDE** that it is appropriate to exercise discretion in this matter by refusing to permit the amendment of the petition to add new parties.

Because of the determinations I have made with respect to the foregoing issues, I believe that it is unnecessary to address respondents' motion to dismiss the Petition of Appeal with respect to any claims against James Wasser, Superintendent of Schools.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that the petition in this matter is hereby **DISMISSED** for lack of standing, and that petitioners' challenges to Policy 8110 and to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on September 12, 2005 (R-3, Exhibit C and D), are out of time pursuant to N.J.A.C. 6A:3-1.3(i), and are hereby **DISMISSED**. I further **ORDER** that petitioners' February 17, 2006, challenge to the revision to the Student Attendance Plan for the 2006-2007 school year, approved by the Board of Education on November 21, 2005, is **DISMISSED** as moot. I further **ORDER** that petitioners' motion to amend the Petition of Appeal to add additional petitioners 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.

October 5, 2006

DATE


JOSEPH F. MARTONE, ALJ

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

10-5-06

DATE

OCT 12 2006

DATE

Mailed to Parties:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX:

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

- P-1 Petitioners' Notice of Motion to Amend the Petition of Appeal
- P-2 Certification of Counsel in Support of Motion with the following attachments:
 - A. Proposed and Amended Petition of Appeal
 - B. Certification of individual residents and parents of students who attend respondents' school in Support of Motion to Amend Petition
- P-3 Petitioners' Response to Respondents' Notice of Motion to Dismiss

For respondent:

- R-1 Notice of Motion to Dismiss the Petition of Appeal
- R-2 Letter Brief in Support of Respondents' Motion to Dismiss Petition of Appeal
- R-3 Certification of James Wasser dated June 15, 2006, with the following attachments:
 - A. Board of Education Policy 8110, revised May 10, 2004
 - B. Minutes of Board meetings of November 21, 2005 and January 9, 2006 (excerpts)
 - C. Attendance Boundary Plan for 2006-2007

- D. Student Attendance Plan, school year 2006-2007 and
Minutes of Board meeting of September 12, 2005 (excerpt)
- E. Guide to 2005-2006 Attendance Boundaries
- F. Minutes of Board meeting of November 21, 2005 (excerpt)
- R-4 Reply Letter Brief to Petitioners' Opposition to Respondents' Motion to
Dismiss
- R-5 Letter Brief in Support of Respondents' Opposition to Petitioners' Motion
to Amend Petition
- R-6 Certification of James Wasser, dated July 27, 2006

R.C. and B.C. on behalf of minor children :
 L.D.C. and R.B.C., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION :

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

SYNOPSIS

Petitioners contested respondent's determination that their children were not domiciled in respondent's district during the 2005-2006 school year. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance, based on observations by an investigator that L.D.C. and R.B.C. were living at their grandparents' address in East Orange.

The ALJ found that petitioners have proven by a preponderance of credible evidence that L.D.C. and R.B.C. were domiciled in respondent's school district during the period in question; that the address in East Orange was never a permanent domicile; and concluded that respondent's decision to disenroll petitioners' children must be overturned, and the Board's counterclaim for tuition is without merit.

Upon an independent and thorough review of the record, the Commissioner adopts the Initial Decision as the Final Decision in this matter.

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

OAL DKT. NO. EDU 7153-06
AGENCY DKT. NO. 177-5/06

R.C. and B.C. on behalf of minor children :
L.D.C. and R.B.C., :

PETITIONERS, :

V. :

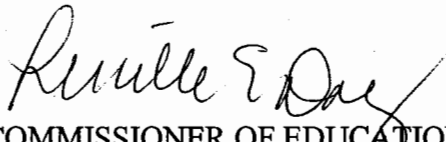
COMMISSIONER OF EDUCATION

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

The record of this matter and the Initial Decision have been reviewed. Although a hearing took place on September 8, 2006, the record does not include a transcript of same. No exceptions have been filed.

For the reasons set forth in the Initial Decision, the Commissioner adopts the Administrative Law Judge's (ALJ) determination that petitioners proved that B.C. and the children never relinquished domicile in Bloomfield, notwithstanding their intermittent stays – over several months – in the East Orange home of B.C.'s parents. Accordingly, the Commissioner adopts the Initial Decision overturning respondent's decision to disenroll the children and dismissing respondent's counter-claim for tuition.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/05/06

Date of Mailing: 12/05/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07153-06

AGENCY DKT. NO. 177-5/06

R.C. AND B.C. O/B/O MINOR CHILDREN,

L.D.C. AND R.B.C.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

Joseph M. Speidel, Esq., for Petitioners

Mark A. Wenczel, Esq., for Respondent (Gaccione, Pomaco & Malanga, attorneys)

Record Closed: September 11, 2006

Decided: October 23, 2006

BEFORE **JAMES A. GERAGHTY, ALJ:**

BACKGROUND

Petitioners, R.C. and B.C., contest the May 3, 2006 decision of the Bloomfield School District Board of Education to disenroll their children, L.D.C. and R.B.C., on

grounds that the children were not domiciled in the district during the 2005/2006 school year. The New Jersey State Department of Education received Petitioners' appeal on May 24, 2006. (Exhibit R-1). The matter was transmitted to the Office of Administrative Law ("OAL") on June 14, 2006. The hearing was held on September 8, 2006, at which Petitioner, B.C., and Robert Presuto, Director of Administrative Services for the Bloomfield School District, testified. Both parties adduced documentary evidence and were represented by counsel. Petitioners' counsel submitted copies of exhibits admitted during the hearing under cover of a letter received September 11, 2006 at the OAL. The record closed that day.

The issues are whether Petitioners' children, L.D.C. and R.B.C., were Bloomfield School District domiciliaries during school year 2005/2006, and if not, whether they are liable for tuition assessment for the period of ineligibility.

LEGAL AUTHORITY

Persons over five and under twenty years of age are entitled to attend public schools without charge if they are domiciled within the school district in which the school is located. N.J.S.A. 18A:38-1. A student is domiciled within a school district:

1. . . . when he or she is living with a parent or legal guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

4. A student is domiciled in the school district when his or her parent or legal guardian resides within the district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere.

N.J.A.C. 6A:22-3.1(a)1,4.

Where a student's dwelling is located within two or more school districts, ". . . 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" Id. at section 3.1(b).

There is a substantial body of precedent on domicile. Our Appellant Division has explained:

Domicile is the relation which the law creates between an individual and a particular locality or country. 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 . . . it is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law And every person, in all circumstances and conditions, is deemed to have a domicile somewhere; and, in general, a domicile once established continues until superseded by a new domicile, and the old domicile is not lost until a new one is acquired . . .

A person may have several residences or places of abode but he can have only one domicile at a time. Domicile of choice is essentially a question of residence and intention - of factum and animus. It involves an exercise of volition And he may have his residence in one place, while his domicile is in another There are certain legal rights and privileges which pertain to "residence" rather than to "domicile." One's "home" may be relinquished and abandoned, while one's "domicile" upon which may depend certain civil rights and duties, may in legal contemplation remain." Kurilla v. Roth, 132 N.J.L., 213, 215 (Sup. Ct. 1944) and authorities there cited.

To effect a change of domicile there must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the factum of residence there must be added animus manendi; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless, or until something uncertain or unexpected shall happen to induce him to adopt some other place as his permanent home. Harral v. Harral, 39 N.J. Eq. 279 (E & A 1884).

A change of residence for a special purpose such as taxation benefits, or a period of seasonal residence and obedience to the demands of health, does not necessarily amount to a change of domicile. The burden of proof to establish that a change of domicile has occurred rests upon the party asserting it. In re Michelson's Will, 136 N.J. Eq. 387 (Prerog. 1944).

Domicile is factual, and each case must be evaluated and determined by its own facts and circumstances.

Cromwell v. Neeld, 15 N.J. Super. 296 (App. Div. 1951).

The courts have established criteria to determine which residence constitutes a person's domicile, to wit: (1) physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has the intention to return. Mercadante v. City of Paterson, 111 N.J. Super. 35 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). Thus, the courts seek evidence of a person's intent by reference to "indicia of domicile." F.P. o/b/o N.P. and S.P., Petitioner v. Board of Education of Point Pleasant Beach, Ocean County, Respondent, OAL Docket No. EDU 6951-98 (Commissioner of Education April 13, 1999) citing Matter of Unanue, 225 N.J. Super. 326 (Law Div. 1991).

A school board may recover tuition from the parents of child found ineligible to attend a school in its district. N.J.S.A.18A:38-1(6)(2). The tuition is 1/180th of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. Ibid.

FACTUAL DISCUSSION

The documents and testimony adduced at the hearing reveal the following:

Petitioners, R.C. and B.C., have resided with their children, L.D.C. and R.B.C., at an address on Ampere Parkway in Bloomfield, New Jersey, since 1998. The house was purchased owned by husband/father, R.C., and his mother, T.C., to facilitate purchase financing because B.C., his wife, had a poor credit rating.

In February 2006, Respondent received information that L.D.C., a student attending school in the Bloomfield School District, actually resided in East Orange, New Jersey. (Exhibit R-1). The District conducted an investigation which entailed a "stake

out” by a compliance officer at Petitioners’ Bloomfield address from 2:30 to 4:00 p.m. on March 16 and 23, 2006. Neither L.D.C. nor her brother, R.B.C. was seen entering that location. On March 29, 2006, he conducted another stake out at the same location from 6:30 a.m. to 7:40 a.m. A young male was seen entering the location during that stake out. On March 30, 2006, the investigator staked out the East Orange Williams Street address owned by Petitioner B.C.’s parents. Both students were observed leaving the house with an older male who drove them to Bloomfield High School where L.D.C. exited, and then to the Ampere Parkway Bloomfield address where R.B.C. exited the vehicle. The vehicle registration was the same as that which dropped off the male child at the Ampere Parkway address during the previous stake out. There were subsequent stake outs on March 31, April 3, April 4, and April 5, 2006 where comparable behavior was observed. The investigator reported the results to Mr. Robert Presuto, the Bloomfield School District Director of Administrative Services accordingly. (Exhibit R-2).

On the strength of the investigator’s report, the School District recommended disenrollment of the children to the School Board because they were not domiciled in Bloomfield. The District afforded Petitioners the opportunity to meet with the School Board on May 2, 2006. Petitioner B.C. attended the hearing and testified, although not under oath, that she resided at her mother’s East Orange address intermittently from the summer of 2005 through April 2006 since she was separated from her husband. However, she declined to explain the circumstances claiming to have been intimidated by so many “blue suits” at the School Board meeting. Specifically, she did not disclose that she was having marital difficulties. Therefore, since her absences from Bloomfield and her children’s movements to and from the East Orange address were not satisfactorily explained, the Bloomfield School Board apparently found B.C.’s evasive explanations to be outweighed by the objective observations of the investigator. The Board concluded that the children’s domicile was East Orange and that they should be disenrolled from the Bloomfield School District. Petitioners appealed to the New Jersey State Department of Education on May 16, 2006. (Exhibit R-3).

At the September 8, 2006 OAL hearing, B.C. testified that when she and her husband married in 1993 they lived with her parents in East Orange until they were able to buy their Ampere Parkway, Bloomfield residence in 2000. Both parents work, B.C.

for State Farm Insurance, and R.C. as an auto mechanic in Newark. He also moonlights as a mechanic in addition to his regular employment. Both R.C. and B.C. pay the mortgage and taxes on their Bloomfield home. The children have been attending the Bloomfield schools since 2001. B.C. testified that she and her husband began having marital difficulties during 2005. She separated from her husband and returned to live temporarily with her parents in East Orange. She testified that she and her husband wished to resolve their difficulties and it was never their intention to permanently separate or to divorce. They never filed a divorce action. At this time, B.C. left most of her personal belongings at the couple's Bloomfield residence. She brought to East Orange clothing and personal items such as a person would need while traveling. Her children accompanied her but did not stay in East Orange continuously. Rather, they returned to their father on occasion depending largely on their parents' work schedules. On those occasions when R.B.C. stayed with his mother in East Orange, his father would pick him up and drive him to school. Sometimes he was dropped off at his Bloomfield home for his father to drive him to school. During this period, both children's personal items including most toys remained at the Bloomfield home. Like their mother, they brought only clothing and other personal items that they would need for a temporary sojourn in East Orange. B.C. testified that she and her children returned home to Bloomfield for the holidays in December 2005. Thereafter, she and the children resumed their intermittent living arrangements between Bloomfield and East Orange.

At some point in February or March 2006, Petitioners learned through acquaintances at their church of a marriage counseling seminar known as the Family Life Weekend to Remember to be held during April 2006 in Burlington, Massachusetts. Petitioners attended beginning April 7, 2006 through April 9, 2006. (Exhibit P-2). Apparently the seminar or marriage encounter was successful since the couple thereafter reunited permanently at their Bloomfield home.

At the OAL hearing, Petitioner authenticated certain documents evidencing her intent to return to her Bloomfield home. For example, her driver's license and vehicle registration state her address as Ampere Parkway in Bloomfield. (Exhibit P-3). On cross-examination, she produced her prior driver's license which likewise showed her

address at the same location. (Exhibit P-3). Petitioners' Capital One credit card was issued to them jointly at their Bloomfield address. (Exhibit P-4). Petitioners' auto insurance bill likewise shows their address as Ampere Parkway in Bloomfield. (Exhibit P-5). Finally, Petitioner B.C.'s pay vouchers from April through August 2006 similarly show her address as Ampere Parkway in Bloomfield. (Exhibit P-6). Petitioner testified that she received all of her mail at her Bloomfield residence.

There were some indicia that Petitioners' children resided in East Orange. Their daughter, L.D.C., received a magazine subscription at her grandmother's East Orange address. Her brother's emergency contact card identified both his parents at Bloomfield and her grandparents at East Orange. (Exhibit R-4).

FINDINGS AND CONCLUSIONS

Petitioner, B.C., testified credibly concerning the circumstances of her temporary separation from her husband, R.C., and their attempts, finally successful, to resolve their differences. During this process, Petitioner, B.C., and her children sojourned temporarily at B.C.'s parents' East Orange home where she and her husband had lived prior to 2000 when they moved to Bloomfield. Petitioners together paid the mortgage and taxes on their Bloomfield home. The OAL received no evidence that either Petitioner contributed in any way to B.C.'s parents' residential expenses, either mortgage or taxes, if any, in East Orange. Also, B.C. and her children's personality remained for the most part in Bloomfield. Although the School Board's conclusion that Petitioners had changed their children's domicile during the 2005/2006 school year was reasonable as it was grounded on the fruits of the investigator's observations as well as B.C.'s elliptical testimony during the May 2006 School Board meeting, nevertheless, all the credible testimony and documentary evidence contradicts this conclusion. Rather, the evidence shows strongly that neither Petitioner ever intended to change their permanent residence even if B.C. and her children resided intermittently in East Orange. Accordingly, I **FIND** as a matter of fact that B.C. and her children, L.B.C. and R.B.C., at all times relevant resided at what was their permanent home and principal establishment in Bloomfield and to which, whenever absent, they intended to and in fact

did return. Neither Petitioner ever did or said anything that evidenced an intention to move from that location permanently. There are no facts which suggest that any of the parties acquired a new domicile. B.C. never relinquished her Bloomfield residence.

Based on the substantial weight of the evidence adduced at the OAL, I **CONCLUDE** that Petitioners' Ampere Parkway residence in Bloomfield was their permanent abode to which they always intended to return even if temporarily absent, and that this intent is corroborated by extensive indicia all of which militate in support this conclusion that Petitioners and their children have been and continue to be domiciled in Bloomfield, New Jersey. I further **CONCLUDE** that Petitioners' children, L.D.C. and R.B.C., though temporarily residing in East Orange during the 2005/2006 school year, nevertheless were domiciled in Bloomfield, New Jersey during that time. Accordingly, the Bloomfield Board of Education decision to disenroll Petitioners' children is not supported by the weight of the evidence and must be overturned. So too, the School Board's counterclaim for tuition reimbursement is without merit.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and legal authority, I **DECIDE** this matter in favor of Petitioners and **ORDER** that their appeal should be and hereby is **GRANTED**, and that Respondents' counterclaim 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/23/2006
DATE

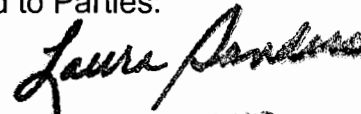

JAMES A. GERAGHTY, ALJ

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

10/23/06
DATE

OCT 24 2006
DATE
pb

Mailed to Parties:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioners:

B.C., Petitioner

For Respondent:

Robert Presuto, Director of Administrative Services, Bloomfield School District

Exhibits

For Petitioners:

P-1	Deed to Ampere Parkway residence
P-2	Marriage Encounter Brochure
P-3 (collective)	B.C. driver's license, vehicle registration, and insurance card
P-4	B.C. and R.C. credit card bill
P-5	B.C. auto insurance bill
P-6	B.C. State Farm pay vouchers

For Respondent:

R-1	Residency Referral
R-2	Investigator Report
R-3	Appeal Notice and related Disenrollment Notices

#425-06

S.H., on behalf of minor child, S.B., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF WEST ORANGE, ESSEX COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner contested respondent's determination that her nephew, S.B., is ineligible to attend West Orange Township schools because she failed to demonstrate a family or economic hardship which would render the parent unable to support or provide care for the child, pursuant to *N.J.S.A. 18A:38-1(b)*. Respondent seeks tuition reimbursement for the alleged period of ineligible attendance. Petitioner failed to appear at hearing scheduled for October 16, 2006, at which the Board presented its proofs on the counterclaim for tuition reimbursement, which were admitted into evidence.

The ALJ found that since no proof was offered to dispute the Board's contention, S.B.'s parent failed to demonstrate that she is incapable of supporting or providing care for her son due to family or economic hardship, and concluded that S.B. is not entitled to a free education in West Orange Township schools. The ALJ further concluded that the Board is entitled to recover tuition pursuant to *N.J.S.A. 18A:38-1(b)(2)*, and granted the Board's application for reimbursement in the amount of \$15,457.28, plus \$77.51 per day for each day S.B. attends school in the district after October 16, 2006.

Upon a full and independent review of this matter, including timely filed exceptions submitted by counsel for the previously *pro se* petitioner, the Commissioner is compelled to reject the Initial Decision and remands the matter to the OAL for a hearing on the merits. The Commissioner concluded that in view of the particular circumstances described in petitioner's exceptions, it would be contrary to the interests of justice to deprive the petitioner of the opportunity to have the merits of her case decided.

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, 2006

OAL DKT. NO. EDU 9150-06
AGENCY DKT. NO. 180-5/06

S.H., on behalf of minor child, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions on behalf of the previously *pro se* petitioner, filed by Matthew E. Przywozny, Esq., were submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4 as were reply exceptions on behalf of the Board and these submissions were fully considered by the Commissioner in reaching her determination herein.¹

Exceptions on behalf of petitioner, in pertinent part, state:

This matter was scheduled for a hearing before Judge Paone on October 16, 2006. Unfortunately, Mrs. Hunter failed to appear for the hearing as she mistakenly believed it to be on another day. Nevertheless, Judge Paone gave Mrs. Hunter until October 27, 2006 to submit objections on which date the record was to close.

Mrs. Hunter came with her husband to see me on the afternoon of October 25th at which time I tried to make sense of what has transpired with this case up to this point. ***I promptly sent the materials to Judge Paone via overnight delivery in hopes that they would be considered.

¹ It is noted that the Board's reply exceptions urge the Commissioner to reject petitioner's exceptions as untimely given that the Administrative Law Judge's (ALJ) decision was issued on October 27, 2006 and petitioner's exceptions were not received by the Board until November 14, 2006. However, the Commissioner observes that *N.J.A.C.* 1:1-18.4, in pertinent part, specifies: "[w]ithin 13 days from the date the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head." (emphasis added) Here the record indicates that the ALJ's decision was mailed to the parties on October 30, 2006. As such, petitioner's exceptions, filed with the Agency on November 8, 2006, are well within the allotted regulatory timeframe. Respondent Board's receipt of petitioner's exceptions operates to trigger the running of the regulatory timeline for the filing of reply exceptions (*N.J.A.C.* 1:1-18.4(d)).

Although Judge Paone acknowledges receipt of the letter and documents on October 27, 2006, *** it appears that he had filed his decision in the morning of the 27th and that the package arrived in the afternoon. ***

It is understandable that Judge Paone reached that conclusion as he was unable to consider the affidavit of S.B.'s biological mother wherein it (sic) she explains that she does not have a permanent residence and is unable to support her son. He was not able to consider [the] statement of Sherell Hunter wherein she confirms that she is a West Orange resident who is S.B.'s guardian.

If Judge Paone's ruling, although reasonable based upon the lack of any meaningful record, is not overruled, Mrs. Hunter will be unable to enroll S.B. in any school, as he does not have a permanent residence in any other School District. (Petitioner's Exceptions at 1-2)

Upon her independent review of the record and full consideration of counsel's exceptions on behalf of petitioner, the Commissioner is compelled to reject the Initial Decision of the Administrative Law Judge (ALJ) and return this matter to the OAL for a hearing on its merits. Notwithstanding petitioner's failure to appear on the scheduled hearing date, in view of the particular circumstances here, the Commissioner concludes that it would be contrary to the interests of justice to deprive petitioner of the opportunity to have the merits of her case decided.

Accordingly, the Initial Decision of the OAL is rejected and this matter is remanded to the OAL for adjudication on its merits. Petitioner is cautioned, however, that should she again fail to appear on a scheduled hearing date without just cause and prior notice to the ALJ, no further opportunities to pursue this matter will be accorded her.

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06

Date of Mailing: 12/01/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9150-06

AGENCY DKT. NO. 180-5/06

S.H., ON BEHALF OF MINOR CHILD,

S.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF WEST ORANGE,

ESSEX COUNTY,

Respondent.

S.H., pro se

Stephen J. Christiano, Esq., for the respondent

Record Closed: October 16, 2006

Decided: October 27, 2006

BEFORE **JOSEPH PAONE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S.H. appeals the determination of respondent Board of Education of the Township of West Orange (Board) that S.B., petitioner's nephew, is ineligible to

attend the West Orange Township schools because she failed to demonstrate a family or economic hardship, which would render the parent unable to support or provide care for the child. N.J.S.A. 18A: 38-1(b). Respondent requests tuition reimbursement for the alleged period of ineligible attendance.

By letter of October 12, 2005, the Board notified petitioner of its determination. On October 27, 2005, the Commissioner received an appeal from S.B.'s mother. The New Jersey Department of Education, Bureau of Controversies and Disputes (Bureau) responded and advised S.B.'s mother that the appeal must be initiated by petitioner, S.H., with whom her child resides. On May 12, 2006, the Board advised petitioner that due to the failure to file an appeal, S.B. would be disenrolled as of May 19, 2006. On May 19, 2006, the Commissioner received an appeal from petitioner. On July 19, 2006, an Answer was filed on behalf of the Board. On August 9, 2006, the Bureau transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for October 16, 2006, and notices were mailed to the parties and to the attorney for the Board. Petitioner did not appear on the hearing date. No message was received in regard to her nonappearance. The hearing went forward and the Board presented its proofs on its counter-claim for tuition reimbursement. On October 16, 2006, correspondence was sent to petitioner advising her that the Board's proofs had been admitted into evidence and offering her the opportunity to file any objections by October 27, 2006. No submissions were received from petitioner and the record closed on that date.

FINDINGS OF FACT

In September 2005, S.B. was enrolled in West Orange High School, which is in the Board's district. On October 12, 2005, the Board advised petitioner that it decided at its October 10, 2005, to deny S.B. admission to its school district because S.B.'s parent failed "to demonstrate a family or economic hardship, which would render the parent unable to support or provide care for the child." Since no proof was offered to dispute the Board's contention, I am compelled to **FIND** as fact that S.B.'s parent failed

to demonstrate that she is incapable of supporting or providing care for S.B. due to a family or economic hardship.

Josefa Lopez, Registrar for the school district, testified that the per pupil cost to the school district was \$13,287 during the 2005-2006 school-year and \$13,951 during the 2006-2007 school year. (R-1). These costs are undisputed. She further testified that S.B. was enrolled in September 2005 and continues to attend school in the district.

CONCLUSIONS OF LAW

Public schools shall be free to . . . [a]ny 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 . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements 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.

[N.J.S.A. 18A:38-1(b)(1)]

I **CONCLUDE** that S.B. is not entitled to a free education by the Board because S.B.'s parent failed to provide the board with sufficient proof of the parent's "family or economic hardship."

The Board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). "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" Ibid. Lopez testified that the total annual per pupil cost for the 2005-2006 school-year was \$13, 287. The total annual per pupil cost for the 2006-2007 school-year is \$13,951. The per diem rate for the 2006-2007 school-year is \$77.51. S.B. was ineligible to attend West Orange High

School during the 2005-2006 school-year and he has accumulated 28 days of ineligible attendance during the 2006-2007 school year. Accordingly, I **CONCLUDE** that the total due the Board as of October 16, 2006, the date of the hearing, is \$15,457.28.

ORDER

I hereby **ORDER** that the Board's decision to remove S.B. from its school district is **AFFIRMED**. I further **ORDER** that the Board's application for tuition reimbursement is hereby **GRANTED** in the amount of \$15,457.28, plus \$77.51 per day for each day S.B. attends school in the district after October 16, 2006.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 27, 2006
DATE



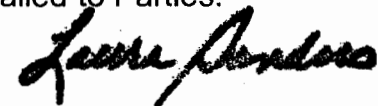
JOSEPH PAONE, ALJ

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

October 27, 2006
DATE

OCT 30 2006
DATE

Mailed to Parties:



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Josefa Lopez

Exhibits

For Petitioner:

None

For Respondent:

R-1 Tuition calculation sheet for S.B.

#424-06

THOMAS MORRIS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
STATE OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured Special Education teacher, appealed the district's withholding of his salary increment for the 2005-2006 school year because of an alleged act of corporal punishment. Respondent contends that petitioner engaged in conduct unbecoming a teacher when he struck a student on the wrist with a ruler, and that its action in withholding his salary increment was reasonable and within its statutory authority.

The ALJ found, *inter alia*, that: the petitioner has not met his burden in demonstrating that the district's action was arbitrary or capricious; the petitioner's version of the incident – in which he denies striking the student with a ruler – is not sustainable; and the evidence indicates that petitioner engaged in an act of corporal punishment. Accordingly, the ALJ affirmed the withholding of petitioner's salary increment.

Upon a full and independent review of the record, the Commissioner agrees with and adopts the ALJ's findings that respondent had a reasonable basis for its conclusion that petitioner engaged in an act of corporal punishment in violation of *N.J.S.A. 18A:6-1*. Accordingly, the Commissioner adopts the Initial Decision upholding respondent's action of withholding petitioner's increment, and the petition is 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 1, 2006

OAL DKT. NO. EDU 9472-05
AGENCY DKT. NO. 157-6/05

THOMAS MORRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record, Initial Decision, petitioner's exceptions and respondent's reply to the exceptions have been reviewed. Upon independent evaluation, the Commissioner adopts the Initial Decision as the Final Decision in this case.

Petitioner claims that the withholding of his increment for the 2005-2006 school year was improper, because it was based on false allegations that he hit a student with a ruler. The complaining student, one of his classmates, the school nurse, and the principal testified for respondent; petitioner testified on behalf of himself; statements and reports taken from the principal, the school nurse, the non-complaining student and a crisis teacher were entered into evidence.

At the outset, the Commissioner notes that unless the Administrative Law Judge's (ALJ) findings of fact are arbitrary and capricious, she must accept them, where they involve credibility determinations, as they do in this case. *H.K. v. State of New Jersey, Department of Human Services, Division of Medical Assistance and Health Services, and Atlantic County Department of Human Services*, 184 N.J. 367, 384 (2005) (it is not for us or the agency head to

disturb that credibility determination, made after due consideration of the witnesses' testimony and demeanor during the hearing, citing *Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 587 (1988)). See also, N.J.S.A. 52:14B-10(c) (indicating that the head of an agency "may not reject or modify any findings of fact as to issues of credibility . . . 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.").

In the present case, the ALJ found credible the testimony of both the student that petitioner had allegedly hit (E.A.), and another student who had been sitting close by and had corroborated the allegation that petitioner had hit his classmate with a ruler. The ALJ further found that the students' accounts were both reasonably consistent with each other and consistent with certain undisputed facts, such as E.A.'s misbehavior prior to the incident, and the welt on E.A.'s arm – consistent with a blow by a ruler – which was observed shortly after the incident by the school nurse, the principal and the crisis teacher, Mr. Rochester.

In contrast, petitioner did not offer adequate support for his theory that E.A. inflicted the welt on himself, and blamed it on petitioner, in order to extract revenge for disciplinary actions petitioner took on the prior school day when E.A. allegedly bit another student. Neither the nurse nor the principal recalled a biting incident, and there is no indication in the record that petitioner had satisfied his burden to request – before or during the hearing – any records from respondent that pertained to an alleged biting.

Similarly, petitioner offered nothing more than speculation to support his hypothesis that the welt on E.A.'s arm, which was observed by respondent's witnesses, was self-inflicted. Petitioner's argument in his second exception – that the Commissioner should conclude that E.A. hit himself on the arm based solely on the amount of time between the

incident and E.A.'s meeting with crisis teacher Rochester – is without merit. Moreover, there are conflicting accounts in the record as to the amount of time that had passed between the incident, reported as having occurred at about 9:25 a.m., and E.A.'s meeting with Rochester.

In light of the foregoing, the Commissioner agrees with and adopts the ALJ's findings that respondent had a reasonable basis for its conclusion that petitioner engaged in an act of corporal punishment in violation of *N.J.S.A. 18A:6-1*. For the reasons set forth in the Initial Decision, the Commissioner further agrees that petitioner failed to meet his burden to show that respondent acted arbitrarily or capriciously in withholding petitioner's increment as a sanction for such unbecoming conduct.

Accordingly, the Commissioner adopts the Initial Decision upholding respondent's action of withholding petitioner's increment. The petition is dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06

Date of Mailing: 12/01/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9472-05

AGENCY DKT. NO. 157-6/05

THOMAS MORRIS,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Eugene G. Liss., Esq., for Petitioner

Arsen Zartarian, for respondent

(Perry L. Lattiboudere, Esq., General Counsel, attorneys)

Record Closed: April 17, 2006

Decided: October 17, 2006

BEFORE **IRENE JONES, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 10, 2005, the respondent, the State Operated School District of the City of Newark ("District" or "respondent") advised the petitioner, Thomas Morris ("petitioner" or "Morris") that it was withholding his salary increment for the 2005-2006 school year because he engaged in conduct that was unbecoming a teacher. On June 20, 2005,



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9472-05

AGENCY DKT. NO. 157-6/05

THOMAS MORRIS,

Petitioner,

v.

**STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,**

Respondent.

Eugene G. Liss., Esq., for Petitioner

Arsen Zartarian, for respondent
(Perry L. Lattiboudere, Esq., General Counsel, attorneys)

Record Closed: April 17, 2006

Decided: October 17, 2006

BEFORE **IRENE JONES, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 10, 2005, the respondent, the State Operated School District of the City of Newark ("District" or "respondent") advised the petitioner, Thomas Morris ("petitioner" or "Morris") that it was withholding his salary increment for the 2005-2006 school year because he engaged in conduct that was unbecoming a teacher. On June 20, 2005,

petitioner filed a Verified Petition with the Commissioner of Education, appealing the action of the respondent. An Answer was filed by the respondent on June 29, 2005.

On August 12, 2005, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. A hearing was held on and concluded on March 16, 2006. Post hearing submissions were filed on April 18, 2006. At the request of the undersigned, the time for the issuance of the Initial Decision was extended to October 15, 2006.

FACTS

Based on the record, I **FIND** the following **FACTS**:

Petitioner is a tenured Special Education teacher in the District. He was hired by the respondent in 1994. During the 2003-2004 school year, petitioner was assigned to the District's 18th Avenue School. E.A. was a student in the petitioner's class in the 2003-2004 and 2004-2005 school years. Petitioner knew E.A. as a baby because his mother worked for the District's Camden Street School. E.A. was classified as Emotionally Disturbed with Attention Deficit Disorder and Oppositional Behavior. He had problems with his teachers, classmates and the principal. He would fight, throw objects and hit his classmates. His trouble was frequent.

On September 10th of the 2004-2005 school year, E.A. was in his classroom throwing tennis balls at his classmates. Petitioner's directive to E.A. to stop was ignored. Indeed, E.A. proceeded to the petitioner's desk and started touching the petitioner's belongings. He picked up a stapler and opened it whereupon petitioner told him to put it down. Petitioner told E.A. to give him the stapler. Instead of doing as told, E.A. began to move the stapler around on the desk.

E.A. testified that he had his head down and his arm on the petitioner's desk. Petitioner threatened to hit him with a ruler that he was holding, he didn't lift his head on the count of three. Petitioner then counted to three and when he did not do as directed,

petitioner hit him on his left arm with the side of the ruler. E.A. told the petitioner that he was "going to tell the principal." Petitioner responded that he should "bring it on." E.A. then said he would tell his stepfather and petitioner again said to "bring it on."

E.A. left the classroom for the principal's office. While enroute, he saw Mr. Rochester (Rochester), the Crisis Counselor. He told him about the incident and Rochester took him to the School Nurse, Doris Austin (Austin). (P-2). Austin observed a red mark on E.A.'s arm. She recalls that E.A. told her that the petitioner hit him with a ruler. E.A. was not crying but was upset. Austin applied an ice pack for comfort and to reduce swelling. Thereafter, she prepared an incident report. (R-5). Austin acknowledges that the mark could have been due to something other than a ruler.

Under cross examination, E.A. denied throwing or touching any tennis balls. He admitted that he was forced to leave the 18th Avenue School because he was accused of setting three fires. However, he denies starting the fires. He was enrolled in the Renaissance Program at the Morton Street School, an alternative school. He was required to leave that program after he alleged that an Aide struck him. His allegation was not believed. He is now enrolled at the Samuel Berliner School, also an alternative school.

H.W. was seated next to E.A.'s assigned seat. He observed E.A. acting out, throwing tennis balls at the class and playing with a "big" stapler on the petitioner's desk. He also heard E.A. curse at the petitioner. The petitioner hit E.A. on his arm because he was acting out.

H.W. did not recall E.A. biting anyone on the day before the incident. Nor did he recall seeing E.A. with the petitioner's tape dispenser or the TV's remote control. When confronted with his written statement, he acknowledged that it stated that E.A. had a tape dispenser and the remote control.

Barbara Ervin, ("Ervin") Principal at the 18th Avenue School, observed a two and half inch red welt on E.A.'s arm. E.A. told her that petitioner hit him with a ruler. Pursuant to Board policy, she called the Division of Youth and Family Services. (R-3).

She had those involved prepare an incident report. (R-1, R-2). Ervin recounted that E.A. is emotionally disturbed and very active. He would curse students and teachers, leave the classroom without permission, fight and lie. In this instance, E.A. admitted being at the petitioner's desk touching his "stuff". He also admitted that he was non-responsive to the petitioner's directives. Ervin also testified that she did not include the petitioner's version of the events in her statement. (R-1). Petitioner denied hitting E.A. She also recounted that all teachers are trained in orientation on how to deal with discipline issues and are given written materials on the subject. (R-4). Indeed, she had spoken to the petitioner on a previous occasion about a similar situation involving another student.

Due to continuous behavioral problems, E.A. was subsequently transferred to a more restrictive program at an alternative school.

Petitioner recounted that in the year prior to the incident, E.A. was in his class. The class consisted of twelve students and an aide. E.A. wanted to be the center of attention and would be a distraction to other students. E.A. is very talented and has many abilities. Despite his talents and abilities, he would curse, walk out of class, overturn desks and chairs, pick fights and tease other students. In response to this behavior, he attempted to lower the emotional level by using humor.

On the first day of the instant school year, E.A. bit a student on the shoulder. He took the student to the nurse. He told E.A. that he would report the biting to the principal. E.A. told him to go "F----" himself and called him a "White M---F----." He escorted the student home, fearful that E.A. would "jump" him. He reported the incident to Ervin and called E.A.'s mom.

His classroom was set up in a "U" shape. In response to the biting incident, he seated E.A. next to his desk. On the morning of the incident, E.A. was throwing tennis balls, cursing and swinging a stapler in the air. E.A. grabbed the tape dispenser and he tussled with him for the stapler. Thereafter, E.A. grabbed the remote control and he attempted to get it from him. At this point, the students in the classroom were laughing.

The two of them had become a spectacle. He believes that E.A. was angry because he had spoken to Ervin and his mother about the biting incident.

E.A. left the classroom saying he was going to the office. Petitioner called security and reported that E.A. had left class. Petitioner denied having a ruler on his desk or hitting E.A. He also denies that E.A. had a welt mark on his arm when he left the classroom. Further, he denies telling E.A. to "bring it on."

After the incident, petitioner said he was reassigned to the Administrative Office at the Sussex Avenue School. The Division of Youth and Family Services investigated the matter and found that physical abuse was not substantiated pursuant to N.J.S.A. 9:6-8.21.

DISCUSSION

N.J.S.A. 18A:29-14 provides that:

Any board of education may withhold for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the actions of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

In contesting a salary increment withholding, a teacher has the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or

induced by improper motives. Kopera v. West Orange Board of Education, 60 N.J. Super 288, 294 (App. Div. 1960).

Petitioner aptly notes that there is no single definition of the term unbecoming conduct. In Laba v. Newark Board of Education, 23 N.J. 364, 384 (1957), it was held that the touchstone of a charge of unbecoming conduct is a teacher's fitness to discharge the duties and functions of one's office or position. Further, unfitness to remain a teacher may be shown by a single incident if sufficiently flagrant, but it is best evidenced by a series of incidents. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967); Redclay v. State Board of Ed., 130 N.J.L. 369, 371 (Sup. Ct.) *aff'd* 131 N.J.L. 326 (E&A 1944).

Corporal punishment is defined in N.J.S.A. 18A:6-1 which provides:

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

1. To quell disturbance, threatening physical injury to others;
2. to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
3. for the purpose of self-defense; and
4. or the protection of persons or property.

In Craze v. Allendale Board of Ed., 1938 S.L.D. 585, 586, the Commissioner of Education defined corporal punishment as "any punishment causing or intended to cause bodily pain or suffering." Thus, a teacher's use of force or fear or unnecessary and inappropriate physical contact in dealing with students constitutes corporal punishment.

In determining whether corporal punishment has been used by a teacher, the Commissioner of Education has recognized that there is a need to examine the testimony of children with great caution, especially when pupil witnesses are offered to support the alleged corporal punishment charges. In the Matter of the Tenure Hearing of Anne Boyd, Matawan – Aberdeen School District, OAL Dkt. No. EDU 6394-91. In In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 SLD 185, the Commissioner discussed the burden of proving a charge of corporal punishment, it was held:

. . . The circumstances under which the episode occurred, its provocation, the nature of the incident, itself, the age of the pupil, the teacher's records, his attitude and the prognosis for his continued effective performance and usefulness in the school system. . . . each such matter must be judged in light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem. . . (at 188).

In this matter, petitioner denies using a ruler to hit E.A. He admits tussling with EA to get the tape dispenser from him. While the alleged incident took place in an open classroom, only one student, H.W. testified that he saw Morris strike E.A. Petitioner contends that H.W. was a friend of E.A. and thus had a motive to lie. Further, H.W.'s written statement made contemporaneously with the event does not say that petitioner hit E.A. with a ruler. Rather, in that statement H.W. wrote that petitioner hit E.A. with the tape dispenser.

The determination credibility herein is crucial to a charge of conduct of unbecoming. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency and the manner in which it hangs together with other evidence. Carbo V. United States, 314 F.2d 718 (9th Cir. 1963). It has been held that testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself and must be such as the common experience and observation of mankind can approve as probable in the circumstances. In re Perrone, 5 N.J. 514, 522 (1950); State v. Taylor, 38 N.J. Super 6 (App. Div. 1965).

Respondent disputes that E.A. and H.W. had ulterior motive. It contends that interest and motive rest with the petitioner who stands to suffer pecuniary loss as well as a blemish on his teaching record. Further, it argues that petitioner's defense requires an illogical "leap of faith" to believe that: (1) E.A. is lying, possibly to retaliate for "getting him in trouble"; (2) E.A. intimidated the other student witness into corroborating the lie; (3) that E.A. might have injured himself; (4) that there was no ruler on his desk, (5) and he is unaware of how E.A. sustained an injury consistent with a ruler slap.

Respondent further argues that the Principal and the school nurse testified that they were not aware of any biting incident. Thus, there was no need for any "revenge". Respondent does not dispute that E.A. was a troubled student prone to "misconduct." It notes that E.A. admitted that he was no angel and misbehaved in his class. He also admitted to being removed from school for allegedly setting fires. However, in this case, E.A.'s testimony is corroborated by H.W. who was an eyewitness. H.W. was not intimidated by E.A. Indeed, H.W. now attends the East Orange school system and has not seen E.A. since the end of last school year.

Respondent contends that petitioner has not met its burden of showing that the denial of the salary increment was arbitrary or capricious. Kopera v. Board of Education of West Orange, 60 N.J. Super 288 (App. Div. 1960). Respondent asserts that the decision to withhold an increment does not require a showing of shortcomings sufficient to justify dismissal under the Tenure Act." Kopera, 1960-61 S.L.D. at 62. The only question for the Commissioner is whether the district "had a reasonable basis for its factual conclusion." 60 N.J. Super at 295. Indeed, it has been observed that:

[A school district has no duty] to prove by a preponderance of credible evidence that the allegations against petitioner are true. To do so would convert an increment withholding action into a tenure case and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-14.

[Reilly v. Board of Ed. of the Twp. of Parsippany-Troy Hills, 1989 S.L.D. 1830, 1843, citing Colavita v. Hillsborough Township Bd. of Ed, 1983 S.L.D. (Nov. 3, 1983)].

There, the Court held that “the decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the legislature to the board.” (Id.; citing Board of Ed. of Bernards Twp. v. Bernards Township Educ. Ass’n, 79 N.J. 311, 321 (1979).

Based on the record, I **FIND** that the petitioner has not met the burden of demonstrating that the District’s action was arbitrary or capricious. I am satisfied that the respondent had a reasonable basis for its conclusion that the petitioner had engaged in an act of corporal punishment. This incident was provoked by E.A.’s acting out to such an extent that the petitioner and E.A. had become a spectacle. All control of the classroom was surrendered to E.A.’s outlandish conduct. However, E.A. was a 12 year old emotionally disturbed student. Despite his disability, he appears to be engaging, thus able to enrapture others. He was fully aware of what he was doing. Unfortunately, his acting out was tolerated for too long and eventually escalated to the point where he was removed from the school.

While I am empathetic to the petitioner’s position on that day, I **FIND** that his version of the incident is not sustainable. Neither H.W., Austin or Ervin recalled the biting incident which petitioner asserts was the motive for E.A.’s accusation. The welt mark was consistent with a touching by a ruler and H.W. was an eyewitness. While H.W.’s written statement was inconsistent with his oral testimony, I am satisfied that he witnessed inappropriate physical contact.

Based on the whole record, I am persuaded by the evidence that petitioner engaged in an act of corporal punishment and thus I hereby **AFFIRM** the withholding of his salary increment.

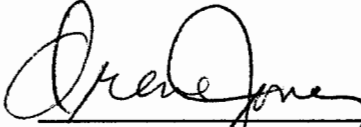
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 17, 2006

DATE



IRENE JONES, ALJ

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

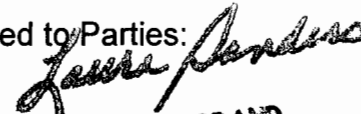
10/17/06

DATE

OCT 19 2006

DATE
sej

Mailed to Parties:



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner

Thomas Morris

For Respondent

E.A.

H.W.

Daris Austin

Barbara Ervin

Exhibits in Evidence

P-1 Statement of H.W.

P-2 Statement of Gregory Rochester

R-1 Incident Report

R-2 Memorandum 9/6/04

R-3 Corporal Punishment Memorandum

R-4 Article – Use the Environment to Prevent Discipline Problems

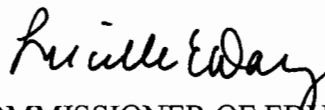
OAL DKT. NO. EDU. 7631-06
 AGENCY DKT. NO. 155-4/06

L.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH	:	DECISION
OF EAST RUTHERFORD, BERGEN COUNTY,	:	
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 the notification sent to the petitioner by OAL on October 24, 2006, providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, the petition is dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

The Board's counterclaim is, therefore, deemed to be admitted and petitioner is hereby ordered to pay tuition for the period of M.G.'s ineligible attendance in the District's schools on the basis of 1/180 of the total annual per pupil cost multiplied by the number of days of ineligible attendance.

IT IS SO ORDERED.*


 COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06
 Date of Mailing: 12/04/06

* 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.*

422-06

OAL DKT. NO. EDU 6318-06
 AGENCY DKT. NO. 242-7/06

J.O. on behalf of minor child R.O., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 TOWNSHIP OF EAST BRUNSWICK,
 MIDDLESEX COUNTY, :
 RESPONDENT. :

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

Upon review, the Commissioner observes that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating Jo Ellen Basaman, Assistant Superintendent, to sign the agreement on its behalf. Nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating Ms. Basaman or another individual to sign on behalf of same. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/01/06

Date of Mailing: 12/01/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6318-06

AGENCY DKT. NO. 242-7/06

J.O. ON BEHALF OF R.O.,

Appellant,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EAST BRUNSWICK,
MIDDLESEX COUNTY,**

Respondent.

Steven J. Sico, Esq., for the petitioner

Robin R. McMahon, Esq., for the respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: October 19, 2006

Decided: October 19, 2006

BEFORE **RONALD W. REBA, ALJ:**

This matter was transmitted to the Office of Administrative Law (OAL) on August 23, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OCTOBER 19 2006
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Receipt Acknowledged:

10-24-06
DATE

M. Kathleen Duncom / *Ch*
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 25 2006
DATE
/cad

[Signature]
OFFICE OF ADMINISTRATIVE LAW

Agreement + Release

This Agreement is made this 19th day of October 2006 between Jyoti + Ashok Oberai + the East Brunswick Board of Education ("Board")

Whereas the parties are desirous of resolving a dispute regarding the residence of Rishi + Ridhima OBERAI, children of Jyoti + Ashok OBERAI ("OBERAI" or "Parents"),

Now Therefore in consideration of the Mutual Covenants contained herein, the Board + OBERAI agree as follows:

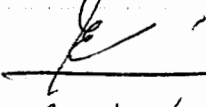
1. The OBERAI's shall pay the Board the amount of \$10,110 as tuition for ~~Ridhima~~ for the 2005-06 school year.
2. The payment referenced above shall be made as follows:
 - a) \$1500 within 7 days, or October 27, 2006, which payment shall be held in escrow by the Board upon formal Board approval of this Agreement.
 - b) \$500 per month thereafter, with the first payment due December 1, 2006;
 - c) Final payment shall be made upon the earlier of closing on the Carteret property or June 15, 2007
3. Parents shall complete + return to the Office of the Business Administrator ~~Assistant Superintendent~~ with the initial payment a registration form, in the form attached hereto, which shall be completely filled out together with a copy of the contract for sale on the Carteret

property.

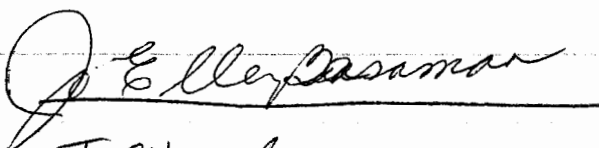
4. All payments shall be made to the office of the Business Administrator, 260 Route 18, East Brunswick, NJ 08816.
5. Parents shall update their registration form upon expiration of ~~the~~ the lease on 11-5 Circle Ctr. Drive, East Brunswick or no later than August 2007.
6. If any payment required hereunder is not made within 15 days of the due date, then the Board shall have the right, on notice to Jyoti Oberai's counsel, Steven Sico, to file this agreement as a consent judgment for the balance then due.
7. This agreement serves as a release by the Board with respect to all issues regarding tuition & residency through the 2006-07 school year.
8. This agreement shall be subject to the approval of the Board.
9. The petition shall be withdrawn by the OBERAI's upon board approval.
10. This agreement shall be typed & re-signed by the parties, which may be in counterpart.

We agree to the above terms and conditions:


Jyoti OBERAI


ASHOK OBERAI

For The Board:


Jo Ellen Pasaman,
Assistant Superintendent

R.H., on behalf of minor child, M.H. :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

PASCACK VALLEY REGIONAL HIGH :

SCHOOL DISTRICT, BERGEN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner appealed the decision of the respondent Board not to issue his child a laptop computer for the 2005-2006 school year, pursuant to a district policy regarding student laptops with which the petitioner refused to comply; specifically, that petitioner declined to pay the \$50 annual premium required to cover accidental damage and fire/theft/loss insurance on the computer. Petitioner argued that the district was required to provide the computer to his daughter pursuant to *N.J.S.A. 18A:34-1*.

The ALJ found, *inter alia*, that the facts of this matter indicate that the laptop computer does not qualify as a supply mandatory to successful completion of the classroom curriculum, and that M.H.'s grades did not suffer from lack of access to the laptop computer. The ALJ concluded that the respondent's action in refusing to issue M.H. a laptop for use during the 2005-2006 school year was reasonable and permissible because her parents refused to comply with district computer use policy, and dismissed the petition with prejudice.

The Commissioner concurred with the ALJ for the reasons stated in the Initial Decision, and dismissed the petition.

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

11/28/06

OAL DKT. NO. EDU 1538-06
 AGENCY DKT. NO. 330-11/05

R.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
PASCACK VALLEY REGIONAL HIGH	:	
SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

Petitioner first excepts to the Administrative Law Judge's (ALJ) determination that in order for a particular item to constitute a "supply" within the intendment of *N.J.S.A. 18A:34-1* – requiring its provision to students free of charge – it is first necessary to establish whether the item was "mandatory" or "integral" to classroom instruction. Petitioner maintains such a determination is not dispositive. Rather, he argues, "once material is made a basic part of the regular classroom instructional activities, as in the instant matter, then such materials must be provided for free." (Petitioner's Exceptions at 1) Notwithstanding this, petitioner argues that – contrary to the finding of the ALJ – the record here establishes that the laptop computers were "a basic, fundamental, mandatory and integral part of the education program conducted in the Respondent schools." (*Id.* at 2)

Petitioner next charges that the ALJ's reasoning that M.H. could have used the school's computers in the library or her own home computer to obtain the information available to students who paid for insurance fails to recognize that in addition to not being issued a school laptop, M.H. was not issued an access code for the 2005-06 school year. Thus, even assuming computer hardware in the library or on her own computer was available to her, "she did not have the same ability to completely use the school district's full technology resources that were available to the students who paid the insurance premium due to the school's refusal to issue her an access code." (*Id.* at 3)

Finally, petitioner submits that the ALJ's decision failed to address the provisions of *N.J.S.A.* 18A:20-25, which requires a board to maintain insurance: a responsibility which he avers cannot, in turn, be transferred to students by "administrative fiat." (*Id.* at 4)

In reply, the Board charges that petitioner has provided no support whatsoever for his conclusion that "once material is made a basic part of the regular classroom instruction activities, as in the instant matter, then such materials must be provided for free." To the contrary, it argues, *N.J.S.A.* 18A:34-1 makes no mention of "material" which a board must furnish free of charge for use by pupils. Rather, this provision clearly and unambiguously imposes such an obligation only for "textbooks" and "other school supplies." The Board urges that:

[i]t is obvious that an optional learning tool such as the laptop computer issued by the Pascack Valley School District ***is not a textbook or equivalent to required textbooks. Indeed, required textbooks are components of an approved curriculum that meets the New Jersey Core Curriculum Content Standards. District issued laptop computers are not a component of the New Jersey Core Curriculum Content Standards.*** Similarly, computer hardware, such as a district issued laptop computer, is not synonymous with consumable school supplies. A court or state agency cannot amend the clear and unambiguous language of

N.J.S.A. 18A:34-1 to include an item that does not meet the requirement established by the Legislature.
(Board's Reply Exceptions at 2)

The Board further points out as significant the fact that it neither required students to pay for laptops nor did it charge a use fee. Rather, the insurance toll was just a cost effective mechanism for parents to pay the expense of damage or loss to the computer which they otherwise would be solely responsible to bear. (*Id.* at 3)

As to petitioner's argument that the school issued laptops were a "basic, fundamental, mandatory and integral part of the educational program in the district," the Board observes that the core curriculum content standards do not require districts to "provide instruction on computers and information literacy and technology education through the issuance of a laptop computer or provide access to the school district's computer network from home". (*Ibid.*) Further, to the extent M.H. needed a computer to assist her in her schoolwork, she had access to computers in the school library and her own personal computer. It points out that M.H. was not penalized because she did not have a school issued laptop and access code, and that her grades for the 2005-2006 school year were comparable to those she achieved during the 2004-2005 school when she had a laptop and those she received during the 2003-2004 school year before the implementation of the laptop initiative. Therefore, it urges that the ALJ correctly concluded:

[t]hough it may have been less convenient for M.H. to not have had use of a district laptop her performance combined with the fact that she retained all the privileges of any other student otherwise not participating in the e-learning initiative, clearly shows that the laptops were not [an] integral part of her curriculum. (Initial Decision at 5; Board's Reply Exceptions at 4)

As to petitioner's claim that *N.J.S.A.* 18A:20-25 is applicable to this matter, the Board professes that this assertion is without merit, instead reasoning:

[w]hile *N.J.S.A.* 18A:20-25 requires a school district to maintain insurance against loss or damage caused by fire, other coverage is discretionary. This statute had nothing to do with the payment of the insurance premium for the district issued laptop computers. Rather, the intent of *N.J.S.A.* 18A:20-25 is to ensure that school districts are protected against property loss or damage caused by fire.

Indeed, the imposition of the \$50.00 fee to cover the cost of the insurance premium is a viable method to protect parents from paying much higher costs if the Board issued laptop computer is damaged, lost, or stolen. Boards of education are, in fact, permitted to assess reasonable fees to cover the costs of damage or loss to district property. *N.J.S.A.* 18A:37-3. If boards of education were not permitted to recoup such expenses, taxpayer dollars would regularly be spent to pay for the loss and damage of such property caused by students. Not only would this be a drain on district resources, but it would also minimize students' responsibility for the care and protection of district property in their possession.*** (Board Reply Exceptions at 6)

In conclusion, in light of petitioner's filing of exceptions, the Board urges it was compelled to file cross exceptions renewing its arguments advanced in papers below that this matter should be dismissed on procedural grounds which were not addressed by the ALJ in her decision. Specifically:

- 1) The matter is untimely, pursuant to *N.J.A.C.* 6A:3-1.3(i), as a consequence of petitioner's failure to file within 90-days from the implementation of the laptop program;
- 2) Because petitioner previously signed the laptop agreement and paid the insurance fee, this claim is barred by the equitable doctrine of laches; and
- 3) Since – effective with the 2006-07 school year – the Board will issue laptop computers and an access code to students even if they do not purchase insurance coverage, petitioner here fails to state a claim upon which relief can be granted.

Upon careful, independent review of the record and finding petitioner's exceptions without merit, the Commissioner agrees with the conclusion of the ALJ that the Board's imposition of a \$50 accidental damage, theft or loss insurance premium and agreement to pay a \$100 deductible for insurance claims as a condition of participation in the district's laptop program was not violative of the district's duty to provide M.H. a free public education pursuant to the New Jersey Constitution, Article VII, Section IV, Paragraph 1 and *N.J.S.A. 18A:38-1*.¹

Accordingly, the recommended decision of the OAL is adopted – for the reasons stated therein – and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 11/28/06

Date of Mailing: 11/28/06

¹ Based on the record before her, the Commissioner finds that the ALJ was correct in declining to dismiss this matter on procedural grounds.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01538-06

AGENCY DKT NO. 330-11/05

R.H. ON BEHALF OF M.H.

Petitioner,

v.

PASCACK VALLEY REGIONAL

BOARD OF EDUCATION

Respondent.

Robert T. Tessaro, Esq., appearing for Petitioner

Rodney T. Hara, Esq. appearing for Respondent
(Fogarty & Hara, attorneys)

Record closed: August 31, 2006

Decided: October 16, 2006

BEFORE **CARIDAD F. RIGO, ALJ**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Petitioner appeals the decision of the Pascack Valley Regional Board of Education (hereinafter Pascack or Respondent), not to issue his minor child a laptop computer for the 2005-2006 school year, pursuant to a policy contained in the Respondent's Student Laptop Manual (hereinafter Manual) with which the Petitioner refused to comply. The Petitioner filed a verified petition of appeal with the Commissioner of Education challenging the Respondent's decision, pursuant to N.J.A.C. 6A:3-1.3(d) on or about November 17, 2005. The Petitioner alleges that the Respondent violated its' obligation to provide M.H. with a free public

education in accordance with the N.J. Constitution by refusing to issue her a laptop. The matter was determined to be a contested case pursuant to N.J.A.C. 1:1-3.1 and 1:1-8.2, and the matter was transmitted to the OAL on January 24, 2006.

A telephone pre-hearing conference was held by the undersigned ALJ on May 15, 2006. The parties agreed that the matter should be decided by summary decision cross-motions, as no material facts are in dispute. The parties filed their respective briefs and reply briefs. The record closed on August 31, 2006.

STATEMENT OF FACTS

1. The Respondent operates a 9th through 12th grade regional high school district for the residents of the Borough of Hillsdale, Borough of Montvale, Township of River Vale, and Borough of Woodcliff Lake.
2. The district contains two high schools, Pascack Hills High School and Pascack Valley High School.
3. At all relevant times, the minor child, M.H., attended Pascack Valley High School, and will complete the 2006-07 school year (her senior year) at Pascack Valley High School.
4. In the Spring of 2004, the Respondent approved an e-learning initiative which involved the issuance of Sony Vaio laptop computers to all students and teachers in the district.
5. To facilitate implementation of the learning initiative, the district also promulgated a Manual which contains the rules and regulations for the use of the laptops as well as use instructions.
6. Certain educational software is installed in each laptop, which is used by the student for testing, homework assignments and other communications between the student and teachers.
7. Students are also issued an access code so that they may remotely access the district's computer network through their assigned laptop.

8. In order to obtain a district issued laptop, the student and his or her parent/guardian must initial and sign the Laptop Agreement Form (Form), a part of the Manual; the following provisions of which is in dispute;
 - a. I/We understand that each laptop includes accidental damage coverage as well as fire/theft/loss insurance. I will be responsible for an annual premium payment of \$50.00 for this coverage. This payment is included with this form.
 - b. I/We understand that the fire/theft policy includes a \$100.00 per incident deductible that will be paid by the parent.
9. M.H. and her parents initialed and signed all portions of the Form, including the above provisions, and paid the \$50.00 insurance premium for the 2004-05 school year.
10. M.H. completely initialed and signed the Form for the 2005-06 school year, but M.H.'s parents declined to initial the above provisions, or pay the \$50.00 annual premium, though they did initial all other provisions and signed the Form.
11. As a result the Respondent declined to issue M.H. a laptop computer and access code for the 2005-06 school year.
12. M.H.'s parents were advised of this decision on or about October 17, 2005.

LEGAL ANALYSIS

The Petitioner contends that the Respondent violated its obligation to provide M.H. with a free public education, in violation of the New Jersey Constitution, Article VIII, Section IV, Paragraph I, and N.J.S.A. 18A:38-1, when it declined to issue M.H. a laptop computer and access code for the 2005-06 school year due to her parents' refusal to pay the annual insurance premium required by the Manual. Regrettably, there is no New Jersey case law on point regarding this type of issue, nor does the non-binding case law that the Petitioner has cited provide any realistic guidance on the matter. However, a common sense interpretation of the plain meaning of N.J.S.A. 18A:34-1 yields an answer.

N.J.S.A. 18A:34-1 reads as follows:

Textbooks shall be selected by the recorded roll call majority vote of the full membership of the board of education of the district and *they [textbooks] and other school supplies shall be furnished free of cost for use by all pupils in the public schools* and money therefore shall be appropriated and raised annually in each school district in the same manner as other school moneys are appropriated and raised in the district. [emphasis added]

The plain meaning of N.J.S.A. 18A:34-1 is clear as both parties agree; schools may not charge fees for the use of “textbooks” or “supplies”. The question then becomes, whether a district issued laptop computer qualifies as a “supply” within the meaning of the statute, because clearly a computer cannot be considered a “textbook” though it may contain software to access digital textbooks.

In Parsippany-Troy Hills Ed. Ass’n v. Parsippany-Troy Hills Bd. of Educ., the Appellate Division upheld the Commissioner of Education’s determination that a school district could charge a fee for non-mandatory, behind the wheel driver education that was not offered outside normal school hours. 188 N.J. Super. 161 (App. Div. 1983), certif. denied, 94 N.J. 527 (1983). In that decision, the Appellate Division additionally noted the Commissioner’s determinations in Willett v. Colts Neck Twp. Bd. of Educ., 1966 S.L.D. 202, 206 and I/M/O the Appeals of Black Horse Pike and Sterling Reg. Sch. Dist. Bd. of Educ., 1973 S.L.D. 130, aff’d 1973 S.L.D. 138. Those cases held that it is impermissible for schools to charge fees for activities that were an “integral part of classroom instruction”, meaning participation in the activities was mandatory for successful completion of the classroom curriculum. The court in Bd. of Educ. of Asbury Park v. Asbury Park Educ. Assn., further held that certain extracurricular activities could be an integral part of a child’s education; however, it declined to define which activities were integral. 145 N.J. Super. 495 (Chancery Div. 1976), aff’d in part, rev’d in part, 155 N.J. Super. 76 (App. Div. 1977). Though none of these cases are remotely on-point, they make clear that the threshold for deciding what a school may and may not charge fees for the use of, or participation in, depends

on whether the questioned item/activity falls within the meaning of “integral” or “mandatory” to classroom instruction. The issue is whether a laptop computer qualifies as a supply to mandatory to successful completion of the classroom curriculum. The facts here strongly indicate that it is not.

The e-learning initiative adopted by the Respondent is both laudable and forward thinking and will undoubtedly provide a great benefit to participating students in the future. However, the development of these types of programs is still in its infancy as the Petitioner acknowledges, and their use is neither commonplace, nor practical for most public educational institutions. The vast majority of public schools still use printed text books, and “traditional” classroom supplies. This court declines to define what a “traditional” classroom supply may be, but it is obvious, given the relative rarity of e-learning programs, that laptop computers are not “traditional” classroom supplies. That being the case, this court can only conclude that under these circumstances a laptop computer is not integral to classroom instruction, the statute does not apply to their use, and that schools may require the parents of a student to pay the reasonable cost to insure the computer from fire/theft or other damage.

If the circumstances of this matter had indicated that the use of a computer were absolutely essential to M.H.’s successful completion of the classroom curriculum (i.e. mandatory participation), this court may decide differently. Though she did not have a district issued laptop, M.H. retained full access to the computers located in the school’s library, and her own personal computer at home. She had access to printed textbooks and supplies, enabling her to complete her classroom assignments. Lastly, her grades remained comparable to her prior two years at the Respondent’s high school. Though it may have been less convenient for M.H. to not have had use of a district laptop her performance combined with the fact that she retained all the privileges of any other student otherwise not participating in the e-learning initiative, clearly shows that the laptops were not an integral part of the curriculum. The Petitioner is

essentially requesting the expansion of N.J.S.A. 18A:34-1 to place the laptops within its scope, and this court declines to grant that request.

Moreover, as a policy matter, public schools are not required to provide their students with the best education possible, they are only required to provide a "thorough and efficient" free public education. Here M.H. received a thorough and efficient free public education as required by the N.J. Constitution of 1947.

CONCLUSION

Petitioner refused to comply with a mandate contained in the Manual requiring the parent or guardian of the student to whom the computer is issued to pay an annual premium for insurance against accidental damage, theft or loss of the computer, and for a per-incident deductible for insurance claims. As a result, the Respondent refused to issue the M.H. a laptop or network access code for the 2005-2006 school year. This court hereby **CONCLUDES** that the Respondent's action in refusing to issue M.H. a Sony Vaio laptop for use during the 2005-2006 school year was reasonable and permissible because of her parent's refusal to comply with the Manual. The Respondent did not fail to provide the Petitioner's daughter with a free public education, in violation of Article VIII, Section IV, Paragraph I of the New Jersey Constitution and N.J.S.A. 18A:38-1. The petition is **DISMISSED** with prejudice.

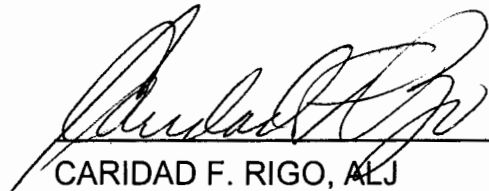
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 16, 2006
DATE


CARIDAD F. RIGO, ALJ

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

DATE

OCT 17 2006
DATE
ljb

Mailed to Parties

**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

OFFICE OF ADMINISTRATIVE LAW

D.D. on behalf of minor child N.D., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF BELLEVILLE,
ESSEX COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner contested respondent's determination that her daughter, N.D., was not domiciled in respondent's district during the 2003-2004 and 2004-2005 school years. Respondent counterclaims for tuition reimbursement in the amount of \$40,801.33 for the alleged period of ineligible attendance, based on observations by an investigator that D.D. was living at an address in Kearny.

The ALJ found that petitioner has proven by a preponderance of evidence that N.D. was domiciled in respondent's school district during the period in question; that the address in Kearny was never a permanent domicile; and concluded that respondent was required to provide N.D. with a free public education. The ALJ ordered that respondent's counterclaim for tuition be denied.

Upon an independent and thorough review of the record, the Commissioner adopts the Initial Decision as the Final Decision in this matter.

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

November 27, 2006

OAL DKT. NO. EDU 5991-04
 AGENCY DKT. NO. 134-4/04

D.D. on behalf of minor child N.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF BELLEVILLE,	:	
ESSEX COUNTY,	:	
RESPONDENT.	:	

The record, Initial Decision of the Office of Administrative Law (OAL) and respondent's exceptions have been reviewed. The Commissioner is satisfied, as was the Administrative Law Judge (ALJ), that petitioner sustained her burden to show, using the three-pronged test in *Matter of Unanue*, 255 N.J. Super. 362, 376 (Law Div. 1991), *aff'd* 311 N.J. Super. 589 (App. Div. 1998), *certif. denied*, 157 N.J. 541 (1998), *cert. denied* 526 U.S. 1051, 119 S.Ct. 1357, 143 L.Ed.2d 518 (1999), that during the period for which respondent demands tuition, she had not intended to change her domicile from Belleville to Kearny.

Respondent's references, in its exceptions, to excerpts from *Matter of Unanue*, *supra*, are unpersuasive. The ALJ properly weighed all the facts against the three-part standard in *Unanue* and came to a reasoned result. Nor can the hearsay notes taken by respondent's investigator change this determination. The provider of the hearsay was not at the hearing to be questioned about the basis for her opinions about petitioner's residence and/or domicile from Autumn 2004 to February 2005. Furthermore, as the ALJ stated, petitioner's (and her dogs') use

of her boyfriend's residence did not, under the total facts of this case, establish that she intended to change her domicile from Belleville to Kearny.¹

The Commissioner accordingly adopts the Initial Decision as the Final Decision in this matter. Respondent's determination that N.D. was not eligible to receive a free public education in Belleville during the period in question is reversed and its counterclaim for tuition is denied.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 11/27/06

Date of Mailing: 11/28/06

¹ Nor do the statements respondent's investigator took from the crossing guard and bus driver add anything to the facts already considered by the ALJ.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5991-04

AGENCY DKT. NO. 134-4/04

D.D. ON BEHALF OF MINOR

CHILD, N.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF BELLEVILLE,

ESSEX COUNTY,

Respondent.

D.D., pro se

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: October 18, 2005

Decided: October 12, 2006

BEFORE RICHARD McGILL, ALJ:

D.D. (hereinafter sometimes "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of Belleville (hereinafter "respondent") in regard to her daughter, N.D.

Respondent counterclaims for tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed her petition on April 20, 2004, 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 May 4, 2004, respondent filed an answer and counterclaim. The matter was transmitted to the Office of Administrative Law on June 24, 2004, for determination as a contested case. A hearing was conducted on October 18, 2005, at the Office of Administrative Law in Newark, New Jersey.

ISSUES

The main issue in this proceeding is whether N.D. was eligible to attend respondent's public schools during the 2003-2004 and 2004-2005 school years. More specifically, the question is whether N.D. was domiciled within respondent's school district during these two school years. Since petitioner established to respondent's satisfaction that N.D. was domiciled within the school district as of the end of February 2005, there is no question as to disenrollment. The final issue is whether respondent's counterclaim for tuition reimbursement should be granted.

SUMMARY OF EVIDENCE

Respondent's first witness was Bruce Morgan, who is employed by respondent as a domicile investigator. Investigator Morgan described his investigation, which began in March 2004. D.D. gave an address on L. Street in Belleville for N.D. Shortly before 8:00 a.m. on several dates in March through May 2004, Investigator Morgan observed a vehicle which he traced to D.D. arrive at L. Street. When the school bus arrived, N.D. got out of D.D.'s vehicle and boarded the school bus.. Since N.D. was a special education student, the school bus picked her up in front of the address given by

D.D. The school bus then took N.D. to a private school. During his observations, Investigator Morgan never saw D.D.'s vehicle at the address on L. Street significantly before the arrival of the bus. When the bus dropped N.D. off after school, N.D. went into the residence at the address provided by D.D.

During the course of his investigation, Investigator Morgan followed D.D. to her place of employment and from there to an apartment on A. Terrace in Kearny. Investigator Morgan made numerous observations of D.D.'s vehicle at this address in the evening and during the early morning hours. Investigator Morgan observed D.D.'s name on the door bell. Investigator Morgan concluded that D.D. and N.D. resided at the address in Kearny.

Respondent's second witness was Dr. Edward Kliszus, who is respondent's superintendent of schools. Dr. Kliszus explained the reimbursement calculation. During the 2003-2004 school year, the tuition for placement in the Windsor School was \$200.06 per day. For 180 days, the tuition was \$36,010.80. For the 2004-2005 school year, the tuition was \$46.51 per day. For 103 days through February 14, 2005, the tuition was \$4,790.53. The total amount sought by respondent as reimbursement is \$40,801.33.

Petitioner did not deny any of Investigator Morgan's observations or contest the tuition calculation. Rather, petitioner explained that the address on L. Street in Belleville is her mother's home, which petitioner still considers to be her permanent residence. Petitioner and N.D. each have their own bedrooms at the address on L. Street. Further, petitioner's important mail is sent to the address on L. Street. Petitioner's boyfriend lived at the address on A. Terrace in Kearny. Although petitioner spent a great deal of time at her boyfriend's apartment, she viewed the arrangement as temporary in nature. The utility bills were placed in D.D.'s name only because her boyfriend's credit was very poor. Subsequently, D.D. moved to an address in Belleville with her boyfriend in February 2005.

FINDINGS OF FACT

All of the witnesses were believable. Investigator Morgan's observations and the calculation by Dr. Kliszus were essentially undisputed. Petitioner's explanation was also credible including her testimony to the effect that she viewed the address on L. Street in Belleville as permanent in nature and the one on A. Terrace in Kearny as a temporary arrangement.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. D.D. lived at her parents' home on L. Street in Belleville from 1984 to 1996.
2. D.D. moved to another location in Belleville in 1996.
3. After D.D.'s father became ill, she moved back to her parents' home.
4. D.D.'s father is now deceased, and her mother still lives in the home on L. Street in Belleville.
5. D.D. and her daughter, N.D., have their own bedrooms in the home on L. Street in Belleville.
6. D.D.'s important mail is sent to the address on L. Street.
7. The address on L. Street is on D.D.'s driver license, her vehicle registration, her automobile insurance, her tax returns, various credit card statements and court papers.
8. D.D. was registered to vote in Belleville.

9. D.D. views the address on L. Street in Belleville as her permanent home.
10. D.D.'s boyfriend rented an apartment on A. Terrace in Kearny, New Jersey.
11. A lease for the apartment ran from August 1, 2003, to August 31, 2004. D.D. is not on the lease.
12. Three dogs belonging D.D. are mentioned on the lease.
13. The electric, gas and telephone utilities were placed in D.D.'s name because of her boyfriend's poor credit.
14. D.D. stayed in her boyfriend's apartment extensively from or about August 2003 to February 2005.
15. D.D. viewed the living arrangement in the apartment as temporary in nature and not her permanent home.
16. In February 2005, D.D. and her boyfriend moved to a location in Belleville.
17. The tuition for N.D. during the 2003-2004 school year would be \$36,010.80.
18. The tuition for N.D. for the 2004-2005 school year through February 14, 2005, would be \$4,790.53.

LAW AND ANALYSIS

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), *aff'd*, 167 N.J. 55 (2001). 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), *aff'd*, 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. 18A:38-1(b)2.

Preliminarily, it may be noted that since N.D. is a child, her domicile is that of her mother, D.D. There is no real dispute that D.D. and therefore N.D. were domiciled on L. Street in Belleville prior to the move to the apartment on A. Terrace. Thus, the main question in this case is whether D.D. changed her domicile from L. Street in Belleville to A. Terrace in Kearny. The factors to consider are whether there was an actual and physical taking up of abode on A. Terrace, whether D.D. had an intention to make her home on A. Terrace permanently or at least indefinitely and whether D.D. had an intention to abandon her old domicile on L. Street.

The first question is whether there was an actual and physical taking up of abode in the apartment on A. Terrace. It is undisputed that D.D. stayed in her boyfriend's apartment extensively during the period of time in question. In fact, respondent's investigator observed D.D.'s vehicle at A. Terrace in the evening and early morning

hours during the period in question and never at L. Street during that time. It follows that there was an actual and physical taking up of abode by D.D. at her boyfriend's apartment on A. Terrace.

The second and third factors are related in that one concerns the intention to make the new abode the person's domicile and the other concerns the abandonment of the old domicile. Here, D.D. continued to use L. Street in Belleville for important purposes such as her driver license, vehicle registration, automobile insurance, tax returns, voter registration, credit cards and court papers. In contrast, D.D.'s name was not on the lease for the apartment on A. Terrace, and the utilities were in her name only out of necessity. These circumstances along with D.D.'s credible testimony indicate that D.D. intended to maintain her domicile on L. Street in Belleville. Further, D.D. did not intend to change her domicile to A. Terrace in Kearny.

Under the circumstances, I **FIND** that D.D. has proven by a preponderance of the evidence that N.D. was domiciled in respondent's school district during the 2003-2004 and 2004-2005 school years. Therefore, I **CONCLUDE** that respondent was required to provide N.D. with a free public education during the period in question.

A counterclaim for tuition reimbursement may be granted when there is a period of ineligible attendance in a public school. Here, there was no period of ineligible attendance by N.D. Therefore, I **CONCLUDE** that the counterclaim for tuition reimbursement must be denied.

Accordingly, it is **ORDERED** that:

1. Respondent's determination that N.D. was ineligible to receive a free education in respondent's public schools during the period in question is reversed.
2. Respondent's counterclaim for tuition is denied.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 12, 2006
DATE

Richard McGill
RICHARD MCGILL, ALJ

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

10/12/06
DATE

M. Kathleen Dunean/Ch

OCT 19 2006
DATE
cml

Mailed to Parties
John Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESS LIST

For petitioner:

D.D.

For respondent:

Bruce Morgan

Dr. Edward Kliszus

EXHIBIT LIST

P-1	Photocopy of D.D.'s driver license	Evidence
P-2	Photocopy of vehicle registration	Evidence
P-3	Automobile insurance declarations for July 13, 2003, to July 13, 2004	Evidence
P-4	Amended declarations for July 13, 2003, to July 13, 2004	Evidence
P-5	Photocopy of first page of D.D.'s U.S. Individual Income Tax Return for 2003	Evidence
P-6	Apartment lease	Evidence

P-7	Letter dated March 24, 2004, from Bergen County Probation to D.D.	Evidence
P-8	Photocopies of credit card statements from Fleet	Evidence
P-9	Photocopies of credit card statements from Capital One	Evidence
P-10	Photocopies of credit card statements from Cross Country Bank	Evidence
P-11	Photocopies of credit card statements from Providian	Evidence
P-12	Ordinance 7-15.1 of Town of Kearny	Evidence
P-13	Photocopy of Insurance Identification Card	Evidence
R-1	Memo dated March 2, 2004, from Frank Romano to Faith Palo	Evidence
R-2	Memo dated March 4, 2004, from Bruce Morgan to J. Kraemer	Evidence
R-3	Memo dated March 9, 2004, from Bruce Morgan to J. Kraemar	Evidence
R-4	Letter from Willie Brooks	Evidence

R-5	Statement of Maureen McNish	Evidence
R-6	Statement of Elizah Reeves	Evidence
R-7	Memo dated March 27, 2004, from B. Morgan to J. Kraemer	Evidence
R-8	Letter dated April 8, 2004, from Frank Pomaco to D.D.	Evidence
R-9	Notes concerning D.D. from April 12, 2004, through March 5, 2005	Evidence
R-10	Letter dated March 7, 2005, from Mark A. Wenczel, Esq., to Kearny Post Office	Evidence
R-11	Student Registration Form dated June 2, 2004	Evidence
R-12	Photocopies of three envelopes sent certified mail, return receipt requested from Gaccione, Pomaco & Malanga to D.D.	Identification
R-13	Certification of records of electric and gas bills	Evidence
R-14	Certification of records of telephone bills	Evidence
R-15	Certification of tuition and transportation fees	Evidence
R-16	Calendar of 2004-2005 school year for Belleville Public Schools	Evidence

#410-06

SHARON WHALEY :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF IRVINGTON, ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner – a tenured secretary in respondent's district – challenged the respondent board's refusal to accept her offer of resignation at a time when tenure charges of unbecoming conduct were pending against her. The charges involved petitioner's theft of money orders submitted by applicants for substitute teaching certificates, and were held in abeyance at petitioner's request during a criminal investigation by the Essex County Prosecutor's Office. Petitioner pled guilty to the criminal charges, and entered a pretrial intervention program which was conditioned upon petitioner's immediate and irrevocable forfeiture of her employment with the Board.

The ALJ found, *inter alia*, that: petitioner does not deny the substance of the conduct which resulted in her indictment on criminal charges; petitioner submitted a letter of resignation to the Board on the same day that she entered her guilty plea on the criminal charges; and the judicial forfeiture order is binding on the petitioner. The ALJ concluded that petitioner forfeited her position as a result of her acceptance into a pretrial intervention program; that the Board is under no obligation to accept her resignation in good standing; and ordered summary decision in favor of respondent.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board has no obligation whatsoever to take any action with respect to petitioner's resignation, stressing that as a consequence of the imposed conditions of her pre-trial intervention program, petitioner does not now – nor will she ever in the future – have an employment relationship with the Board. The Commissioner dismissed the petition.

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

November 28, 2006

SHARON WHALEY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF IRVINGTON, ESSEX COUNTY, :
 :
 RESPONDENT. :
 _____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in making her determination herein.^{1 2}

Petitioner's exceptions support the Administrative Law Judge's (ALJ) finding that petitioner forfeited her position with the District as of June 6, 2005, and thus – as of that date – the parties' employment relationship was severed. She does, however, charge that the Initial Decision fails to reconcile this finding with the fact that, subsequent to this time, respondent has continued to treat petitioner's employment status with the District "as an indefinite suspension without pay pending resolution of the criminal matter." (Petitioner's Exceptions at pages 5-6,

¹ Although petitioner's submission was erroneously captioned "Brief in Support of Petitioner's Request for Clarification of the Initial Decision of the Administrative Law Judge," it is obvious that this filing was intended as Exceptions to the Initial Decision and it was, therefore, accepted as such. Petitioner is cautioned to in the future take care with the titling of materials, as there is no authorization for the acceptance by the Agency of any document other than "Exceptions" in connection with an Administrative Law Judge's Initial Decision.

² It is noted that petitioner's *faxed* submission – some 60 pages in length – included a copy of the Petition of Appeal, the Initial Decision, and a number of additional documents which were part of her filings below. As these are materials which are always included in the record before the Commissioner, it is unnecessary for parties to provide additional copies with their exceptions, particularly when transmitting by facsimile.

quote at page 6) Petitioner claims that the District's continued reporting of this status to potential employers has "unjustly interfered with [her] prospective economic advantage" by preventing her from securing gainful employment in her field. (*Id.* at page 8)

Also left unresolved in the ALJ's decision, petitioner maintains, is the status of the District's tenure charges against her. She advances that, consistent with the ALJ's finding that she forfeited her position on June 6, 2005, the District lacks authority to pursue these charges, as the maximum penalty which could be imposed as a consequence of her being found guilty of the charges is dismissal from her employment – an event which has already transpired. (*Id.* at page 6)

Upon her full and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board has no obligation to take any action whatsoever with respect to petitioner's resignation because, as of June 6, 2005, – as a result of the Order of the Superior Court Judge entered on that date with regard to the conditions of her entry into the Pre-Trial Intervention Program (PTI)³ – petitioner forfeited her position with the Irvington Board of Education and was forever prohibited from seeking or accepting employment with any governmental entity in the State of New Jersey. Therefore, her employment relationship with the Board was *immediately* terminated as of that date. The Commissioner observes that the record indicates apparent confusion on the part of the parties as to the interplay of petitioner's forfeiture and the legal consequences of whether she does or does not successfully complete the PTI Program. The Commissioner stresses that petitioner's forfeiture of her position

³ PTI is a probationary type of program that enables an individual who meets certain requirements (*N.J.S.A.* 2C:43-12(e)) to avoid the prospect of a conviction if he or she successfully completes the program. When an individual is accepted into this program, he or she receives a stay of prosecution. In most cases, individuals complete the program and, subsequently, receive the benefit of dismissal of all charges. If, however, an individual does not successfully complete the program, the indictment is returned to the court trial calendar for a full disposition. (See *N.J.S.A.* 2C:43-12 & 13, *R.* 3:28)

and prohibitions of employment with any governmental entity in the State were conditions of her entry into PTI, not her *successful completion* of PTI. Consequently, these imposed conditions are irrevocable and will in no way be altered by the eventual outcome of her participation in this program. Inasmuch as petitioner does not now, nor will she ever in the future, have an employment relationship with the Board of Education of the Township of Irvington, the District's tenure charges against her, which were placed in abeyance in January 2005 pursuant to *Ott v. Board of Education of the Township of Hamilton*, 160 N.J. Super. 333 (App. Div. 1978), have been rendered moot.⁴

Accordingly, the Initial Decision of the OAL – as expounded upon herein – is adopted as the final decision in this matter, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.⁵



COMMISSIONER OF EDUCATION

Date of Decision: 11/28/06

Date of Mailing: 11/28/06

⁴ These charges were not certified to the Commissioner but were proceeding at the preliminary District level at the time of placement in abeyance.

⁵ This decision may be appealed to the State Board of Education pursuant to N.J.S.A. 18A:6-27 *et seq.* and N.J.A.C. 6A:4-1.1 *et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1164-06

AGENCY DKT. NO. 306-11/05

SHARON WHALEY,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF IRVINGTON,

Respondent.

John A. Boppert, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Raymond L. Hamlin, Esq., for respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: October 13, 2006

Decided: October 16, 2006

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is an appeal by a tenured secretary challenging a school district's refusal to accept her offer of resignation. While tenure charges against her were pending but unadjudicated, petitioner Sharon Whaley ("Whaley") sought to resign in good standing

from her tenured position as school secretary. Meanwhile, as a condition of entering into a pretrial intervention program, Whaley agreed to forfeit her employment in the district. Nonetheless, she contends that Irvington must either act on her resignation or give her back pay.

For the reasons that follow, an employee cannot voluntarily resign from a position that she has forfeited as a result of criminal proceedings.

Procedural History

On November 6, 2005, Whaley filed her petition with the Commissioner of Education. Irvington filed its answer on December 1, 2005. Subsequently, on January 10, 2006, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Prior to hearing, both parties filed cross-motions for summary decision. Whaley filed her supporting brief, together with various exhibits, on August 31, 2006. Irvington filed its opposing papers on September 27, 2006. The OAL heard oral argument on October 13, 2006.

Findings of Fact

All of the material facts are undisputed. **I FIND** the following facts. From the papers on file with the Office of Administrative Law, **I FIND** the following facts:

Sharon Whaley began her employment in the district on August 16, 1989 and attained tenure in the position of secretary. On January 7, 2005, Irvington served disciplinary charges on Whaley seeking her removal for conduct unbecoming a public employee. Irvington alleged that Whaley had illegally converted money received in her employment capacity to her personal use. Because of a pending criminal investigation arising out of the same circumstances, Whaley invoked her Fifth Amendment right against self incrimination and requested that the disciplinary charges "be held in

abeyance pending a decision in the related criminal matter". Irvington acceded to Whaley's request to delay certification of tenure charges¹.

As a result of its criminal investigation, on January 26, 2005, the Essex County Prosecutor's Office obtained a three-count indictment charging Whaley with official misconduct, theft by deception and forgery. Specifically, the indictment charged that, in January through April 2001, while acting in the course of her employment, Whaley had accepted money orders submitted by applicants for substitute teaching certificates and illegally converted the funds for her own use. Consequently, Irvington exercised its right to suspend Whaley without pay pending resolution of the criminal charges².

Significantly, Whaley does not deny the substance of the conduct that forms the basis of the criminal charges against her. In a signed statement made to an investigator from the Essex County Prosecutor's Office on April 13, 2004, Whaley admitted that she misappropriated money orders entrusted to her care, "not all of them" but "maybe one a week or once a month," because she needed the money. Before going to trial, Whaley pled guilty to the charges and entered a pretrial intervention program on June 6, 2005. As a condition of her acceptance into pretrial intervention, Whaley agreed to "immediately forfeit her position with the Irvington Board of Education and not seek reinstatement." (Emphasis in the original).

On June 6, 2005, the same date that she entered her guilty plea, Whaley submitted a letter to Irvington director of human resources, purportedly "tendering my resignation effective immediately." However, the Board never accepted her resignation by formal vote and takes the position that further action on its part is unnecessary. At the time of oral argument Whaley was still under criminal indictment and had not yet fully satisfied the requirements of her pretrial intervention program.

¹ In Ott v. Board of Education of the Twp. of Hamilton, 160 N.J. Super. 333 (App. Div. 1978) certif. denied, 78 N.J. 336 (1978), the Appellate Division affirmed the trial's courts order restraining a board of education from certifying tenure charges to the Commissioner until disposition of related criminal charges.

² See N.J.S.A. 18A:6-8.3

abeyance pending a decision in the related criminal matter". Irvington acceded to Whaley's request to delay certification of tenure charges¹.

As a result of its criminal investigation, on January 26, 2005, the Essex County Prosecutor's Office obtained a three-count indictment charging Whaley with official misconduct, theft by deception and forgery. Specifically, the indictment charged that, in January through April 2001, while acting in the course of her employment, Whaley had accepted money orders submitted by applicants for substitute teaching certificates and illegally converted the funds for her own use. Consequently, Irvington exercised its right to suspend Whaley without pay pending resolution of the criminal charges².

Significantly, Whaley does not deny the substance of the conduct that forms the basis of the criminal charges against her. In a signed statement made to an investigator from the Essex County Prosecutor's Office on April 13, 2004, Whaley admitted that she misappropriated money orders entrusted to her care, "not all of them" but "maybe one a week or once a month," because she needed the money. Before going to trial, Whaley pled guilty to the charges and entered a pretrial intervention program on June 6, 2005. As a condition of her acceptance into pretrial intervention, Whaley agreed to "immediately forfeit her position with the Irvington Board of Education and not seek reinstatement." (Emphasis in the original).

On June 6, 2005, the same date that she entered her guilty plea, Whaley submitted a letter to Irvington director of human resources, purportedly "tendering my resignation effective immediately." However, the Board never accepted her resignation by formal vote and takes the position that further action on its part is unnecessary. At the time of oral argument Whaley was still under criminal indictment and had not yet fully satisfied the requirements of her pretrial intervention program.

¹ In Ott v. Board of Education of the Twp. of Hamilton, 160 N.J. Super. 333 (App. Div. 1978) certif. denied, 78 N.J. 336 (1978), the Appellate Division affirmed the trial's courts order restraining a board of education from certifying tenure charges to the Commissioner until disposition of related criminal charges.

² See N.J.S.A. 18A:6-8.3

Conclusions of Law

Based on the forgoing facts and the applicable law, I **CONCLUDE** that Whaley has forfeited her position as a result of her acceptance into the pretrial intervention program and Irvington is under no obligation to accept her resignation in good standing.

Claiming that she had a right to resign from her secretarial position prior to the adjudication of tenure charges, Whaley asserts that the Board's refusal to act on her resignation is arbitrary, capricious and unreasonable. She relies on N.J.A.C. 6A:3-5.6, which provides that, "where tenure proceedings are concluded prior to adjudication because the charged party has unilaterally resigned or retired, the Commissioner may refer the matter to the State Board of Examiners for action against a charged parties certificate as it deems appropriate." That provision is inapplicable here, since Whaley does not hold any educational certificates. Moreover, the rule does not recognize any inherent right to resign, but merely allows the Commissioner to refer the matter to the educational licensing authority once a teacher has resigned.

Further, Whaley argues that she had a legal obligation to submit her resignation in order to comply with the conditions of her pretrial intervention program. Petitioner, however, confuses "resignation" with "forfeiture." Resignation implies the voluntary and knowing relinquishment of employment rights, including tenure. See O'Toole v. Forestal, 21 N.J. Super. 394 (App. Div. 1986). Normally, it is accomplished by the voluntary offer of resignation and acceptance of that offer by the school board. Forfeiture, on the other hand, reflects that "the circumstances surrounding a criminal conviction bear directly on an employee's competency and capacity to do his or her job or to perform any other job for the state." State v. Timoldi, 277 N.J. Super. 297, 300 (App. Div. 1994); see also Moore v. Youth Correctional Institute, 119 N.J. 256, 271 (1990).

Here, of course, the forfeiture was not the result of a criminal conviction, but rather a condition imposed for entry into a pretrial intervention program. There was

nothing that Irvington could or should have done to implement what the Court had already ordered. The judicial forfeiture order is binding on Whaley and took effect as soon as it was entered by the Superior Court judge..

Order

It is **ORDERED** that summary decision is granted in favor of Irvington denying Whaley's request for relief.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 16, 2006
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

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

October 16, 2006
DATE

OCT 17 2006
DATE
nd

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

404-06

AGENCY DKT. NO. 355-9/06

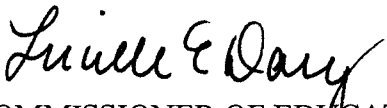
IN THE MATTER OF JOHN <u>CHILDRESS</u> ,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EAST GREENWICH,	:	DECISION
GLOUCESTER COUNTY.	:	

On October 17, 2006, the Commissioner of Education (Commissioner) rendered a decision concurring with the September 27, 2006 recommendation of the School Ethics Commission (Commission) that the respondent Board member be suspended from office, effective upon filing of the Commissioner's decision, for failure to attend the Board member training required by *N.J.S.A.* 18A:12-33. Such suspension was to have remained in effect until the respondent completed the New Jersey School Boards Association training for new board members on October 24, 2006; provided, however, that if the required training was not completed, the respondent would be summarily removed from office.

Subsequently, by letter dated November 2, 2006, the Executive Director of the School Ethics Commission advised respondent – and the Commissioner – that the Commission had voted on October 24, 2006 to vacate its prior decision finding respondent in violation of the School Ethics Act because: 1) the Commission was now satisfied that respondent did, in fact, file a reply to the Commission's Order to Show Cause, although the Commission had not previously received it; and 2) because it had allowed other Board members who replied in a manner similar to respondent to attend the October training session without a finding of violation.

Accordingly, given that the finding of violation upon which it was based has now been vacated by the Commission, the Commissioner's decision of October 17, 2006 is concomitantly VACATED and shall be deemed of no force and effect.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 11/20/06
Date of Mailing: 11/21/06



State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

November 2, 2006

Mr. John Childress
297 Katie Court
Mickleton, NJ 08056

**Subject: Vacate Decision for Failure to Attend Training
School Ethics Commission Docket No. T05-06**

Dear Mr. Childress:

Please be advised that the School Ethics Commission, at its meeting on October 24, 2006, voted to vacate its decision finding you in violation of the Act for failing to attend training so long as you attended the October 24, 2006 training session. The Commission determined that you had responded to the Order to Show Cause and copied the Superintendent, but the Commission never received your response. Having been satisfied that you sent a response, the Commission voted to vacate the decision against you since the other board members who had responded similarly were allowed to attend the October training session. By copy of this decision, I am informing the Director of the Office of Controversies and Disputes to request that she do what is necessary to vacate the Commissioner's decision as well.

Thank you for your attention to this matter.

Sincerely,

Lisa James-Beavers
Executive Director
School Ethics Commission

LJB/MET/training/correspondence/Childress vacate

c: Kathleen Duncan
Board Secretary
Mark Stanwood
Walter Meyer, NJSBA

OAL DKT. NO. EDU 11351-04
AGENCY DKT. NO. 293-8/04

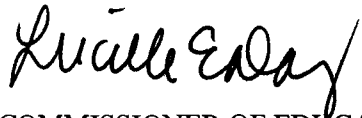
NANCY WIRKMAA, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
RAMAPO-INDIAN HILLS REGIONAL :
SCHOOL DISTRICT, BERGEN COUNTY, :
RESPONDENT. :

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 such review, the Commissioner observes that Term 7 specifically conditions this agreement on approval 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 – as specified in Term 8 – the Board's President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Accordingly, this matter is hereby remanded to the OAL for revision of the settlement agreement consistent with the concerns set forth above.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 11/20/06

Date of Mailing: 11/20/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11351-04

AGENCY DKT. NO. 293-8/04

NANCY WIRKMAA,

Petitioner,

v.

RAMAPO-INDIAN HILLS REGIONAL SCHOOL

DISTRICT BOARD OF EDUCATION,

Respondent.

Jennifer Borja, Esq., for petitioner

(Timothy R. Smith and Associates, L.L.C., attorneys)

Paul H. Green, Esq., Esq., for respondent

(Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys)

Record Closed: October 9, 2006

Decided: October 13, 2006

BEFORE **DIANA C. SUKOVICH, ALJ:**

On August 24, 2004, petitioner, a School Nurse employed by respondent, filed a petition with the State Department of Education (DOE) requesting reimbursement of certain legal fees and costs by respondent, pursuant to N.J.S.A.18A:16-6.1. The DOE

transmitted the matter to the Office of Administrative Law on October 27, 2004 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

Scheduled hearing dates were adjourned at the requests of the parties for various reasons. Throughout the proceedings, telephone and settlement conferences were conducted. The parties ultimately reached a resolution of the matter and an executed Stipulation of Settlement and Release (Stipulation) was filed. This judge subsequently requested, via telephone communications, clarification regarding whether the parties intended that the matter be finalized by the issuance of an Initial Decision Settlement or a petitioner withdrawal. Those communications were memorialized by a letter dated October 2, 2006 from this judge to counsel, which letter advised that if responses were not received within seven days, an Initial Decision would issue. No replies were received, and the record is deemed closed on October 9, 2006. Attached herewith is a copy of the Stipulation.

Having reviewed the terms of the Stipulation, I **FIND** that the parties voluntarily have agreed to the terms and conditions of the settlement, as evidenced by the signatures contained thereon, and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the Stipulation and that these proceedings be and are hereby **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 13, 2006
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10-18-06
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 2006
DATE
lr

Laure Sanders
**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 211
South Orange, NJ 07079
Attorney for Petitioner,

NANCY WIRKMAA

Petitioner,

RAMAPO-INDIAN HILLS REGIONAL
SCHOOL DISTRICT
BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: EDUOA-11351-2004

Agency Reference No.: 293-8/04

**STIPULATION OF SETTLEMENT
AND RELEASE**

This Stipulation of Settlement and Release is made by and between the Ramapo-Indian Hills Regional School District Board of Education (the "Board") with administrative offices located at 9331 George Street, Franklin Lakes, New Jersey 07417 and Nancy Wirkmaa (the "Petitioner"), whose address is 113 Lakeshore Drive, Oakland, New Jersey 07436. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on September 18, 2003, Petitioner was employed as a school nurse by the Board; and

WHEREAS, on that date, Petitioner was charged with a criminal action for certain acts alleged to have occurred while Petitioner was in the employ of the Board; and

WHEREAS, on June 3, 2003, the criminal complaint against Petitioner was downgraded and dismissed by the Waldwick Municipal Court; and

WHEREAS, Petitioner filed a Petition of Reimbursement with the Commissioner of Education on or about June 16, 2004, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

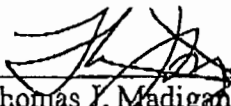
NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Ten Thousand Dollars (\$10,000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to her from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with her own independent legal counsel and that she enters into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Reimbursement.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

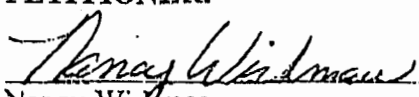
FOR THE BOARD OF EDUCATION:

By: 
Thomas J. Madigan, Board President

Date: August 15, 2006

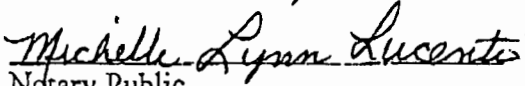
By: 
Paul H. Green, Witness
AN ATTORNEY AT LAW OF NEW JERSEY

PETITIONER:


Nancy Winkmaa

Date: 7/24/06

Sworn and subscribed to before me this
24th day of July, 2006


Notary Public

MICHELLE LYNN LUCETTI
A Notary Public of New Jersey
My Commission Expires 2/15/2011

OAL DKT. NO. EDU 2859-06
 AGENCY DKT. NO. 149-4/06

MELISSA MEEHAN AND JOHN AND	:	
RENEE MEEHAN,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF WASHINGTON, GLOUCESTER COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record, Settlement Agreement and General 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 that the Board President and the Board Secretary/School Business Administrator signed the Settlement Agreement and General 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 these individuals 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.¹

¹ It is noted that subsequent to the issuance of his Initial Decision here, but prior to the transmission of the file to the Commissioner, the Administrative Law Judge received a letter, dated October 27, 2006, from petitioner John Meehan withdrawing the Petition of Appeal in accordance with term 2. of the parties' agreement. In that Mr. Meehan is only one of three petitioners involved in this matter, the Commissioner cannot accept a request for withdrawal signed solely by him.

Accordingly, this matter is hereby remanded to the OAL for revision of the settlement agreement consistent with the concerns set forth herein.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 11/20/06

Date of Mailing: 11/20/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2859-06

AGENCY DKT. NO. 149-4/06

**MELISSA MEEHAN AND JOHN
AND RENEE MEEHAN,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WASHINGTON,
GLOUCESTER COUNTY,**

Respondent.

Melissa Meehan, petitioner, pro se

John and Renee Meehan, petitioners, pro se

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: October 25, 2006

Decided: October 25, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 12, 2006, 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 indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms thereof and I **FIND**:

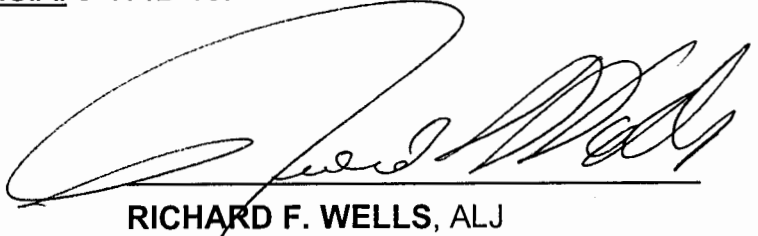
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

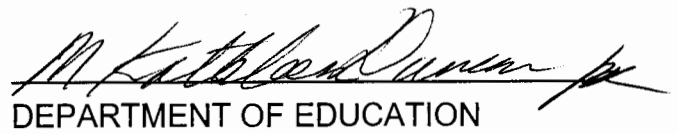
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10/25/06
DATE


RICHARD F. WELLS, ALJ

Receipt Acknowledged:

10/27/06
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties: 
DIRECTOR AND
CHIEF, ADMINISTRATIVE LAW JUDGE

OCT 30 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

CAPEHART & SCATCHARD, P.A.

A Professional Corporation

Laurel Corporate Center, Suite 300

8000 Midlantic Drive

Mount Laurel, N.J. 08054

(856) 234-6800

Attorneys for Respondent, Washington Township Board of Education

RECEIVED

2006 OCT 25 A 10:40

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MELISSA MEEHAN, JOHN MEEHAN and	:	COMMISSIONER OF EDUCATION
RENEE MEEHAN,	:	STATE OF NEW JERSEY
	:	
Petitioners,	:	OFFICE OF CONTROVERSIES AND
	:	DISPUTES
vs.	:	
	:	OAL DKT. NO. EDUOS-02859-06
WASHINGTON TOWNSHIP BOARD OF	:	AGENCY REF. NO.: 149-4/2006
EDUCATION	:	
	:	SETTLEMENT AGREEMENT AND
Respondent	:	GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is entered into by and among Melissa Meehan, John Meehan and Renee Meehan (hereinafter collectively referred to as "Petitioners"), and the Washington Township Board of Education, a local public school board of education organized under Title 18A of the New Jersey Statutes with its principle offices at 206 East Holly Avenue, Sewell, Gloucester County, New Jersey ("Board").

WHEREAS, Melissa Meehan is former student of the Washington Township School District ("School District"), having graduated from the Washington Township High School in June, 2006; and

WHEREAS, a dispute arose as to the eligibility of Melissa Meehan to attend school in the School District pursuant to N.J.S.A. 18A:38-1; and

WHEREAS, on March 28, 2006 the Board determined that Melissa Meehan was ineligible to attend the Washington Township High School; and

WHEREAS, on or about May 5, 2006 the Petitioners filed a Petition of Appeal with the Commissioner of Education challenging the Board's decision of ineligibility, OAL Dkt. No. EDU-OS-02859-06, Agency Ref. No.: 149-4/2006 ("Petition of Appeal"); and

WHEREAS, in order to resolve any and all disputes between the parties without resort to further time-consuming and costly litigation, the Petitioners and the Board have agreed to a full and final settlement of all claims and matters involving Melissa Meehan's eligibility to attend school in the School District, as well as any and all claims asserted in or which could have been asserted in the Petition of Appeal; and

WHEREAS, the parties have, in resolving this matter, also agreed to a mutual General Release which, without limitation, covers all claims involving Melissa Meehan's attendance in the School District; and

WHEREAS, this Agreement and the execution and implementation of same shall not be construed or considered an admission of liability or wrongdoing by the Petitioners or the Board, its present and former board members, officers, employees, agents and servants.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the Petitioners and the Board **AGREE AS FOLLOWS**:

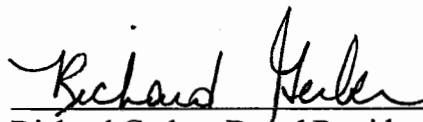
1. The Petitioners shall pay to the Board Eight Thousand Seven Hundred Twenty-Six dollars and Ninety-Three cents (\$8,726.93) on or before October 10, 2006. The settlement check shall be made payable to the "Washington Township Board of Education" and delivered to the Board's Central Administrative Offices at 206 East Holly Avenue, Sewell, New Jersey. This payment shall be in full and final settlement of all claims for tuition due for the attendance of

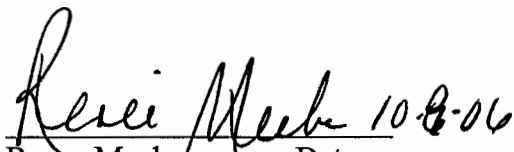
Melissa Meehan at the Washington Township High School for the 2004-2005 and 2005-2006 school years, and any other costs or fees arising from or associated with Melissa Meehan's attendance in the School District.

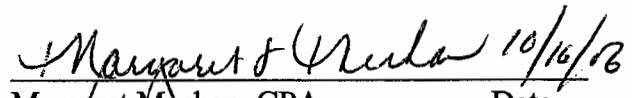
2. It is understood and agreed that the hearing for the Petition of Appeal was scheduled for September 28, 2006 before Administrative Law Judge Richard F. Wells, and that said hearing was postponed due to the pending settlement agreement between the parties. Upon payment of the settlement amount, the Petitioners shall withdraw the Petition of Appeal filing with the Commissioner of Education with prejudice. If the payment set forth in paragraph 1 above is not made, this Agreement is null and void, and the Petition of Appeal shall proceed on a new date as determined by the Office of Administrative Law.

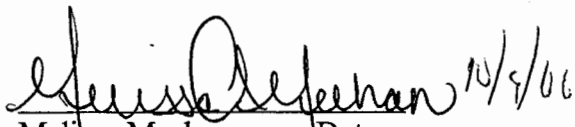
3. The Petitioners and Board mutual agree to **RELEASE, WAIVE AND FOREVER DISCHARGE** each other from any and all claims in law or in equity, whether known or unknown, arising from or relating directly or indirectly to Melissa Meehan's attendance in the School District, including but not limited to any claims of tuition for her attendance during the 2004-2005 and 2005-2006 school years.


John Meehan Date


Richard Gerber, Board President Date
Washington Township Board of Education


Renee Meehan Date


Margaret Meehan, CPA Date
Board Secretary/School Business Administrator
Washington Township Board of Education


Melissa Meehan Date

#442-06

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

SYNOPSIS

Petitioner – a former teacher in respondent’s district – alleged that the Board improperly terminated him on contractual notice when he had already obtained tenure in his position, claiming that he had been employed with the district since 2001. Respondent asserted that petitioner never acquired tenure because he did not hold the requisite teaching certificate until October 2003, having been employed prior to that time under a county substitute certificate.

The ALJ found, *inter alia*, that: the facts in this matter are essentially undisputed and summary decision is appropriate; petitioner did not obtain a provisional certificate until October 2003; petitioner’s substitute teaching assignments prior to that date may not accrue toward tenure; petitioner’s certificate of eligibility to seek provisional employment is not an appropriate certificate for the purpose of tenure accrual; and therefore petitioner has not acquired tenure pursuant to *N.J.S.A.* 18A:28-5. The ALJ denied petitioner’s appeal for re-employment with back salary and benefits.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board properly exercised its contractual right to terminate petitioner’s employment and adopted the Initial Decision as the final decision in this matter.

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

December 8, 2006

OAL DKT. NO. EDU 9689-06
AGENCY DKT. NO. 222-6/06

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

The record of this matter and the Initial Decision have been reviewed. No exceptions were filed.

Petitioner taught in respondent's district in various capacities from September of 2001 to the end of the 2005-2006 school year. On May 15, 2006, he was advised via notice from respondent that he would not receive a contract to return for the 2006-2007 school year. He maintains that at the time of that notice he had already attained tenure, and that the non-renewal was improper.

Because the material facts were and are not in dispute, the matter proceeded in the Office of Administrative Law (OAL) as a summary disposition. The Commissioner adopts the Administrative Law Judge's (ALJ) determination that summary decision in favor of respondent is appropriate.

The undisputed facts reveal that petitioner was first employed by respondent in September 2001 and served as a substitute teacher. From September 2001 until December 2002 he worked solely under a county substitute credential. He received a certificate of eligibility to seek employment as a teacher in December 2002. However, he continued to work as a substitute through the end of the 2002-2003 school year.

In October 2003 the respondent district offered petitioner a teaching position and sent to the Board of Examiners of the New Jersey Department of Education the required paperwork to obtain a provisional elementary school teaching certificate for petitioner, which certificate was issued in October 2003. Petitioner continued to teach in respondent's district and received a standard certificate with an endorsement in elementary education in November 2004.

As set forth in the Initial Decision, *N.J.S.A.* 18A:28-5 identifies the requirements for the achievement of tenure. It states in pertinent part that:

The services of all teaching staff members employed in the position of teacher . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . ., shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for:

- (a) Three consecutive calendar years . . . ;
- (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
- (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

(Emphasis added.)

At the outset, the Commissioner notes that until October 2003, petitioner was not a "teaching staff member," as required by *N.J.S.A.* 18A:28-5. The term "teaching staff member" is defined in *N.J.S.A.* 18A:1-1 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

(Emphasis added.)

As the ALJ explained, the certificate of eligibility (CE) to seek employment in the provisional teaching program, which petitioner received in December 2002, was not the equivalent of any of the certificates identified in *N.J.S.A.* 18A:1-1.

Moreover, as a substitute teacher, petitioner was not “in [a position] which required him to hold appropriate certificates issued by the board of examiners.” *N.J.S.A.* 18A:28-5.¹ Petitioner’s employment was allowed by *N.J.S.A.* 18A:16-1.1, which permits districts to hire persons to act in the place of absent employees. Under the terms of that statute, such surrogate employees may not accrue tenure while acting in the absent employee’s stead. Thus, under *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:16-1.1, petitioner could not have attained tenure until October 2006, three years after he commenced the regular teaching position that did require an appropriate certificate from the board of examiners.

Accordingly, the Commissioner adopts the determinations of the ALJ that summary disposition is appropriate, and that petitioner had not achieved tenure at the end of the 2005-2006 school year when he received notice that he would not be offered a contract for the next school year. The petition is therefore dismissed.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 12/08/06

Date of Mailing: 12/11/06

¹ See also, *Spiewak v. Board of Educ. of Rutherford*, 90 N.J. 63, 74 (1982) (By the express terms of these statutes, 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. (Emphasis added.))

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.*

#443-06SEC

AGENCY DKT. NO. 444-12/06

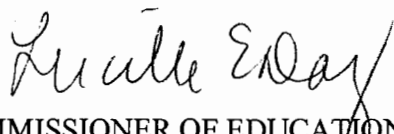
IN THE MATTER OF DEBORAH FOX, :
BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION
BOROUGH OF WEST WILDWOOD, : DECISION
CAPE MAY COUNTY. :

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failing to attend the required training, in that such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby suspended from the board if she fails to attend the December 9, 2006 training session and summarily removed from office if she fails to attend the January 6, 2007 training session.

IT IS SO ORDERED. *


COMMISSIONER OF EDUCATION

Date of Decision: 12/11/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.* Pursuant to *N.J.A.C. 6A:4-1.4(a)*, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T11-06
DEBORAH FOX	:	
West Wildwood Board of Education	:	DECISION FOR FAILURE
Cape May County	:	TO ATTEND TRAINING
	:	

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Deborah Fox was newly elected or appointed in April 2005 to a local school board or charter school board and therefore, had until April 2006, to complete the training requirement; 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 October 5, 2005, January 17, 2006 and February 6, 2006; and

WHEREAS, the NJSBA conducted eight training sessions between April 2005 and March 2006 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, through correspondence dated August 9, 2006, because you are a member of a non-operating district, the Commission provided you with the opportunity to attend half of the one-day training on October 24, 2006; and

WHEREAS, the Commission has been notified by the New Jersey School Boards Association that you did not attend the October 24, 2006 training; and

WHEREAS, the Commission issued an Order on November 1, 2006, directing Deborah Fox to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Fox did not respond to the Order; and

WHEREAS, the Commission notified Ms. Fox that the Commission would discuss this matter at its November 28, 2006 meeting; and

WHEREAS, Ms. Fox has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2005 to March 2006 constitutes a clear violation of N.J.S.A. 18A:12-33; and

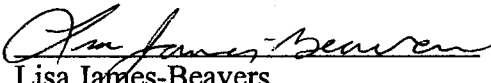
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Deborah Fox violated the N.J.S.A. 18A:12-33 of the School Ethics Act if she fails to attend the December 9, 2006 training session and recommends that the Commissioner of Education impose a penalty of suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 29, 2006

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on November 28, 2006.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT.NO. EDU 09689-06

AGENCY DKT. NO. 222-6/06

WILLIAM DAVIS,

Petitioner,

v.

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

Respondent.

Harold N. Springstead, Esq. (Springstead and Maurice), for petitioner

Mark A. Tabakin, Esq. (Weiner Lesniak) for respondent

Record Closed: October 12, 2006

Decided: October 26, 2006

BEFORE **CAROL I. COHEN, ALJ:**

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On May 15, 2006 the Englewood Board of Education (Respondent/District) sent Mr. William Davis (Petitioner) a letter stating that the District would not be offering him employment for the 2006-2007 school year. On June 19, 2006 the appellant filed a Petition of Appeal with the Commissioner of Education. The petition alleged that Mr. Davis had been employed with the

District since 2001; that he advised the respondent that he had served the statutory time to qualify for tenure; and that the District refused to offer him employment for the 2006-2007 school year in violation of his tenure and seniority rights. The petitioner asserted that the actions of the District were arbitrary, unreasonable and illegal. The appeal sought the re-employment of the petitioner as a tenured teaching staff member; back pay and benefits and such other relief as was deemed appropriate. On June 30, 2006 the respondent filed its answer with the Department of Education. In its answer it asked that the petition be denied; that it be awarded attorney's fees and costs of suit, and other relief that the Commissioner deem appropriate. The respondent asserted that: "the Petitioner never acquired (and could not acquire) tenure because Petitioner did not have the requisite teaching certificate from the State of New Jersey until October of 2003. Therefore, Petitioner did not meet the three-year and one-day service requirement to achieve tenure prior to his non-renewal."

The matter was forwarded to the Office of Administrative Law (OAL) on September 11, 2006 and assigned to ALJ Cohen on September 26, 2006. A telephone conference was held on October 12, 2006 at which time it was determined that the matter should be decided on the papers that had previously been submitted.

ISSUES

1. Whether the matter can be decided on Summary Decision.
2. Whether the petitioner had obtained tenure.
3. Whether the respondent had violated the petitioner's tenure and seniority rights.

STATEMENT OF FACTS

1. From November 2001 through June 2002 the petitioner worked as a long term substitute teacher, teaching bi-lingual science.
2. From September 2002 through December 2002 Mr. Davis worked as an intermittent substitute teacher.
3. In December 2002 the petitioner was issued a Certificate of Eligibility.
4. From January through March 2003 Mr. Davis worked as a long term substitute teacher for 8th grade English in the District.
5. From March 2003 through June 2003 he was assigned as a long term substitute teacher in Mathematics.
6. On September 24, 2003 the petitioner was enrolled in the Provisional Teacher Program.
7. In October 2003 Mr. Davis was issued a provisional certification.
8. The petitioner signed a contract in October 2003 to teach Related Arts and to supervise the In School Suspension Program for the 2003-2004 school year.
9. In October 2004 the petitioner was issued the Standard Teaching Certification.
10. The petitioner signed contracts as a regular teacher for the 2004-2005 and 2005-2006 school year.

11. On May 15, 2006 the Board sent a letter to the petitioner stating that they would not be renewing his teaching contract for the 2006-2007 school year.

DISCUSSION

1. STANDARD FOR SUMMARY DECISION

In accordance with the New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.12.5, any party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. To grant a motion for summary decision, it must be examined whether "the papers and discovery...together with the affidavits...show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-1.12.5(b).

A motion for summary decision is similar to summary judgment found at R. 4:46-2. The motion for summary judgment "shall be served with briefs, a statement of material facts, with or without supporting affidavits." R. 4:46-2(a). "The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue, together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." Ibid.

The Supreme Court has held that when deciding a motion for summary judgment:

[a] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to

the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). Thus, the critical question is “whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law.” Brill, *supra*, 142 N.J. at 533.

In this matter there is no genuine issue of material fact.

II. Acquisition of Tenure

Teachers in New Jersey have a statutory right to tenure provided they meet certain requirement. Zimmerman v. Newark Board of Education, 38 N.J. 65, 70-72 (1962), cert. den. 371 U.S. 956 (1963). The criteria under which teachers achieve tenure is outlined in N.J.S.A. 18A:28-5 which provides:

The services of all teaching staff members ... which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, **excepting those who are not the holder of proper certificates in full force and effect**, shall be under tenure during good behavior and efficiency . . . 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 year; or

- (c) the equivalent of more than three academic years within a period of any four consecutive academic years . . .

[Emphasis added]

A "teaching staff member" is defined at N.J.S.A. 18A:1-1 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 qualification, 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. [Emphasis added].¹

In order to achieve tenure, the petitioner must meet the following conditions: (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 73 (1982). The petitioner claims that a portion of his service prior to the 2003-2004 school year should be included in calculating his time for accruing tenure. He cites Ellicott v. Bd. Of Educ. 251 N.J. Super. 242, 347-348 for the proposition that he completed the requirements for certification under the terms of the Certificate of Eligibility issued in December 2002. The petitioner points to language in the opinion which states that:

Thus, tenure is achieved by a teaching staff member who serves the probationary period either in a specifically designated 'position,' such as a teacher, or in 'positions which require them to hold appropriate certificates..' While 'position is not defined by the act, 'teaching staff member' is defined as a staff member who holds

¹ A standard certificate is a "permanent certificate issued to candidates who have met all requirements for State certification." N.J.A.C. 6:11-4.1. A provisional certificate is "a temporary one-year certificate issued to candidates who have met requirements for initial employment as part of a State approved district training program or residency leading to standard certification." N.J.A.C. 6:11-4.2. An emergency certificate is "a substandard one-year certificate issued only in the field of educational services, teacher of the handicapped, teacher of the blind and partially sighted, and teacher of the deaf and hard of hearing." N.J.A.C. 6:11-4.3.

'office, position or employment' which requires that he or she 'hold a valid...certificate. Id. at 348.

Based on this language he contends that: "at all times he taught under an appropriate certificate for the position for which he was hired."

Prior to December 2002, the petitioner held a County Substitute Teacher's Certification. He admits that he worked as a substitute teacher during the 2001-2002 and 2002-2003 school years. Under the tenure statute, time spent as a substitute teacher does not count toward tenure. . See N.J.S.A. 18A:28-5(a)-(c). The only exception to the tenure 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 takes the place of a regular teacher, because of the absence of the regular teacher, whose return is contemplated.

Thus, it would appear that the time used to accrue tenure would have had to begin once the petitioner was issued a Certificate of Eligibility in December 2002. However, as the respondent has pointed out, the Certificate of Eligibility was not activated during the 2002-2003 school year, because Mr. Williams continued to work as a substitute teacher. He did not obtain a regular teaching position until September 2003. At that point his Certificate of Eligibility was activated. This was just the beginning of the certification process. As the Provisional Teacher Program Information and Application Packet (Respondent's Exhibit 1) states: "These certificates provide the opportunity to seek

employment. These are **NOT** TEACHING LICENSES.” Once the teacher has accepted an offer of employment, the District must register the teacher in the Provisional Teacher Program and agree to provide support and supervision.

At that time you will be notified through your employer of any additional documents and/or fees needed to obtain your PROVISIONAL LICENSE...

Upon successful completion of program requirements, you will need to submit a current Application for Licensure and the appropriate fee to receive your STANDARD LICENSE.

A teacher is not considered a “teaching staff member” within the meaning of N.J.S.A. 18A:1-1, until he obtains his provisional license. The petitioner did not obtain a Provisional Certificate until October 2003. As the respondent pointed out, the petitioner’s legal argument, that the time served while he held a Certificate of Eligibility counted toward tenure accrual, is flawed. As pointed out above, a holder of a Certificate of Eligibility is not a “teaching staff member” as defined by N.J.S.A. 18A; 1-1, since he did not hold a valid and effective standard, provisional or emergency certificate. While the petitioner appears to have analogized a “Certificate of Eligibility” to an “Emergency Certificate”, there is nothing in the statute or case law that supports that position. As the court pointed out in Zimmerman, supra, 38 N.J. at 72: In order to acquire tenure, “a teacher must comply with the precise conditions articulated in the statute.” Based on this standard, the ALJ in Joanne McAneney v. Board of Education of the School District of the Chathams, 92 N.J.A.R. 2d (EDU) 208 (1991) found that a teacher, who taught for 13 years, but did not have the proper instructional certificate, had not attained tenure. The decision was affirmed by the Commissioner who concurred that “the petitioner did not possess the appropriate certificate for service as a supplemental teacher and, therefore, did not meet the precise requirements for acquiring tenure set forth in Spiewak, supra.” See also Jennings v. Board of Education of the Borough of Highland Park, 1989 S.L.D. (St. Bd. Feb. 28, 1989) in which an athletic trainer, who taught health courses without the proper health education endorsement, was denied tenure.

I also do not find persuasive the petitioner's argument that he can somehow use his prior teaching time to retroactively grant him seniority and tenure. The fact that he eventually became a regular certificated teacher does not mean that he can tack on the time he spent teaching under a substitute teacher certificate and under a certificate of eligibility. As the ALJ found in Morano v. Board of Education of the Borough of Verona, 1990 S.L.D. (June 27, 1990), affirmed, Commissioner, August 10, 1990, there could be no "retroactive seniority" granted to a teacher who completed all of the prerequisites to be "eligible" to obtain a specific endorsement in a particular subject, but who did not actually have the endorsement. As the ALJ explained:

To recognize "seniority" based upon "eligibility" for endorsement and authorization to teach a subject would have results including the following: It would erode the authority of the regulatory system. It would result in uncertainty and confusion by, e.g., entertaining the claims of teachers who are unendorsed and unauthorized, that they should be afforded seniority-type rights over teachers who conscientiously secured endorsement and authorization. It would ultimately deny the endorsed and authorized teachers their rights afforded by the statutory and regulatory systems.

CONCLUSION AND ORDER

Based on the briefs and certifications submitted, I **CONCLUDE** that there is no material issue of fact that would require a hearing. Therefore, the matter can be decided on Summary Decision.

I further **CONCLUDE** that the petitioner has not acquired tenure under the terms of the statute.

I therefore **ORDER**, that the petitioner's application for re-employment as a tenured teaching staff member, back salary and benefits be denied.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/26/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

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

10/26/06
DATE

OCT 27 2006
DATE

Mailed to Parties:
Laure Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

#444-06SEC

AGENCY DKT. NO. 445-12/06

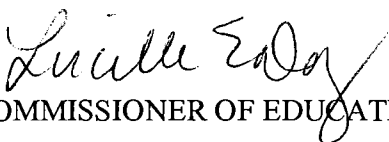
IN THE MATTER OF ROSEANNE ANTINE, :
 ROCKLEIGH SCHOOL DISTRICT, BERGEN : COMMISSIONER OF EDUCATION
 COUNTY. : DECISION
 _____:

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Further, the Commissioner admonishes the respondent for failing to attend the required training in her first year of service as a Board member; such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby suspended from the board if she fails to attend the December 9, 2006 training session and summarily removed from office if she fails to attend the January 6, 2007 training session.

IT IS SO ORDERED. *


 COMMISSIONER OF EDUCATION

Date of Decision: 12/11/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.* Pursuant to *N.J.A.C. 6A:4-1.4(a)*, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T09-06
ROSEANNE ANTINE	:	
Rockleigh Board of Education	:	DECISION FOR FAILURE
<i>Bergen County</i>	:	TO ATTEND TRAINING
	:	

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Roseanne Antine was newly elected or appointed in April 2005 to a local school board or charter school board and therefore, had until April 2006, to complete the training requirement; 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 October 5, 2005, January 17, 2006 and February 6, 2006; and

WHEREAS, the NJSBA conducted eight training sessions between April 2005 and March 2006 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, through correspondence dated August 9, 2006, because you are a member of a non-operating district, the Commission provided you with the opportunity to attend half of the one-day training on October 24, 2006; and

WHEREAS, the Commission has been notified by the New Jersey School Boards Association that you did not attend the October 24, 2006 training; and

WHEREAS, the Commission issued an Order on November 1, 2006, directing Roseanne Antine to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Antine responded to the Order and indicated that she failed to attend the October 24, 2006 training due to a business commitment that she could not cancel; and

WHEREAS, the Commission notified Ms. Antine that the Commission would discuss this matter at its November 28, 2006 meeting; and

WHEREAS, Ms. Antine has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2005 to March 2006 constitutes a clear violation of N.J.S.A. 18A:12-33; and

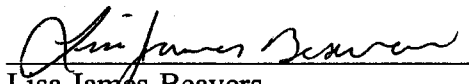
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Roseanne Antine violated the N.J.S.A. 18A:12-33 of the School Ethics Act if she fails to attend the December 9, 2006 training session and recommends that the Commissioner of Education impose a penalty of suspension from the board if she fails to attend the December 9, 2006 training session and removal if she fails to attend the January 6, 2007 training session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 29, 2006

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on November 28, 2006.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

#447-06SEC

AGENCY DKT. NO. 407-11/06

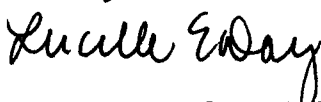
IN THE MATTER OF ARETHA DOOLEY-MALLOY, :
BOARD OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* 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.*

SCHOOL ETHICS COMMISSION

V.

**ARETHA DOOLEY-MALLOY
NEWARK CITY BOARD
OF EDUCATION
ESSEX COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D07-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Aretha Dooley-Malloy is a Vice Principal for the Newark City School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 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 August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Ms. Dooley-Malloy files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Aretha Dooley-Malloy 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 until she files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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.

#446-06SEC

AGENCY DKT. NO. 405-11/06

IN THE MATTER OF CHRIS CASTANO, :
JERSEY CITY COMMUNITY CHARTER : COMMISSIONER OF EDUCATION
SCHOOL, HUDSON COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06
Date of Mailing: 12/12/06

* 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.*

SCHOOL ETHICS COMMISSION

V.

**CHRIS CASTANO
JERSEY CITY COMMUNITY CS
HUDSON COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D16-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Chris Castano is a member of the Board of Education for the Jersey City Community Charter School 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 May 1, 2006 for school officials in office since January 30, 2005 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 charter school and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

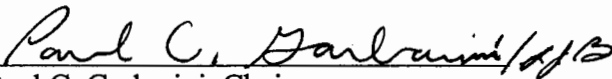
WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Castano files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Chris Castano 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 until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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. 410-11/06

IN THE MATTER OF STEVEN COLE, :
STATE-OPERATED DISTRICT OF THE CITY : COMMISSIONER OF EDUCATION
OF NEWARK, ESSEX COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.

Mr. Cole's comments to the Commission's recommended penalty, in pertinent part, stated

***I have been employed as a school administrator for twenty (20) years. Throughout my tenure, I have never failed to adhere to my job responsibilities nor have I failed to file required disclosure statements of any kind. Over the past year, I have had additional personal pressures that may have led to the late submission. My wife was recently diagnosed with breast cancer and has to undergo chemotherapy and ultimately surgery. With the decline of my wife's health, I have been taking on the duties to care for my autistic child alone. It has been a difficult year for me personally, however, I continued to have a successful year professionally as a school administrator, as a father to two children and as a mentor to young students of Newark.

While these personal difficulties do not excuse a failure to adhere to the statutory code, I submit to you that given my past performance record, the fact no such infraction of this kind has ever been brought against me in twenty (20) years and the personal difficulties I have had over the past year, should excuse me from any penalty of reprimand.

Upon her review – notwithstanding Mr. Cole's violation of the School Ethics Act as a result of his untimely filing of the requisite disclosure statement – under the particular circumstances in this matter, the Commissioner cannot agree with the Commission that any

penalty against him is warranted. However, Mr. Cole is hereby directed to insure that all future requisite submissions are filed in a timely fashion.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.* Pursuant to *N.J.A.C. 6A:4-1.4(a)*, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

V.

**STEVEN COLE
NEWARK BOARD
OF EDUCATION
ESSEX COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D06-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Steven Cole is 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 May 1, 2006 for school officials in office since January 30, 2005 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 August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 4, 2006,

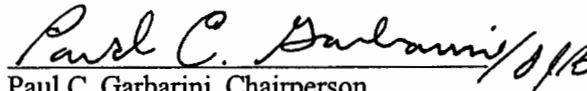
WHEREAS, the school official did not file an answer; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; 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 appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Steven Cole 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 reprimand.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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.

#449-06SEC

AGENCY DKT. NO. 403-11/06

IN THE MATTER OF LAWRENCE CHIARAVALLLO :
 ACADEMY CHARTER HIGH SCHOOL : COMMISSIONER OF EDUCATION
 MONMOUTH COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission (SEC), forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.¹ No comments were filed by the respondent, but the required disclosure statement was filed on November 8, 2006.

Upon review of the foregoing, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.²



COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

¹ The Commissioner notes that the name "Chris Castano" was erroneously inserted into the second paragraph of the SEC's findings in its decision concerning Mr. Chiaravallo.

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.

SCHOOL ETHICS COMMISSION

V.

**LAWRENCE CHIARAVALLO
ACADEMY CHARTER HIGH SCHOOL:
MONMOUTH COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D18-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Chris Castano is a member of the Board of Education for the Jersey City Community Charter School 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 May 1, 2006 for school officials in office since January 30, 2005 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 charter school and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

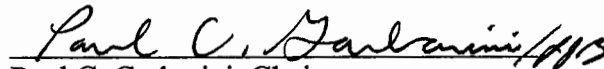
WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Chiaravallo files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Lawrence Chiaravallo 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 until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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. 408-11/06

IN THE MATTER OF TRACIE HURST, :
NORTHFIELD BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
ATLANTIC COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.* Pursuant to *N.J.A.C. 6A:4-1.4(a)*, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

V.

TRACIE HURST
NORTHFIELD BOARD
OF EDUCATION
ATLANTIC COUNTY

BEFORE THE SCHOOL
ETHICS COMMISSION

Docket No.: D01-06

DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Tracie Hurst is a member of the Board of Education for the Northfield School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 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 August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 5, 2006,

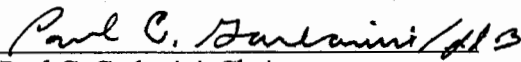
WHEREAS, the school official filed an answer indicating that her delinquency was not intentional, but that she had the disclosure statement returned several times because it was incomplete ; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; 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 appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Tracie Hurst 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 reprimand.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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.

#450-06SEC

AGENCY DKT. NO. 412-11/06

IN THE MATTER OF MARY JO WALILKO, :
MINE HILL SCHOOL DISTRICT, MORRIS : COMMISSIONER OF EDUCATION
COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06

Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to N.J.S.A. 18A:6-27 *et seq.* and N.J.A.C. 6A:4-1.1 *et seq.* Pursuant to N.J.A.C. 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

V.

MARY JO WALILKO
MINE HILL BOARD
OF EDUCATION
MORRIS COUNTY

BEFORE THE SCHOOL
ETHICS COMMISSION

Docket No.: D19-06

DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Mary Jo Walilko is a member of the Board of Education for the Mine Hill School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 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 August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 3, 2006,

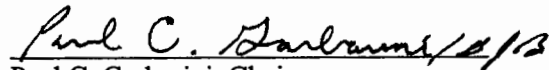
WHEREAS, the school official filed an answer indicating that she leads an extremely busy life due to family responsibilities; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; 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 appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mary Jo Walilko 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 reprimand.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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. 406-11/06

IN THE MATTER OF DAVID WRIGHT, :
BOARD OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/13/06
Date of Mailing: 12/13/06

* 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.*

SCHOOL ETHICS COMMISSION

V.

**DAVID WRIGHT
NEWARK CITY BOARD
OF EDUCATION
ESSEX COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D10-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, David Wright is a Principal for the Newark City School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 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 August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

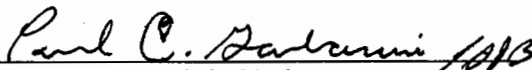
WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Wright files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that David Wright 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 until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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. 404-11/06

IN THE MATTER OF DELISA BRAZILE, :
ACADEMY CHARTER HIGH SCHOOL, : COMMISSIONER OF EDUCATION
MONMOUTH COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/12/06
Date of Mailing: 12/12/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to N.J.S.A. 18A:6-27 *et seq.* and N.J.A.C. 6A:4-1.1 *et seq.* Pursuant to N.J.A.C. 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

V.

**DELISA BRAZILE
ACADEMY CHARTER HIGH SCHOOL:
MONMOUTH COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D17-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Delisa Brazile is a member of the Board of Educationl for the Academy Charter High School 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 May 1, 2006 for school officials in office since January 30, 2005 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 charter school and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

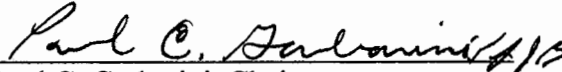
WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Ms. Brazile files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Delisa Brazile 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 until she files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statement is filed prior to issuance of the Commissioner's decision.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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. 402-11/06

IN THE MATTER OF DAWN POPE, :
BOARD OF EDUCATION OF THE BOROUGH : COMMISSIONER OF EDUCATION
OF SOMERDALE, CAMDEN COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, particularly in light of respondent's prior violation of the same provision. The Commissioner additionally admonishes the respondent for her disregard of the law, which has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby removed as a member of the Somerdale Board of Education, effective upon filing of this decision.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/13/06

Date of Mailing: 12/13/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to N.J.S.A. 18A:6-27 *et seq.* and N.J.A.C. 6A:4-1.1 *et seq.* Pursuant to N.J.A.C. 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

V.

**DAWN POPE
SOMERDALE BOARD
OF EDUCATION
CAMDEN COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D03-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Dawn Pope is a member of the Board of Education for the Somerdale School District and thus a "school official" under **N.J.S.A. 18A:12-23** of the Act and **N.J.A.C. 6A:28-1.2** of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 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 August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

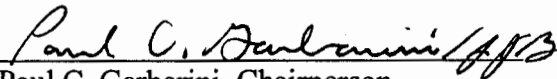
WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, last year on December 20, 2005, the Commission found Ms. Pope in violation of the Act and recommended to the Commissioner of Education a penalty of reprimand for Ms. Pope's failure to file a disclosure within the designated timeline; and

WHEREAS, on January 31, 2006, the Acting Commissioner of Education concurred with the penalty of reprimand and Ms. Pope was reprimanded; and

WHEREAS, the appropriate penalty for the violation is removal since Ms. Pope was reprimanded last year for her late filing of a disclosure statement and she has failed to file a disclosure statement this year;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Dawn Pope 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 removal.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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.

#458-06

OAL DKT. NO. EDU 3570-06
 AGENCY DKT. NO. 9-1/06

S.V., on behalf of minor children, H.W., D.A. :
 and K.V., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
 TOWNSHIP OF WEST ORANGE, :
 ESSEX COUNTY, :

DECISION

RESPONDENT. :

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

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 12/14/06

Date of Mailing: 12/14/06



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3570-06

AGENCY DKT. NO. 9-1/06

S.V., O/B/O H.W., D.A., and K.V.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,

Respondent.

S.V., petitioner, pro se

Stephen J. Christiano, Esq., for respondent

Record Closed: October 12, 2006

Decided: November 9, 2006

BEFORE **DIANA C. SUKOVICH, ALJ:**

Petitioner filed a petition with the Commissioner of the State Department of Education (DOE), on January 6, 2006, regarding a dispute with respondent pertinent to the continued enrollment of H.W., D.A., and K.V., his minor children, in respondent's school district. Respondent filed an answer and counterclaim on February 14, 2006. The DOE transmitted the matter to the Office of Administrative Law on March 29, 2006 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

A hearing scheduled on July 17, 2006 was adjourned because of petitioner's unavailability. The parties appeared for a hearing on September 8, 2006. A hearing commenced at that time. The parties conferred during the proceedings and reached a resolution of the matter. The terms of the settlement were placed on the record. Subsequent to additional communications, an executed Stipulation of Settlement and Minutes of a meeting by respondent, on October 9, 2006, evidencing approval of the settlement, were filed on October 12, 2006, on which date the record was closed. Attached herewith are copies of those documents.

I have reviewed the record and terms of the Stipulation of Settlement and pertinent Minutes and **FIND** that the parties have voluntarily agreed to the settlement, as evidenced by the signatures of the parties or their representatives on the settlement, and the settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the 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.

November 9, 2006
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

11-15-06
DATE

M. Keith Deen/Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

Laure Sanders
**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

NOV 16 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

Stephen J. Christiano, Esq.
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

**BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 3570-06
AGENCY REF. NO. 9-1/06**

**S.V., ON BEHALF OF MINOR
CHILDREN, H.W., D.A., and K.V.,
Petitioner,**

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,
Respondent.**

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

- (1) Petitioner withdraws his petition of appeal.
- (2) Respondent withdraws its counterclaim for tuition charges.
- (3) Petitioner's children will be permitted to attend school in respondent's district so long as the requirements of school eligibility under statute and regulations are met.
- (4) Petitioner shall pay respondent the sum of \$11,400 in full settlement of all tuition charges. The first payment of \$5,700 shall be due within 30 days of the approval of this settlement by the Commissioner of Education. The second payment of \$2,850 shall be due 30

days after the first payment is due. The third payment of \$2,850 shall be due 30 days after the second payment is due.

(5) Petitioner shall have the right to prepay any or all of the above sums.

(6) If petitioner does not make any of the above payments by their due dates, respondent shall be entitled to the entire amount of tuition for the three children for the 2005-2006 school year, less any payments previously made.

(7) This settlement is subject to approval by the Commissioner of Education.

(8) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated:

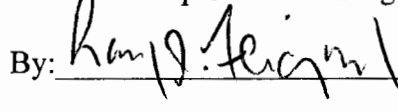
29 Sept-06


Sheldon Vickers, Petitioner

Attest:


Secretary

Board of Education of
The Township of West Orange

By: 
President

**EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK**

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on October 9, 2006 at 8:00 P.M., at St. Cloud Elementary School, 71 Sheridan Avenue, West Orange, NJ.

The following members of the Board of Education were present:

Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

The following motion was offered by Mr. Petigrow, and seconded by Mrs. Garnes, and adopted by the Board of Education by the following roll call vote:

Stipulation of Settlement: S.V. o/b/o H.W., D.A., and K.V. v. West Orange Board of Education.

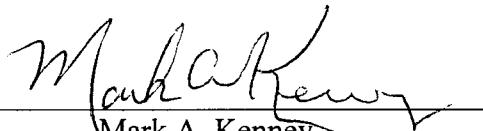
ROLL CALL: Ayes: Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow,
Mrs. Kyle, Mrs. Casalino

Abstain: None

RECEIVED
STATE OF N.J.
OFFICE OF ADM. LAW
2006 OCT 12 A 9:21

CERTIFICATE

I, Mark A. Kenney, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, 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 October 9, 2006, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 10th day of October 2006.



Mark A. Kenney
Business Administrator/Board Secretary

AGENCY DKT. NO. 411-11/06

IN THE MATTER OF ROCIO C. DAY, :
BOARD OF EDUCATION OF THE TOWN : COMMISSIONER OF EDUCATION
OF GUTTENBERG, HUDSON COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/13/06

Date of Mailing: 12/13/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.* Pursuant to *N.J.A.C. 6A:4-1.4(a)*, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

V.

**ROCIO C. DAY
GUTTENBERG BOARD
OF EDUCATION
HUDSON COUNTY**

**BEFORE THE SCHOOL
ETHICS COMMISSION**

Docket No.: D15-06

**DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Rocio C. Day is a member of the Board of Education for the Guttenberg School District and thus a "school official" under **N.J.S.A. 18A:12-23** of the Act and **N.J.A.C. 6A:28-1.2** of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 18, 2006,

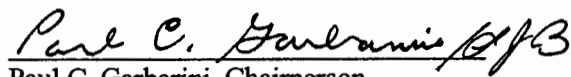
WHEREAS, the school official did not file an answer; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; 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 appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Rocio C. Day 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 reprimand.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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.

#459-06

OAL DKT. NO. EDU 10429-06
 AGENCY DKT. NO. 321-9/06

H.S.K., on behalf of minor child, S.O., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF : DECISION
 THE NORTHERN VALLEY :
 REGIONAL HIGH SCHOOL :
 DISTRICT, BERGEN COUNTY, :
 RESPONDENT. :

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.


 COMMISSIONER OF EDUCATION

Date of Decision: 12/14/06

Date of Mailing: 12/15/06



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10429-06
AGENCY DKT. NO. 321-9/06

H.S.K. o/b/o S.O.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
NORTHERN REGIONAL HIGH
SCHOOL DISTRICT, BERGEN COUNTY,**

Respondent.

Hyun Sook Kim, petitioner, pro se

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: November 17, 2006

Decided: November 17, 2006

BEFORE J. HOWARD SOLOMON, ALJ:

This matter was transmitted to the Office of Administrative Law on October 11, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for November 17, 2006. The parties appeared and agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

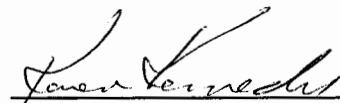
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11-17-06
DATE


J. HOWARD SOLOMON, ALJ

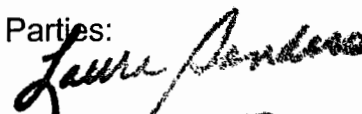
Receipt Acknowledged:

11-22-06
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 2006
DATE


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

(1) STIPULATION OF SETTLEMENT

H.S.K. 0110 S.O., Petitioners, v. Northern Valley Regional High School Bd. of Ed.,	State of New Jersey Office of Admin- istrative Law Agency Ref No. 831-9106 OAL Ref. No. BAW 10429-06

The parties in the above-captioned matter have agreed to resolve the above-captioned matter as follows:

1. Petitioners' Residency Petition is hereby ~~dismissed with prejudice~~ withdrawn.

2. Within 30 days of the date of this Stipulation, Petitioners will pay to
Cred. J-1

②

Valley an amount equal
to 3 months' tuition
(\$106 to 11/06 inclus-
ive), calculated on a per
diem amount of \$77.60.
(\$1420.00 per month)

3. Petitioners agree to contin-
ue to pay this tuition
amount for S.O. on an
ongoing basis, until & unless
they meet the tuition-free
school attendance standard
set forth in N.J.S.A.
18A:38-1(a)(1) by obtaining
legal guardianship of S.O.

4. Defendant Northern Valley
hereby waives any claims
against Petitioners for

③

reimbursement for legal fees.

S.S.O.'s attendance at
school in Northern Valley
Cold Tappan is contingent
upon Detainers' prompt pay-
ment of tuition for S.O.
as well as S.O.'s

~~and~~ remaining in ^{ACCEPTABLE} ~~good~~ academic
& behavioral standing in ACCORDANCE
WITH THE RESPONDENT'S
RULES AND REGULATIONS

Northern Valley ROE

By:
Jones
Attorney

G. Hossain
for Northern Valley

Raymond R. Jacobs
RAYMOND R. JACOBS

Dated: 4/17/06

Kwong Jin Han

Hsun Sook Kim

Kwong Jin Han 11/17/06
KYANG JIN HAN

Dated: 11/17/06

Hsun Sook Kim 11/17
HYUNSOOK KIM

Dated: 11/17/06

#460-06SEC

AGENCY DKT. NO. 413-11/06

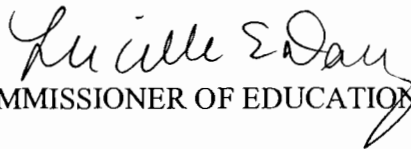
IN THE MATTER OF DIANE COLE, :
MONTAGUE SCHOOL DISTRICT, : COMMISSIONER OF EDUCATION
SUSSEX COUNTY. : DECISION

The record of this matter, the decision of the School Ethics Commission (SEC) – forwarded to the Commissioner pursuant to *N.J.S.A. 18A:12-29* solely for review of the Commission's recommended penalty – and respondent's communication dated November 5, 2006, conveying a copy of her disclosure statement, have been reviewed. As set forth in the SEC's decision, respondent first filed her required disclosure statement with the Commission on October 2, 2006, substantially later than the date it was due.

Upon review of the foregoing, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*


COMMISSIONER OF EDUCATION

Date of Decision: 12/14/06

Date of Mailing: 12/15/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.* Pursuant to *N.J.A.C. 6A:4-1.4(a)*, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

V.

DIANE COLE
MONTAGUE BOARD
OF EDUCATION
SUSSEX COUNTY

BEFORE THE SCHOOL
ETHICS COMMISSION

Docket No.: D24-06

DECISION FOR FAILURE TO
FILE A 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 with the School Ethics Commission; and

WHEREAS, Diane Cole is a member of the Board of Education for the Montague School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was May 1, 2006 for school officials in office since January 30, 2005 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 August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, through regular and certified mail return receipt requested, 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, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the school official filed the completed disclosure statement with the County Superintendent on October 2, 2006,

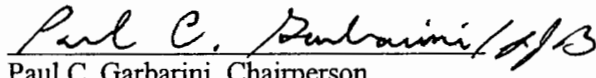
WHEREAS, the school official did not file an answer; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; 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 appropriate penalty for the violation is reprimand since the form has been filed;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Diane Cole 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 reprimand.


Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 31, 2006

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.

OAL DKT. NO. EDU 8101-01
AGENCY DKT. NO. 408-10/01

ADAM E. DRAPCZUK, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

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

DECISION

RESPONDENT. :

The record in this matter, the proposed settlement agreement, a resolution by respondent authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following advisement. The settlement agreement will be annexed to the Final Decision in this matter and will, consequently, be part of a public document. Thus, while the parties themselves may comply with their accord – in Paragraph 14 of the Settlement – not to disclose the terms of the settlement agreement, the settlement document will be subject to the provisions of the Open Public Records Act, *N.J.S.A. 47:1A-1 et seq.*

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

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

Date of Decision: 12/18/06

Date of Mailing: 12/18/06



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 8101-01

AGENCY DKT. NO. 408-10/01

ADAM E. DRAPCZUK,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WINFIELD, UNION COUNTY,**

Respondent.

Beth L. Finkelstein, Esq., for petitioner

Mark A. Tabakin, Esq., for respondent
(Weiner A. Lesniak, attorneys)

Record Closed: October 3, 2006

Decided: November 13, 2006

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

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on November 16, 2001 for hearing 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 settle this matter and have prepared the attached settlement agreement and release indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 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.

Nov. 13, 2006
DATE

Mumtaz Bari Brown
MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

11-15-06
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 16 2006
DATE
nd

Laure Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2001 OCT -3 P 11:58

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the Township of Winfield (the "Board") and Adam E. Drapczuk ("Drapczuk"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about August 17, 1998, Drapczuk was employed as the Superintendent of the Winfield Public School District pursuant to a contract of employment, effective August 17, 1998 through June 30, 2002; and

WHEREAS, on or about April 24, 2001, the Board forwarded Drapczuk a letter advising him that the Board did not intend to renew his employment contract; and

WHEREAS, on or about September 18, 2001, the Board adopted a resolution ratifying its previous decision to non-renew Drapczuk's employment contract; and

WHEREAS, Drapczuk filed a Petition for a Declaration Ruling on or about September 29, 2001, asserting that he had not been afforded timely notice of his non-renewal in accordance with N.J.S.A. 18A:17-20.1; and

WHEREAS, the matter was docketed before the Office of Administrative Law as OAL Docket Number EDU-OA-08101-01N; and

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Drapczuk deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations; and

WHEREAS, the Board and Drapczuk are now mutually desirous of settling the matters and allegations in dispute; and

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

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

1. The "Board", as used herein, shall at all times mean the Board of Education of the Township of Winfield, its 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, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. "Drapczuk," as used herein, shall mean Adam E. Drapczuk, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. The parties acknowledge and agree that Drapczuk's Employment Contract dated August 13, 1998 terminated on June 30, 2002.
4. Drapczuk shall cause to be filed a withdrawal, with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as EDU- OA-08101-01N, subject to the approval of this Settlement and Release Agreement by the Office of Administrative Law and the Commissioner of Education.
5. Drapczuk promises and agrees never to seek re-employment or assert any tenure status or employment with the Board at any time in the future in any capacity.
6. Within thirty (30) business days of execution of the Settlement Agreement by all parties, and approval of this Settlement Agreement by the Office of Administrative Law, the Board shall pay Drapczuk the lump sum of Seven-thousand, five-hundred dollars (\$7,500.00). Drapczuk and the Board acknowledge and agree that said payment is in full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by Drapczuk for reinstatement, automatic renewal of his employment contact, reemployment, 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, loss of seniority, loss of pension, loss of salary placement, 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 Drapczuk's Complaint against the Board now docketed before the OAL as EDU-OA-08101-01N, for, but not

limited to, violation of his civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, Title 18A of the New Jersey Statutes; Titles 6 and 6A of the New Jersey Administrative Code, the New Jersey Tort Claims Act N.J.S.A. Title 59, the Fourth and Fourteenth Amendments to the United States Constitution and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not. Drapczuk and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Drapczuk or on his behalf, or by his attorneys, heirs, successors or assigns, against the Board. Specifically excluded from this release are Drapczuk's rights arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations, and any rights he may have for indemnification by the Board through his last day of employment, June 30, 2002, pursuant to *N.J.S.A.* 18A: 16-6 and 6.1.

7. Drapczuk hereby acknowledges and agrees that he further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which Drapczuk does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect his decision to enter into this Settlement Agreement and General Release.
8. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education.
9. Drapczuk and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board.
10. This settlement is intended as and for damages for any and all possible injuries and Drapczuk hereby waives any and all claims for lost wages, income or future earnings.
11. Should it be determined that any payments made pursuant to Paragraph 6 herein constitute gross income within the meaning of the Internal Revenue Code and its applicable amendments, or under any other federal, state or local statute or ordinance, Drapczuk shall be solely liable for and agrees to pay any amount that may be determined to be due and owing as taxes, interest and penalties arising out of such payments. Specifically, Drapczuk understands and agrees that his attorney will be provided with a 1099 Miscellaneous form with his payment from the Board. Drapczuk

also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibility. Further, Drapczuk understands and agrees that the Board will report the payment made to Drapczuk 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 payment is taxable.

12. In any action commenced against by either party to enforce the provisions of this Agreement, the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.
13. Drapczuk specifically acknowledges that the payment referred to in Paragraph 6 hereof constitutes any and all additional consideration not otherwise owed to him for this Settlement Agreement and General Release. Drapczuk agrees that he shall not seek any further amount from the Board other than the amount stated in Paragraph 6.
14. The parties and their attorney(s) agree and promise that they will not disclose, either directly or indirectly any information contained in this Settlement Agreement, except that the parties or their attorney(s) shall not be precluded from disclosing the existence or terms of this Settlement Agreement and General Release when required to do so by law. The parties may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Drapczuk and the Board."
15. This Settlement Agreement and General Release contains the full agreement of Drapczuk and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Drapczuk and the Board, which consent must be signed by Drapczuk and the Board, or their duly authorized agents.
16. The waiver by Drapczuk and/or 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.
17. 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.
18. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

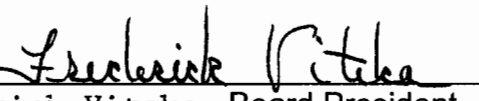
19. Drapczuk and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release.
20. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.
21. In entering into this Settlement Agreement and General Release, Drapczuk has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by his attorney and those terms are fully understood and voluntarily accepted.

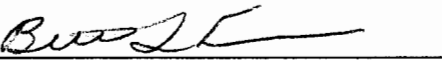
IN WITNESS WHEREOF, Drapczuk and the Board have hereunto set their hands.

ADAM E. DRAPCZUK

By: 
Adam Drapczuk

**BOARD OF EDUCATION OF
THE TOWNSHIP OF WINFIELD**

By: 
Frederick Viteka, Board President

By: 
Beth Finkelstein, Esq.

By: 
Mark A. Tabakin, Esq.

WINFIELD BOARD OF EDUCATION

RESOLUTION
September 19, 2006

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 OCT -3 P 4: 58

BE IT RESOLVED that the Winfield Board of Education approve the settlement agreement and release between Adam Drapczuk and the Winfield Board of Education in the amount of \$7500.00.

MOTION MADE BY: Ms. Baker

SECONDED BY: Mr. Heuser

The motion was carried by roll call vote as follows:

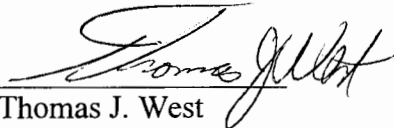
Yes-Mrs. Fellner, Mrs. Gerhart, Mr. Heuser, Mr. Koomer, Mrs. Vail, Mr. Viteka

No-Ms. Baker

Abstain-Mrs. Byrne

Absent-Mrs. Quinn

I certify the foregoing to be a true and correct abstract of a resolution regularly passed at a meeting of the Board of Education of the Township of Winfield held September 19, 2006 and in that respect is a true and correct copy of its minutes.


Thomas J. West
Board Secretary
Winfield Board of Education

#463-06

E.A.E. on behalf of minor child S.N.W., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF BLOOMFIELD,

ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner – a resident of Bloomfield – contested respondent's determination that her son, S.N.W., was not domiciled in respondent's district during the 2005-2006 school year. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance, based on an investigator's observations of S.N.W. at his grandparents' address in East Orange.

The ALJ found that petitioner admitted that she sent her son to stay with her parents in East Orange after she discovered that her live-in boyfriend was a convicted sex offender. Based on the foregoing, the ALJ concluded that S.N.W. was not domiciled in respondent's district between November 2005 and May 2006; affirmed the residency determination of the respondent; and ordered E.A.E. to pay the district the appropriate per diem tuition rate for the period of S.N.W.'s ineligible attendance.

Upon careful and independent review of the record, the Commissioner rejects the Initial Decision of the OAL for the following reasons: respondent does not challenge the fact that petitioner is domiciled in its district; it is well settled that the domicile of a minor child is determined by the domicile of the parent; and – by virtue of E.A.E.'s undisputed domicile in Bloomfield – her child had a right to a free public education in respondent's district. Accordingly, no tuition is due for S.N.W.'s attendance in Bloomfield schools during the 2005-2006 school year.

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

December 19, 2006

OAL DKT. NO EDU 3893-06
AGENCY DKT. NO. 101-3/06

E.A.E. on behalf of minor child S.N.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF BLOOMFIELD,	:	
ESSEX COUNTY,	:	
RESPONDENT.	:	

Petitioner, E.A.E., a resident of Bloomfield, initiated this matter when respondent, Bloomfield Board of Education, acted to disenroll her son, S.N.W., from its school district. The record, Initial Decision of the Office of Administrative Law (OAL) recommending that respondent's action be upheld, and respondent's exceptions have been reviewed.¹ After careful consideration and for the reasons set forth *infra*, the Commissioner rejects the Initial Decision.

The Commissioner adopts the Administrative Law Judge's (ALJ) procedural history and relies upon the following undisputed facts:

1. Petitioner is the biological mother of S.N.W., a special needs student.
2. Petitioner has lived in Bloomfield for over four years, and currently resides on W. Avenue in Bloomfield, New Jersey.
3. S.L.W. has been attending school in Bloomfield since at least September 2004.
4. Petitioner's mother and step-father live a few blocks away from petitioner on N. M. Avenue in East Orange, New Jersey.

¹ No transcript of the July 14, 2006 hearing was provided to the Commissioner.

5. Petitioner's mother and step-father have no legal custody or guardianship of S.N.W.
6. During the period of time relevant to this controversy, petitioner often worked afternoons and nights.
7. In or about May 2005, petitioner learned through a Megan's Law notice that her live-in boyfriend was a convicted sex offender.
8. Due to her working schedule and concerns about her boyfriend's background, petitioner allowed S.N.W. to stay with her parents extensively during the 2005-2006 school year. During that school year S.N.W. was seen by respondent's residency compliance officer going to school from the grandparents' house and returning to it after school.
9. Petitioner's boyfriend vacated the W. Avenue residence in April 2006 and stopped trying to return there in May 2006.

At the outset, the Commissioner notes that respondent does not challenge the fact that petitioner was domiciled in its district; it contends that S.N.W. stayed with his grandparents in East Orange during the school year and consequently failed to meet the domicile requirement that would entitle him to a free public education in Bloomfield. However, it is well settled that a minor child does not establish his or her own domicile. Rather, the domicile of the child is determined by the domicile of the parent. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d 29, 46 (1989); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.*, 283 N.J. Super. 505, 521-22 (App. Div.1995), *certif. denied*, 143 N.J. 325 (1996); *V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 N.J.A.R. 283, 286; 25 Am. Jur. 2d Domicil § 42 (1996); *Restatement (Second) Conflict of Laws* § 22 (1971).

It appears that S.N.W. spent the majority of his time at his grandparents' residence, due to his mother's work schedule and her boyfriend's history. S.N.W. nonetheless had a right to a free public education in respondent's district by virtue of the fact that his mother, petitioner, was domiciled in that district. *See, also, M.L.P. on behalf of minor child C.L.P. v. Board of Education of the Township of Bloomfield, Essex County*, OAL Dkt. No. EDU 1420-06, Agency Dkt. No. 395-12/05, decided September 19, 2006; *J.M. on behalf of minor child S.C. v. Board of Education of the Township of West Orange, Essex County*, OAL Dkt. No. EDU1061-00, Agency Dkt. No. 347-11/99, decided May 24, 2001.

Since the facts found by the ALJ established petitioner's domicile in Bloomfield, and there was nothing in the record to cast doubt on petitioner's legal custody of S.N.W., S.N.W. must be deemed to have been domiciled in Bloomfield during the 2005-2006 school year and entitled to a free public education there.

The Commissioner directs respondent to continue to enroll S.N.W. in its district, assuming that petitioner is still domiciled there, and denies respondent's request for tuition.²

IT IS SO ORDERED.³


COMMISSIONER OF EDUCATION

Date of Decision: 12/19/06

Date of Mailing: 12/20/06

² Insofar as the Commissioner finds that S.N.W. is domiciled in Bloomfield, respondent's exceptions are rendered moot.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03893-06

AGENCY DKT NO. 101-3/06

E.E. ON BEHALF OF S.N.W.

Petitioner,

v.

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

Respondent.

E.E. parent of **S.N.W.**, appearing *pro se*

Mark Wenczel, Esq., for respondent (Gaccione, Pomaco & Malanga,
Attorneys)

Record Closed: October 16, 2006

Decided: November 21, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, E.E. challenges the residency determination made by the Township of Bloomfield Board of Education (hereinafter "Board"). The matter was transmitted to the Office of Administrative Law (OAL) on April 6, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. A hearing was held on July 14, 2006, at the OAL in Newark, New Jersey. Respondent filed a post hearing brief and the Petitioner requested

some time to submit post hearing documentation. The Court, not having heard from the petitioner, closed the record on October 16, 2006.

ISSUE

The issue in this proceeding is whether S.N.W. is domiciled in the Township of Bloomfield, and is eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1.

SUMMARY OF THE TESTIMONY

E.E.

E.E. is the mother of the minor child S.N.W. S.N. W. is 14 years old and will be entering the 9th grade in September 2006. E.E. testified that she lived on Prospect St., in Bloomfield, New Jersey from June 2003 until November 2004. She moved to another location, Watesessing Ave, Bloomfield in November 2004 where she remains to date.

E.E. testified that she lived in Bloomfield in an apartment occupied by herself, her boyfriend and her son (S.N.W.). Some time after living with her boyfriend she received a Megan's Law notice that informed her that the boyfriend was a convicted child molester. Thereafter, she wanted him to vacate her apartment but he refused to leave. The relationship became very difficult. Her boyfriend would harass her causing her to call the Bloomfield police department on him numerous times. However, she never filed a domestic violence complaint so she never obtained a restraining order against him. He finally left the apartment in April 2006. Nevertheless, he continued to harass her a pattern that continued until approximately May 2006.

During this period, she sent S.N.W. to stay with her parents so that he would not be exposed to the boyfriend and potentially be at risk of molestation. E.E. testified that her son stayed at his grandparents in East Orange at least

during the four (4) months she was trying to get the boyfriend out of her apartment.

S.N.W. routinely went to his grandparents' home after school and stayed there until the following morning. If her boyfriend was at the apartment after school, S.N.W. would be sent directly to his grandparents' house and would stay there until either the next morning, or until his mother came home to the Bloomfield apartment. S.N.W.'s grandfather would take him to the Bloomfield bus stop in the morning and in the afternoon he would pick him up at the same bus stop and walk him back to his house in East Orange. This was the routine was followed for most of the 2005-2006 school year because she had a very difficult time evicting the boyfriend.

On cross-examination, E.E. stated that the child lived with his grandparents from November 2005 until May 2006. She said she found out, through her employer, that her boyfriend was a sex offender in May 2005.

Mrs. G. (grandmother)

Mrs. G. testified that she is SNW's biological grandmother and is E.E.'s mother. She lives on N. Maple St., East Orange, New Jersey with her husband, Mr. G., the child's step-grandfather. She stated that S.N.W. goes back and forth between her house in East Orange and his mother's house in Bloomfield. S.N.W. would appear at her house without prior notice and there were times when he would leave her house and go either to his mother's apartment in Bloomfield, or somewhere else. She stated that S.N.W. would sometimes spend days and weeks at their house.

Mr. G. (step-grandfather)

Mr. G. testified that he is S.N.W.'s step-grandfather. He lives on N. Maple St., East Orange with his wife, E.E.'s mother. His grandson often stays with him them, and in the past has stayed with them on and off. He saw the Meagan's

Law flyer with E.E.'s boyfriend's picture on it and called his step-daughter and told her she was living with a child molester. It was then that he took S.N.W. away from E.E. and had him live with them.

Mr. G. further testified that he could not register his grandson in the East Orange school district because he had no guardianship or legal custody of the child. He said that he never reported that the child was staying with them to either the East Orange Board of Education or the Bloomfield Board of Education.

Robert Presuto

Robert Presuto is employed by the respondent as the Director of Administrative Services and Technology and is responsible for residency and truancy. He testified as to the sum of the tuition due for students not residing within the district. During the 2005-2006 academic year when S.N.W. was in the seventh grade the amount of tuition was \$7,956.00. (See R-5)

Jeffrey Allyn

Jeffrey Allyn is employed by the respondent school board as the district's residency compliance officer. Mr. Allyn has been in this position for approximately 15 years.

Mr. Allyn testified that he observed S.N.W. leave his grandparents' home on N. Maple Ave., East Orange, in the morning to catch the Bloomfield school bus and go to school. He testified that he saw this occur on numerous occasions throughout the 2005-2006 school year. Specifically, October 31, 2005 and on November 2, 2005, he observed S.N.W. leave the East Orange address at approximately 7:30 a.m., and go to the Bloomfield bus stop and then to school in Bloomfield. He also observed S.N.W. getting off the Bloomfield bus on November 1, 2005. On that date he observed S.N.W. go to his grandparents home in East Orange after school. He conducted a phone check on October 25, 2005 and was told by E.E. that S.N.W. was not home at the Bloomfield address,

2005 and was told by E.E. that S.N.W. was not home at the Bloomfield address, but was in East Orange because he was sick. He further testified that on January 31, 2005, S.N.W. admitted to living with his grandparents on N. Maple Ave., in East Orange.

Mr. Allyn testified that as early as October 2004, he received referrals regarding S.N.W.'s residency. On October 11, 2004, he went to the Bloomfield address and was told that S.N.W. was not there because he had spent the night at his grandparents in East Orange because he had an asthma attack the night before. On the morning of October 19, 2004, he observed S.N.W. arrive at the bus stop at 7:30 a.m. and board a Bloomfield school bus. He concluded, at that time, that the child may have been living in Bloomfield with his mother, but spent a lot of time with his grandparents in East Orange.

However, Mr. Allyn testified as to further observations of similar occurrences on November 7 and 8, 2005, January 13, 26, 31, and June 6 and 12 of 2006. It became obvious to Mr. Allyn that throughout the 2004-2005 and 2005-2006 academic years that S.N.W. resided with his grandparents in East Orange.

On November 4, 2005, Mr. Allyn received a report that someone found a wallet that belonged to S.N.W. Inside the wallet was an ID card listing S.N.W.'s name and address. The address given on the ID card was the N. Maple Ave., East Orange address and the grandparents' telephone number. The card identified E.E. as the person to contact in case of an emergency and it had E.E.'s Bloomfield telephone number.

Lastly, Mr. Allyn testified that the grandparents live only a few blocks away from E.E. and it is an easy short walk.

FINDINGS

Based upon the testimony and documentary evidence presented at the hearing, I **FIND** the following **FACTS**,

E.E., petitioner, has one child, S.N.W. that attends the Township of Bloomfield public schools. Petitioner resides on Watesessing Ave., Bloomfield, New Jersey. Petitioner's parents live on N. Maple Ave., East Orange, New Jersey, a couple of blocks away.

S.N.W. lives with his grandparents. I **FIND** that E.E. sent her son to live with her parents because her live-in boyfriend was a child molester. I **FIND** that E.E. worked afternoons and nights, thus it was convenient and practicable for S.N.W. to live with her parents.

I **FIND** that E.E.'s Section 8 Housing Voucher and Lease Agreement indicates that she began occupancy at the Watessing address on or about November 1, 2004. It further indicates that the apartment was to be occupied by two people E.E., and J.W. (the boyfriend). S.N.W. was not mentioned as an occupant or as a member of the household.

I also **FIND** that petitioner's boyfriend resisted leaving the Bloomfield apartment and only left in April of 2006, this covers the time frame in which the respondent alleges the child was not residing in Bloomfield. I **FIND** credible the petitioner's testimony that even after her boyfriend left the apartment he would continue to harass her and attempt entry into her apartment. It is, therefore, reasonable to conclude that S.N.W. was not residing in Bloomfield with his mother during the time that all this activity took place as the petitioner sent him to live in a safer environment (i.e. with his grandparents). I also **FIND** credible petitioner's parents testimony that from at least November 2005 through May 2006, the petitioner's grandparents had physical custody of the child.

LEGAL DISCUSSION AND CONCLUSION

Respondent school board asserts that S.N.W. was not domiciled within the district during the 2005-2006 school year and, therefore, he is not entitled to a free public education in Bloomfield.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age. Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have more than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. A person may have multiple residences, but may only have one true domicile at a time. Board of Educ. of Middle Township, Cape May County v. K.K., 93 N.J.A.R.2d (EDU) 461.

Therefore, residence may coincide with domicile, but does not alone determine domicile. State v. Benny, 20 N.J. 238, 251 (1955). As the New Jersey Supreme Court held in Lyon v. Glaser, domicile requires proof of physical presence and the intention to remain there indefinitely. 60 N.J. 259, 264 (1972). Here, even if one were to look at petitioner's statements in the light most favorable to her position, one wonders how long she intended to keep her son out of the Bloomfield residence, since the boyfriend left in April/May of 2006. Evidently the child was to stay at the grandparents home indefinitely or at least until such time as the boyfriend ceased all contact with E.E.

In a proceeding such as this, the parent has the burden of proving by a preponderance of the competent and credible evidence that the child/children in question meet the school district's residency requirements. Here, the Petitioner admitted that she sent her son to live with her parents in East Orange. She

offered nothing more than that. She provided no proof that this was a temporary situation or that something else occurred that interrupted or otherwise lengthened the time she had anticipated her son would be staying with his grandparents. She provided no documentary evidence to indicate that her child resided in Bloomfield. She did provide the items marked P-4, P-7 and P-8, however, said items do not prove domicile. Everything points to the fact that the child was residing in East Orange at minimum from November 2005 through May of 2006

Based upon all of the foregoing and the circumstances of this case, I **FIND** that S.N.W. was not domiciled within the Township of Bloomfield's school district, between November 2005 and May 2006. Therefore, he does not meet the requirements set forth in N.J.S.A. 18A:38-1(a). I therefore, **CONCLUDE** that S.N.W. is not entitled to a free public education in the Township of Bloomfield school district from November 2005 through May 31, 2006.

ORDER

It is hereby **ORDERED** that the residency determination by the respondent is **AFFIRMED**. It is further **ORDERED** that E.E. be assessed at the per diem rate of \$43.48 for the number of school days between November 2005 and May 31, 2006.

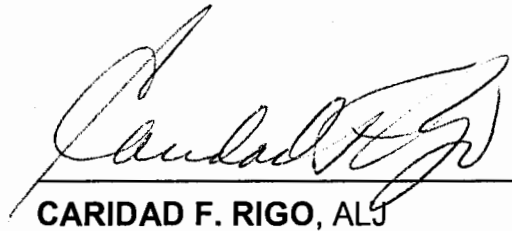
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 21, 2006
DATE


CARIDAD F. RIGO, ALJ

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

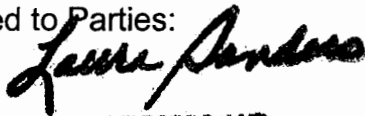
DATE

NOV 22 2006

DATE

ljb

Mailed to Parties:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses:

For petitioner:

E.E.

Mr. G.

Mrs. G.

For respondent:

Jeffrey Allyn

Robert Presuto

EXHIBITS

For petitioner

P-1 NJ Sex Offender Internet Registry (2 pages)

P-2 Marking period warning notice 9/07/05 thru 11/09/05

P-3 Envelope

P-4 Complaint in Juvenile Delinquency

P-5 Bloomfield Township Megan's Law notice

P-6 Letter dated October 15, 2004

P-7 N.J. Public Defender's Reimbursement Agreement

P-8 Superior Court Juvenile Division Summons

For respondent

R-1 Residency Referral dated 10/20/05

R-2 Residency Referrals (4 pages)

R-3 Identification Card

R-4 School Calendar 2006-2006 year

R-5 Notice of Defect in Application Potential Ineligibility

R-6 Registration Checklist

R-7 Bloomfield Public Schools Registration (9 pages)

OAL DKT. NO. EDU 03893-06

R-8 Bad Debt Alert

R-9 Notice from Bloomfield Municipal Court

R-10 Bloomfield Primary Contact Information

R-11 Notice for Disenrollment (2 pages)

R-12 Final Disenrollment letter dated March 1, 2006

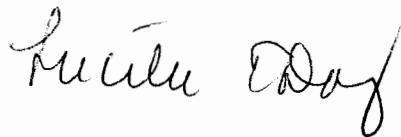
OAL DKT. NO. EDU 4207-06
AGENCY DKT. NO. 147-4/06

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF
JOHN McGOVERN, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF DECISION
JACKSON, OCEAN COUNTY. :

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 12/20/06

Date of Mailing: 12/21/06



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4207-06

AGENCY DKT. NO. 147-4/06

**IN THE MATTER OF THE SUSPENSION
OF THE TEACHING CERTIFICATE OF
JOHN McGOVERN, SCHOOL DISTRICT
OF JACKSON TOWNSHIP,
OCEAN COUNTY,**

Ben A. Montenegro, Esq., for the petitioner (School District of Jackson Township, Ocean County)

John McGovern, respondent, pro se

Record Closed: November 30, 2006

Decided: December 1, 2006

BEFORE RONALD W. REBA, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 5, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DECEMBER 1, 2006
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Dec 6, 2006
DATE

Receipt Acknowledged:

Lauren Kennedy
DEPARTMENT OF EDUCATION

DEC 7 2006

DATE
/cad

Mailed to Parties: [Signature]
2006
OFFICE OF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

NOV 14 2006

MONTENEGRO, THOMPSON, MONTENEGRO & GENZ

531 Burnt Tavern Road

P.O. Box 1049

Brick, NJ 08724

(732) 295-4500

Attorneys for Petitioner, Jackson Township School District

2006 NOV 30 A 10:52

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE
SUSPENSION OF THE TEACHING
CERTIFICATE OF JOHN McGOVERN,
SCHOOL DISTRICT OF JACKSON
TOWNSHIP, OCEAN COUNTY,

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-4207-06
AGENCY DOCKET NO.: 147-4/06

STIPULATION OF DISMISSAL WITH
PREJUDICE

THE PARTIES, having amicably resolved the subject dispute, by
Settlement Agreement dated 11/03/06 9/14/06, 2006, hereby
stipulate to the dismissal with prejudice of the petition in the
subject action.



BEN A. MONTENEGRO

Attorney for Petitioner,

Jackson Township School District

DATED:

DATED:

11/03/06



JOHN E. McGOVERN, Pro Se, Respondent

MONTENEGRO, THOMPSON, MONTENEGRO & GENZ

531 Burnt Tavern Road

P.O. Box 1049

Brick, NJ 08724

(732) 295-4500

Attorneys for Jackson Township School District

2006 NOV 30 A 10: 52

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE
SUSPENSION OF THE TEACHING
CERTIFICATE OF JOHN McGOVERN,
SCHOOL DISTRICT OF JACKSON
TOWNSHIP, OCEAN COUNTY,

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-4207-06
AGENCY DOCKET NO.: 147-4/06

SETTLEMENT AGREEMENT

THIS AGREEMENT made on this 14th day of September, 2006,
by and between **Jackson Township School District** with offices located
at 151 Don Connor Boulevard, Jackson, New Jersey 08527 (hereinafter
"Jackson")

AND

John E. McGovern with an address of 812 Gilmores Island Road,
Toms River, New Jersey 08753 (hereinafter "J.M.").

WHEREAS, Jackson hired J.M. as a non-tenured teaching staff
member for the 2005-06 school year pursuant to a July 19, 2005
employee contract; and

WHEREAS, the contract and applicable New Jersey Law required that
J.M. provide 60 days written notice of an intent to resign from the
position; and

WHEREAS, J.M. ceased employment with Jackson, effective December
8, 2005; and

WHEREAS, Jackson has filed this action under Agency Docket Number
147-4/06 and OAL Docket Number EDU4207-06 for the failure to provide
the requisite 60 day notice of intent to resign; and

WHEREAS, for the purpose of avoiding the expense, distraction,
distress, and uncertainty of litigation, and to minimize disruption to
the District, Jackson and J.M. desire to resolve their differences
amicably.

NOW, THEREFORE, Jackson and J.M., intending to be legally bound, and in consideration of these mutual promises, hereby agree as follows:

1. J.M. is guilty of unprofessional conduct for failing to provide 60 days written notice of his intent to resign his position with Jackson in violation of his employment contract and relevant New Jersey Law.

2. J.M. expressly represents he has not been employed as a teaching staff member for any public school since his cessation of employment with Jackson in December 2005.

3. J.M. agrees he shall not apply for employment with or be employed as a teaching staff member in any public school on or before December 31, 2006.

4. There shall be no suspension of the teaching license of J.M. as a result of his failure to provide the requisite 60 written notice of his intent to resign employment with Jackson.

5. Jackson and J.M. hereby expressly release the other, their heirs, executors, administrators, successors or assigns from any and all liability for claims and demands asserted or that could be asserted in any jurisdiction or forum as a result of J.M.'s 2005 employment with Jackson.

6. J.M. agrees to indemnify and hold Jackson harmless against any and all claims, demands, damages, costs and expenses including reasonable attorneys fees for the defense of such claims and demands if said claims or demands are filed by J.M. directly or indirectly via a third party against Jackson arising out of the operation/ management of Jackson's special education program.

7. The parties have negotiated this settlement agreement through counsel for Jackson and the pro se respondent. Pro se respondent consulted with his own private counsel with regard to the settlement in advance of agreeing to its terms. Jackson and J.M. warrant, represent and agree that the terms of the settlement agreement were discussed with counsel of their choice and are voluntarily accepted by the parties.

8. This settlement agreement contains the entire agreement between Jackson and J.M. relating to the pending petition. There are no other understandings or agreements, verbal or otherwise, in relation thereto, between the parties except those herein expressly set forth.

9. This settlement agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

WITNESS:

JACKSON TOWNSHIP SCHOOL DISTRICT

BY: _____

DATED:

WITNESS:

A. R. Nucifora

DATED:

4/03/02

John E. McGovern
JOHN E. MCGOVERN

9. This settlement agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

WITNESS:

JACKSON TOWNSHIP SCHOOL DISTRICT



BY: 

SUPERINTENDENT

DATED:

WITNESS:

DATED:

JOHN E. MCGOVERN

OAL DKT. NO. EDU 7821-06
(EDU 3682-06 ON REMAND)
AGENCY DKT. NO. 117-3/06

JANICE PAMPLONA AND TODDLERTOWN :
CHILD CARE CENTER, :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF IRVINGTON, :
ESSEX 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: 12/20/06

Date of Mailing: 12/20/06



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07821-06

EDU 03682-06 (**ON REMAND**)

AGENCY DKT. NO.117-3/06

JANICE PAMPLONA AND TODDLERTOWN CHILD

CARE CENTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF IRVINGTON, ESSEX COUNTY,

Respondent.

Kecia M. Clarke, Esq., for petitioner

Raymond L. Hamlin, Esq., for respondent (Hunt, Hamlin & Ridley, Attorneys)

Record Closed: November 14, 2006

Decided: November 21, 2006

BEFORE **CAROL I. COHEN, ALJ:**

The matter was transmitted to the Office of Administrative Law (OAL) on July 29, 2006 for determination as a contested case. A hearing was scheduled for April 6, 2006.

On the date of the hearing the parties were able to resolve the matter. On April 28, 2006, the parties submitted the Settlement Agreement indicating the terms of the agreement. On July 27, 2007 the Commissioner of Education filed a decision remanding the matter to the Office of Administrative Law (OAL). It stated that: "Upon such review, the

Commissioner observes that an unidentified Individual signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contained a copy of the Board's resolution approving the settlement¹ and further designating this individual to sign the agreement on its behalf, nor – in the alternative – is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement." After several telephone calls and correspondence to the Board's attorney, on November 14, 2006, the undersigned received a Resolution from the Board and Settlement Agreement signed by the Board's attorney. The attached Settlement Agreement indicates the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

¹ It is noted that the agreement, on its face, is specifically contingent on such approval.

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

11/21/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

11-28-06
DATE

DEC 1 2006
DATE
id

Receipt Acknowledged:

Karen Kennedy
DEPARTMENT OF EDUCATION

Laura Sanders
Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

CERTIFIED AS A TRUE COPY

RECEIVED

2006 NOV 14 P 2:35

STATE OF NEW JERSEY
OFFICE OF THE CLERK
IN LAW

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2006 APR 28 A 8:12

RECEIVED

Janice Pamplona and Toddler Town v. Irvington Board of Education

Agency Reference Number: 117-3706

SETTLEMENT AGREEMENT

WHEREAS, this matter having been brought by way of an Emergent Application for Relief as a result of issues which arose concerning the licensing status of the petitioner; and

WHEREAS, the parties acknowledge that Petitioner Janice Pamplona, currently employed in the capacity of Lead Teacher for Petitioner Toddler Town, possesses a Standard Certificate for Eligibility K-5; and

WHEREAS, Janice Pamplona possesses a Bachelor's Degree in accordance with N.J.A.C. 6A:9-11.1 and is a newly hired teacher pursuant to the language set forth in 6A:9-11.1 (a)(2); and

WHEREAS, Janice Pamplona has applied for a Pre-School through Grade Three Certification; and

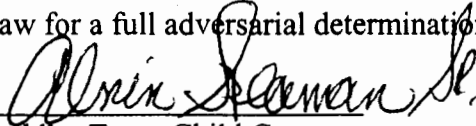
WHEREAS, the language contained in N.J.A.C. 6A:9-11.1, et seq. and Section II of paragraph 3 (a) and 3 (c)(iii) of the Revised-2005 Abbott Preschool Educational Program Contract between the Irvington Board of Education and Toddler Town Child Center, which permits the employment of a teacher who possesses the above referenced qualifications provided said employee completes said requirements within one (1) year;

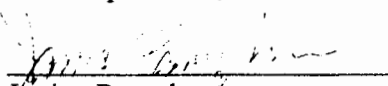
NOW THEREFORE BE IT RESOLVED that Janice Pamplona, Toddler Town Child Center and the Irvington Board of Education agree to settle the above referenced dispute provided Janice Pamplona, receives a certificate of eligibility from the Department of Education for Pre-School through Grade Three, enrolls in a Department of Education Provisional teacher program and completes the appropriate early childhood education courses and obtain a teacher of preschool through grade three endorsement within one calendar year from the date of her application of March 5, 2006, that her employment at Toddler Town shall remain in effect.

In addition, the Board of Education will not withhold any funding related to Ms. Pamplona's employment during this period unless it is demonstrated that Ms. Pamplona is no longer employed at Toddler Town, is removed from any accredited Department of Education course, withdraws from said course, or fails to obtain the requisite endorsement within the one year time period.

All parties have had the benefit of counsel with respect to this matter and the Court having reviewed the moving papers of petitioner Janice Pamplona, Toddler Town Child Care Center and the opposition from the Irvington Board of Education, acknowledges that the within agreement is fair, equitable and in accordance with current law, the New Jersey Administrative Code and the Revised-2005 Abbott Preschool Educational Program Contract between the Irvington Board of Education and Toddler Town Child Center.

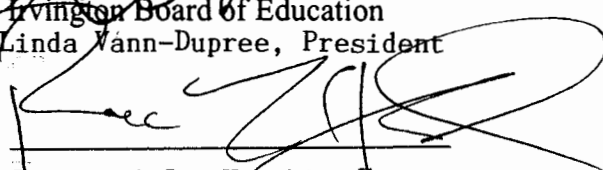
It is agreed that the within agreement is subject to Board of Education approval. The failure to approve the within agreement shall not result in the Board of Education's right to withhold payment to Toddler Town for purposes of the within cause of action but would rather return this matter to the Office of Administrative Law for a full adversarial determination.

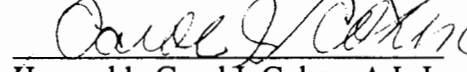

Toddler Town Child Center
Alvin Spearman, Sr.


Janice Pamplona

Date: April 6, 2006


Irvington Board of Education
Linda Vann-Dupree, President


Raymond L. Hamlin, Esq.
Attorney for IBOE


Honorable Carol I. Cohen, A.L.J.

CERTIFIED AS A TRUE COPY

REGULAR BOARD MEETING

April 11, 2006

WALK-ON

JANICE PAMPLONA AND TODDLERTOWN vs. IRVINGTON BOARD OF EDUCATION

RESOLVED, that the Board of Education accepted the recommendation of the Interim Superintendent of Schools and approved the settlement in the matter entitled Janice Pamplona and Toddlerstown v. Irvington Board of Education Agency Reference #117-3106, no additional cost to the District.

ACTION:

Motion by: Ahmed Screven, Seconded by Anna Scott

Roll Call: 7 Ayes: Carty, Derisse, Scott, Screven, Witherspoon, Burgess, Vann-Dupree

1 Abstention: Bryant

Date: April 11, 2006

As certified by



Reggie Lamptey

Assistant Superintendent for Finance/Board Secretary

RECEIVED
2006 NOV 14 P 2:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGENCY DKT. NO. 403-11/06

CORRECTED DECISION

IN THE MATTER OF LAWRENCE CHIARAVALLLO :
ACADEMY CHARTER HIGH SCHOOL : COMMISSIONER OF EDUCATION
MONMOUTH COUNTY. :

The record of this matter and the decision of the School Ethics Commission (SEC), forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.¹ No comments were filed by the respondent, but the required disclosure statement was filed on November 8, 2006.

Upon review of the foregoing, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06Date of Mailing: 12/22/06

¹ The Commissioner notes that the name "Chris Castano" was erroneously inserted into the second paragraph of the SEC's findings in its decision concerning Mr. Chiaravallo.

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.

#468-06

OAL DKT. NO. EDU 11663-06
 AGENCY DKT. NO. 453-12/06

BOARD OF EDUCATION OF THE TOWNSHIP :
 OF CEDAR GROVE, ESSEX COUNTY, :

COMMISSIONER OF EDUCATION

PETITIONER,

DECISION ON MOTION

V. :

PHILIP TULLY, :

RESPONDENT. :

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law (OAL), and the Initial Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner is satisfied that the ALJ fully and carefully considered the positions of the parties, and – having done so – correctly concluded that the petitioning Board of Education has established the likelihood of success on the merits necessary to obtain an interim order pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982) and N.J.A.C. 6A:3-1.6, suspending respondent from service as a Board member pending the final outcome of this matter.

Accordingly, for the reasons expressed summarily therein – as more fully elaborated during proceedings at the OAL – the Commissioner adopts the Initial Order of the ALJ granting the Board's application for emergent relief. The matter shall now proceed to plenary hearing as the parties deem appropriate, consistent with the order of the ALJ.

IT IS SO ORDERED.*


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06

Date of Mailing: 12/26/06

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, New Jersey 07102
(973) 648-6076
Fax (973) 648-2358

BARRY E. MOSCOWITZ
Administrative Law Judge

December 12, 2006

John G. Geppert, Jr., Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
10 James Street
Florham Park, NJ 07932

Philip Tully
72 Elmwood Road
Cedar Grove, NJ 07009

Re: **BOE of Cedar Grove Township, Essex County v. Philip Tully**
OAL Dkt. No. EDU 11663-06
Agency Dkt. No. 453-12/06

Dear Mr. Geppert and Mr. Tully:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

A handwritten signature in black ink, appearing to read "Barry E. Moscowitz".

Barry E. Moscowitz
Administrative Law Judge

BEM/da

c: William Speziale, Deputy Clerk



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 11663-06

AGENCY DKT. NO. 453-12/06

**BOARD OF EDUCATION OF CEDAR
GROVE TOWNSHIP, ESSEX COUNTY,**

Petitioner,

v.

PHILIP TULLY,

Respondent.

John G. Geppert, Jr., Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Philip Tully, respondent, pro se

BEFORE BARRY E. MOSCOWITZ, ALJ:

THIS MATTER having been opened to the Commissioner of Education by Motion for Emergent Relief

IT IS on this 12 day of DECEMBER, 2006,

ORDERED that Respondent's filing a Notice of Tort Claim against the Board on or about November 30, 2006 constitutes a claim against the Board within the meaning of N.J.S.A. 18A:12-2, which disqualifies him from serving on the Board; and it is further

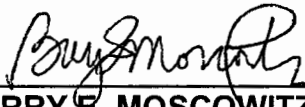
ORDERED that Respondent is immediately suspended from serving on the Cedar Grove Board of Education pending a full hearing on the merits; and it is further

ORDERED that during the period of Respondent's suspension he shall be precluded from serving as a board member in any way, including but not limited to attending executive session meetings and committee meetings on the Board, and receiving confidential communications, correspondence or packets related to the Board.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

12/12/06

DATE
da



BARRY E. MOSCOWITZ, ALJ

#469-06

BEVERLY ASARO,

:

PETITIONER,

:

V.

:

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH :
OF MOONACHIE, BERGEN COUNTY,

DECISION

:

RESPONDENT.

:

SYNOPSIS

Petitioner – a former social worker and member of the Child Study Team in respondent's district – alleged that the Board improperly eliminated her position in violation of her tenure rights. Petitioner also asserted that elimination of her position constituted a violation of the Board's duty pursuant to N.J.A.C. 6A:14-3.1 (b) to utilize district employees to constitute its Child Study Team. Respondent contended that the abolition of petitioner's position was pursuant to N.J.S.A. 18A29-9, and resulted in financial savings for the district.

The ALJ found, *inter alia*, that: although petitioner contended that the Board's action in eliminating her position was a pretext – and that there were other, non-economic reasons for her termination – there was no credible evidence to indicate that the Board acted in anything but good faith; petitioner's position was abolished for reasons of economy, which is entirely within the authority of the Board; and the method by which a district decides to staff a Child Study Team – whether by contracting out those services or by hiring staff – need not be permanent, so long as the provision of the required services comports with applicable law and regulations. Accordingly, the ALJ affirmed the Board's abolishment of petitioner's position.

Upon independent and careful review of the record, the Commissioner adopts the Initial Decision of the OAL for the reasons well stated therein. The instant Petition of Appeal is 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, 2006

OAL DKT. NO. EDU 9309-99
AGENCY DKT. NO. 203-7/99

BEVERLY ASARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
_____	:	

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

On exception, petitioner essentially recasts and reiterates her arguments advanced before the Administrative Law Judge (ALJ) below, *i.e.*, 1) the Board could have saved even more money than it did without eliminating her tenured position, therefore, saving money was not the “true motivation” for the Board's abolishment of her position; and 2) there were reasons other than economic that led to her termination. (Petitioner's Exceptions at 1-2) She charges that the ALJ failed to ascribe due credence, without explanation in his decision, to her testimony and that of her witness – a local union officer – in support of these contentions. (*Id.* at 2)

In response, the Board points out – as recognized by the ALJ – the purely speculative nature of petitioner's argument that the Board could have saved even more money than it did, without eliminating her position, by taking the alternative steps she advocated. The Initial Decision additionally recognized that petitioner presented no legal authority which would obligate the Board to pursue petitioner's suggested course of action. (Board's Reply Exceptions at 1) As to petitioner's

argument with respect to evidence she presented at hearing that she claims established the “pre-textual nature of the abolition of her position”, the ALJ clearly stated in his decision that he found petitioner failed to present any evidence of a “credible nature” in support of such a claim. (*Id.* at 2)

The Board therefore urges that the Commissioner adopt the decision of the ALJ “as the Petitioner has failed to provide any legal or factual basis that warrants a reversal of his decision.” (*Id.* at 1)

Upon an independent and careful review of the record in this matter and according due deference to the ALJ’s credibility determinations,¹ the Commissioner concurs with the ALJ that the Board’s action abolishing petitioner’s position and contracting with the South Bergen Jointure Commission for the provision of all its child study team services was proper under *N.J.S.A.* 18A:46-5.1, *N.J.A.C.* 6A:14-5.1 and existing case law.

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

IT IS SO ORDERED.²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06

Date of Mailing: 12/26/06

¹ Petitioner’s exceptions seek to have the Commissioner arrive at different conclusions from those of the ALJ as a consequence of testimony presented at hearing. It is noted that in challenging the credibility determinations of an ALJ, petitioner bears the burden of presenting transcripts relevant to the exceptions filed so that the Commissioner might assess the judge’s findings. Such is the case because the Commissioner “may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record.” *N.J.S.A.* 52:14B-10(c). The record before the Commissioner, which did not include transcripts of the hearing at the OAL, provides no cause for rejection or modification in this regard.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9309-99

BEVERLY ASARO,

Appellant,

v.

MOONACHIE BOARD OF EDUCATION,

Respondent

Mary J. Hammer, Esq., for appellant
(Bucceri & Pincus, attorneys)

Eric Levine, Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: June 30, 2005

Decided: November 17, 2006

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

BACKGROUND AND FACTS

Beverly Asaro was employed by the Moonachie Board of Education as a Social Worker.

Petitioner first became employed by respondent in February 1975 and until June 30, 1989 was a per case/per diem employee. During the school year 1989-90,

petitioner became a contract employee on a part-time basis until June 30, 1999 thereby acquiring tenure in the position of School Social Worker.

In addition to serving as the school social worker for respondent, petitioner also served as a member of the Child Study Team.

On or about July 1, 1997, the LDTC retired from her position requiring Board action.

The Board contracted with the South Bergen Jointure Commission for the provision of a LDTC who services commenced on or about October 1, 1997. In the spring of 1997, the Board did not renew the contract of the school psychologist who was not tenured and entered into a contract with the South Bergen Jointure Commission for the provision of psychological services for the 1997-1998 school year.

On or about August 6, 1998, the Superintendent of the South Bergen Jointure Commission contacted Moonachie's superintendent and advised that the Commission must employ the entire Child Study Team. At the time that letter was received, petitioner was serving as social worker to the Child Study Team with a psychologist and a LDTC provided by the South Bergen Jointure Commission.

On or about April 27, 1999, the Board abolished the position of social worker. Subsequently, the Board entered into a contract with the South Bergen Jointure Commission to provide Child Study Team services to the district.

Petitioner was notified by letter that her position was abolished effective June 30, 1999.

The above are the salient facts with regard to this matter and are not in dispute. Supplementing the above facts was testimony at the time of the hearing from John Tudor, who at the time events stated above was the School Business Administrator for Moonachie and Board Secretary.

Documentation produced by Mr. Tudor supported the Board's contention that the abolishing of the petitioner's position resulted in financial benefits. Petitioner contended that the financial benefits realized by the Board as a result of the elimination of her position could have been attained by other actions though they were not specified nor was there any legal basis for such an argument presented.

Though petitioner contended that the Board's actions in eliminating her position were actually pretextual and that there were other reasons other than economic that led to her termination, there was no evidence presented of a credible nature that could lead to a factual finding that the Board acted in anything other than good faith.

Petitioner, by way of legal argument, contends that once a school district chooses to employ the services of all members of a Child Study Team, they are at that point obligated to continue to provide those services with the employees so chosen until they either retire or voluntarily leave the Board's employment.

THE LAW

A local board of education in New Jersey is required to provide Special Education Services for handicapped pupils. N.J.S.A. 18A:46-5. The basic Child Study Team shall consist of a school Social Psychologist, a Learning Disabilities Teacher and a School Social Worker. N.J.S.A. 18A:46-5.1.

The Legislature has authorized the elimination of teaching positions for reasons of economy and efficiency. N.J.S.A. 18A:28-9 provides:

Nothing in this title or any other law relating to the tenure of service shall be held to limit the right of any Board of Education to reduce the number of teaching staff members, employed in the district, whenever, in the judgment of the Board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrator or supervisory

organization of the district or for other good cause upon compliance with the provisions of this article.

Petitioner contends that the case of Vicenzino v. The Board of Education of the Township of Bedminster, 312 N.J. Super 243 (App. Div. 1998) stands for the proposition that a tenured social worker cannot be terminated and replaced by a ESC to perform the duties of a social worker while retaining the rest of the Child Study Team as Board Employees. Petitioner points to N.J.A.C. 6A:14-3.1(b) which provides that all Child Study Team members are to be employees of a District Board of Education. N.J.A.C. 6A:14-5.1 provides the Board with the authority to contract with State Agencies for Child Study Team services, thereby allowing for the provision of Child Study Team services through employees of the State Operated Agency. N.J.S.A. 18A:46-13 allows Boards to provide Child Study Team services either separately or jointly with one or more other Board's of Education or State Agencies, using non-district employees to provide CST services. Vicenzino, supra though holding that a Board may not eliminate one Child Study Team position and contract out for that service, it did also state:

If the Board were in good faith to eliminate the Child Study Team for reasons of economy and instead, join with one or more board's of education or State agencies to provide for basic Child Study Team services, under N.J.S.A. 18A: 46-5.1, that would be an appropriate decision to make, in that event, the board of education would have complied with N.J.S.A. 18A:46-5.1 and N.J.S.A. 18A:28-9.

At the time of the abolishment of petitioner's position, she was the sole remaining member of the Child Study Team. Based on the law as construed in Vicenzino, supra, there is little merit to petitioner's contention that since respondent violated school law in the prior year for having a mixed Child Study Team, they should now be precluded from benefiting from their own wrongdoing by being mandated to reemploy petitioner. Though maintaining a mixed Child Study Team may not have been in accord with statutory interpretation at the time, there is no reason to permanently deprive the residents of Moonachie from having their Board take advantage of the economies presented by replacing the contracted employees of the Child Study Team.

CONCLUSION

Petitioner's position was abolished by Moonachie Board of Education in the exercise of their judgment for reasons of economy. . . "reduction in force is entirely within the authority of the Board if done for reasons of economy. Klinger v. Board of Education, 190 N.J. Super 354 (App. Div. 1982) cert den. 93 N.J. Super 277 (1983).

If a Board decides to hire their own employees to staff a Child Study Team or, in the alternative, decides to contract out those services in full, neither decision should become forever permanent. If a Board can realize economic benefits from providing the services in a manner which they deem appropriate, and the provision of those services comport with the laws, rules and regulation applicable, the Board shall not be precluded from doing so.

ORDER

It is **ORDERED** that the abolishment of petitioner's position is **AFFIRMED**.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

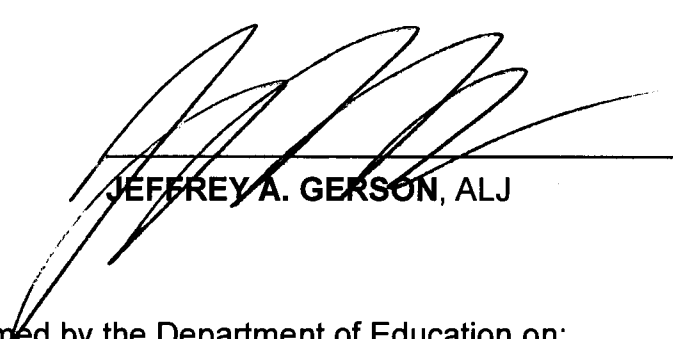
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 17, 2006

DATE



JEFFREY A. GERSON, ALJ

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

11/20/06
DATE

Mailed to Parties: 

PATRICIA ANDERSON
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 20 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

AGENCY DKT. NO. 405-11/06

AMENDED DECISION

IN THE MATTER OF CHRIS CASTANO, :
 JERSEY CITY COMMUNITY CHARTER : COMMISSIONER OF EDUCATION
 SCHOOL, HUDSON COUNTY. :

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the required disclosure statement was filed on November 13, 2006.¹

Upon review, in light of the respondent's filing of the necessary disclosure statement prior to issuance of the Commissioner's decision in this matter, the Commissioner adopts the Commission's recommended penalty of censure, additionally admonishing the respondent for the delaying in filing the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*


 COMMISSIONER OF EDUCATION

Date of Decision: 12/26/06
 Date of Mailing: 12/26/06

¹ The Commissioner was notified of this filing on December 18, 2006, subsequent to issuance of a decision in this matter; hence, it is necessary to issue the within amended decision.

* 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.*

AGENCY DKT. NO. 406-11/06

AMENDED DECISION

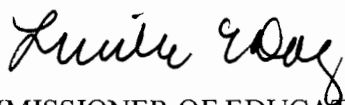
IN THE MATTER OF DAVID WRIGHT, :
BOARD OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY. :

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the required disclosure statement was filed on October 25, 2006.¹

Upon review, in light of the respondent's filing of the necessary disclosure statement prior to issuance of the Commissioner's decision in this matter, the Commissioner adopts the Commission's recommended penalty of censure, additionally admonishing the respondent for the delaying in filing the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.²


COMMISSIONER OF EDUCATION

Date of Decision: 12/26/06

Date of Mailing: 12/26/06

¹ The Commissioner was notified of this filing on December 18, 2006, subsequent to issuance of a decision in this matter; hence, it is necessary to issue the within amended decision.

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.*

#470-06

OAL DKT. NO. EDU 8771-06
 (EDU 2426-06 ON REMAND)
 AGENCY DKT. NO. 78-2/06

MIDDLETOWN TOWNSHIP EDUCATION	:	
ASSOCIATION, on behalf of	:	
LAURA LARSON, JANET HALEY AND	:	
MAUREEN KEHOE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MIDDLETOWN,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

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

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

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/06

Date of Mailing: 12/26/06



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8771-06

AGENCY DKT. NO. 78-2/06

**MIDDLESEX TOWNSHIP EDUCATION
ASSOCIATION, on behalf of LAURA
LARSON, JANET HALEY AND
MAUREEN KEHOE,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF MIDDLETOWN,
MONMOUTH COUNTY,**

Respondent.

Sanford R. Oxfeld, Esq., for petitioners (Oxfeld Cohen, attorneys)

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats & Parton,
attorneys)

Record Closed: November 22, 2006

Decided: December 6, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 17, 2006, 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 indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms thereof and I **FIND**:

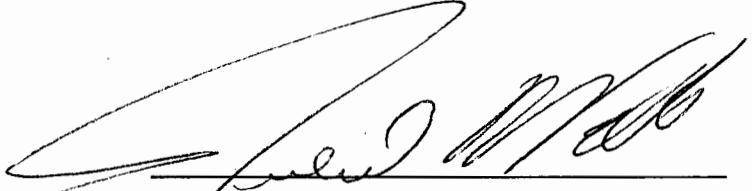
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement agreement meets the requirements of N.J.A.C. 17:27-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

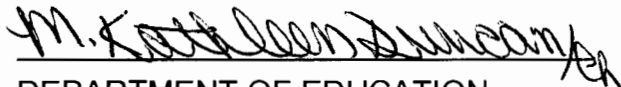
12-6-06
DATE



RICHARD F. WELLS, ALJ

Receipt Acknowledged:

12-7-07
DATE



DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 9 2006
DATE



OFFICE OF ADMINISTRATIVE LAW

jh

MINUTES OF THE REGULAR MEETING
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION
TUESDAY EVENING, SEPTEMBER 26, 2006

Time and Place of Meeting Pursuant to notices sent to each member of the Board of Education, the regular meeting was held on Tuesday evening, September 26, 2006 in the High School North Library, 63 Tindall Road, Middletown, New Jersey.

E. Personnel Committee (Joan Minnuies, Chair)

Note: All appointments of the district staff are contingent upon satisfying the requirements of the Criminal History Review.

- 21). Approval of settlement agreement for the MTEA on behalf of L.L., J.H. and M.K.

2006 NOV 22 A 10:11
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATION

This is a certified extract of the official Middletown Township Board of Education minutes of the voting meeting of September 26, 2006. Motion made by Mrs. Walsh, seconded by Mr. Ryan, for **Approval of Personnel Item # 21**. Motion carried on roll call vote:

Ayes: (9) - Mrs. Agin, Mrs. Caminiti, Mrs. Gevarter, Mrs. Minnuies, Mr. Ryan, Mrs. Self, Mrs. Stallmeyer, Mrs. Walsh and Mrs. Diorio.

Noes: (0)

SIGNED: _____


WILLIAM J. DOERING
School Business Administrator/Board Secretary

DATE: November 16, 2006

FILED
2006 NOV 22 A 10: 51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into on this 18th day of September in the year 2006,
by and between

LAURA LARSON, JANET HALEY AND MAUREEN KEHOE, individuals
employed by the Middletown Township Board of Education (hereinafter
"PETITIONERS");

and

THE MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, the recognized
majority bargaining representative for teachers and secretaries employed by the
Middletown Township Board of Education (hereinafter "MTEA");

and

THE MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, a body corporate
and politic, on behalf of itself and its agents, administrators, officers and representatives
(hereinafter "BOARD");

WHEREAS, PETITIONERS are tenured secretarial staff members employed by the
BOARD; and

WHEREAS, PETITIONERS were involved in a confrontation with their building
supervisor, former High School North Principal Jeff Simon, on or about September 13, 2005, as a
result of which PETITIONERS claim that they became physically ill and suffered from stress and
anxiety, necessitating their absence from work for four (4) days on September 13, 14, 15 and 16,
2005; and

WHEREAS, PETITIONERS have been charged with sick days for the above-cited
absences; and

WHEREAS, PETITIONERS, by and through the MTEA, have filed a Petition of Appeal
with the Commissioner of Education, under Agency Referral Number 78-2/06 and OAL Docket
Number EDUOA-02426-2006S, and pursuant to N.J.S.A. 18A:30-2.1, seeking the restoration to
their respective sick leave banks of the above-cited days; and

WHEREAS, the BOARD, PETITIONERS and the MTEA have entered into discussions
for an amicable and mutually beneficial settlement of all issues between them;

NOW, THEREFORE, in consideration of the mutual promises contained herein and for
other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged
by all parties hereto, PETITIONERS, the MTEA and the BOARD agree and hereby are agreed as
follows:

1. **Restoration of Sick Days:**
In consideration of the provisions of this Agreement, immediately upon receipt of a fully-executed copy of this Agreement, the BOARD shall restore to each PETITIONER's sick leave bank two (2) sick days.
2. **Dismissal of Petition of Appeal:**
PETITIONERS and the MTEA shall withdraw and dismiss the within Petition of Appeal with prejudice immediately upon receipt of a fully-executed copy of this Agreement.
3. **Release and Discharge:**
In consideration of the promises contained herein, PETITIONERS and the MTEA, on behalf of themselves and their assigns and successors, waive and release the BOARD and each and every one of its members, representatives, agents, and past and present employees from any and all claims of any sort whatsoever arising out of the events set forth in the within Petition of Appeal.
4. **No Admission of Liability:**
The parties understand, acknowledge and hereby agree that their Settlement as embodied in this Agreement is not to be construed as an admission of liability on the part of either party.
5. **No Precedent:**
The parties understand, acknowledge and hereby agree that the consideration, terms and understanding set forth in this Agreement is limited to the facts of this matter and is in no way precedent-setting or binding upon any party with regard to any other existing, pending or future claims. For purposes of this Agreement, the parties agree that the actions set forth in the Petition of Appeal constitute extreme and traumatic conduct as defined in Dorfman v. Board of Education of Neptune, 97 N.J.A.R.2d (EDU) 512, and that absent such a level of conduct, Petitioners' claim would be without merit barring any other statutory entitlement to restoration of sick leave.
6. **Execution of Release:**
The parties to this Agreement have consulted with their respective legal counsel regarding the terms and conditions of this Agreement, have carefully read this Agreement, and understand and acknowledge the contents hereof. The parties expressly acknowledge and agree that they each execute this Agreement of their own free will and without duress or undue influence by any individual or entity other than the parties themselves.
7. **Materiality of Provisions:**
The parties mutually acknowledge that each and every provision of this Agreement is material, and the breach of any provision shall be considered a material breach, which would relieve the non-breaching party of its performance obligations.

8. **Effective Date:**

This Agreement and the accrual of all obligations set forth herein shall be effective and binding upon the parties on the date first written above.

9. **Governing Law:**

This Agreement shall be construed under, governed by, and enforceable under the laws of the State of New Jersey.

10. **Entire Agreement:**

This Agreement constitutes the full and complete agreement and understanding between the parties with respect to its subject matter.

11. **Authority to Execute Agreement:**

The signatories to this Agreement affirm and represent that they have authority to execute this Agreement and do thereby bind the party which they represent to this Agreement.

12. **Effectiveness of Terms:**

If any provision of this Agreement shall be deemed unlawful, invalid or unenforceable by any Court or administrative agency of competent jurisdiction, the remaining terms and provisions of this Agreement shall remain in full force and effect and shall remain binding on the parties to this Agreement.

IN WITNESS WHEREOF, and intending and understanding themselves to be legally bound, the parties have executed this Agreement on the date written below.

PETITIONERS

Dated: 8/31/06

By: Laura Larson
Laura Larson

Dated: 8/21/06

Witness: Lorena Schutt

Dated: 8-31-06

By: Janet Haley
Janet Healy Haley
Haley

Dated: 8-31-06

Witness: Lorena Schutt

Dated: 8-31-06

By: Maureen Kehoe
Maureen Kehoe

Dated: 8-31-06

Witness: Lorraine Schutt

MIDDLETOWN TOWNSHIP EDUCATION
ASSOCIATION

Dated: 9-1-06

By: Diane Swain

Dated: 9-1-06

Attest: Lorraine Schutt

MIDDLETOWN TOWNSHIP BOARD
OF EDUCATION

Dated: 9/18/06

By: Dawn Diorio
DAWN DIORIO, PRESIDENT

Dated: 9-14-06

Attest: 
WILLIAM J. BOERING, BUSINESS
ADMINISTRATOR / BOARD SECRETARY

BOARD OF EDUCATION OF THE CITY :
OF CAMDEN, CAMDEN COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

NEW JERSEY STATE INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, :

RESPONDENT. :

SYNOPSIS

The Board of Education of the City of Camden (Camden) filed a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) placing the Camden High School Basketball Team on probation for two years as the result of an incident at the South Jersey Group III boys' basketball championship contest on March 7, 2006. The incident involved an assault by a Camden player on a member of the Deptford High School team during the post-game handshaking ritual.

The Board argued that the imposition of a team penalty for actions solely attributable to one individual player – who, the Board contends, was appropriately sanctioned by the district – was arbitrary, capricious and unreasonable; not supported by credible evidence; and improperly based upon the past history of the Camden basketball program.

The Acting Assistant Commissioner – to whom the matter was delegated for hearing pursuant to *N.J.S.A.* 18A:4-34 – upheld the NJSIAA's decision, deeming its intent to compel Camden to address systemic flaws and gaps in the supervision and operation of its basketball program to be a reasonable exercise of the NJSIAA's authority and responsibility for oversight of interscholastic athletic activity statewide.

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.

12/28/06

AGENCY DKT. NO. 363-10/06

BOARD OF EDUCATION OF THE CITY	:	
OF CAMDEN, CAMDEN COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
NEW JERSEY STATE INTERSCHOLASTIC	:	
ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

For Petitioner, Harvey C. Johnson, Esq. (Wolf, Block, Schorr and Solis-Cohen, LLP)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on October 2, 2006, through the filing of a Petition of Appeal by the Camden City Board of Education ("Camden" or "Board"), wherein the Board sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association ("NJSIAA" or "Association") placing the Camden High School Basketball Team on probation for two years as the result of an incident at the South Jersey Group III boys' basketball championship contest on March 7, 2006. Following the Board's correction of technical deficiencies in its petition, submission of the record on appeal, and receipt of the NJSIAA's Answer to the Petition, the parties were directed to proceed with briefing in accordance with *N.J.A.C.* 6A:3-7.3. Camden's brief was duly submitted, and the record

before the Commissioner closed on November 13, 2006, upon expiration of the time for filing of the NJSIAA's responsive brief.¹

Pursuant to *N.J.S.A.* 18A:4-34, the matter was delegated to the Acting Assistant Commissioner for hearing.

OPERATIVE FACTS

The following facts were found by the NJSIAA, as stated in the July 21, 2006 decision of the NJSIAA Controversies Committee, adopted by the NJSIAA Executive Committee on September 13, 2006:

1. At the conclusion of the March 7, 2006 South Jersey Group III boys' basketball championship contest, played at the Voorhees High School gym, Camden player M.M. assaulted Deptford player R.C. while proceeding through the handshaking ritual after that contest.

2. The conduct of M.M. was unprovoked and resulted in the student being arrested and thereafter being suspended from Camden High School for the remainder of his senior year.

3. Fortunately, despite the unprovoked assault, there was no involvement of any other team members or the crowd and prompt action by Camden and Voorhees Police personnel prevented any further outbreaks of violence.

4. The incident occurred while Coach Clarence Turner was at the head of the handshaking line and there is no evidence that he provoked or encouraged the improper conduct by the student.

5. On March 9, 2006, Camden High School Principal Al Davis submitted a Corrective Action Plan stating that Clarence Turner would no longer be the basketball coach; that the team would not be allowed to participate in post-season playoff games for two years; that

¹ The NJSIAA did file a reply brief, which bore a face date of November 13, 2006 and was received by the Department on November 15, 2006, consistent with the included certificate of service indicating transmission by regular mail. However, Camden's brief was filed on November 3, 2006 via hand delivery, with a proof of service indicating that counsel for the NJSIAA was served on the same day and in the same manner, so that NJSIAA's brief was due on or before November 13, 2006 pursuant to *N.J.A.C.* 6A:3-7.3. Having been thus untimely filed, the NJSIAA's brief is not considered herein, nor are Camden's letter of November 17, 2006 – objecting to the brief's inclusion of past agency decisions adverse to Camden – or the NJSIAA's November 22, 2006 response thereto.

Camden High School would not provide students with support buses to away games and M.M. would no longer attend Camden High School.

6. Prior to the first hearing on this matter on March 31, the Board of Education rescinded all the components of the Principal's Corrective Action Plan except for the action taken against the individual student. Ultimately, at the May 16 hearing, the Board advised that Coach Turner was being retained as the basketball coach.

7. The Athletic Director was never consulted by Principal Davis or by the Board concerning any Corrective Action Plan.

8. While the Committee could not conclude that Coach Turner or any personnel at Camden High School were in any way responsible for the unprovoked assault, the Committee believes that continued scrutiny of that program must be maintained, with extra precaution to prevent any reoccurrence of violence of the type that occurred on March 7, 2006.

(Record on Appeal, Item 22 at 4; Item 27²)

The following additional facts may be adduced from the record:

1. M.M. was "the star of the basketball team," an "impact player" who does not usually "foul out" but did so in the game in question. (Item 20, Transcript of May 16 Hearing, at 35-36, 39) He is classified as Emotionally Disturbed and is subject to "swift and wide mood swings." (Item 15, Letter Brief to NJSIAA, at 1; Item 20, Transcript of May 16 Hearing, at 27) Although an "aggressive" player in basketball and football, in his participation in sports, he has no history of explosive behavior or conduct of the type that occurred on March 7. (Item 20, Transcript of May 16 Hearing, at 26-28, 31-32) It is unclear whether Coach Turner actually read M.M.'s IEP and behavioral plan – it was not mandatory that he do so – although he would have been privy to it as a teaching staff member, in contrast to non-certificated assistant coaches. (*Id.* at 30, 33-34)

2. The championship game – which Camden lost – lasted for approximately two hours and there were no officially reported incidents of violence or indications of player agitation during that time, nor were any observed by the Camden Athletic Director. (Item 2, Incident Report; Item 20, Transcript of May 16 Hearing, at 14-15, 27) However, the parents of R.C. contended that a number of unaddressed violations occurred, including instances of tripping, punching and elbowing – two of the three involving M.M. – and that these, together with Camden's

² This and all subsequent "Item" designations refer to the Record on Appeal.

indifference toward R.C. and his family,³ evinced an attempt to minimize the seriousness of the situation and avoid its broader implication as an indicator of problems with the basketball program's leadership and eligibility requirements. (Item 7, Letter to NJSIAA)

3. M.M. punched R.C. in the face. R.C. did not retaliate, but responded by trying to get away as M.M. continued to assault him. R.C. was rushed to the hospital, where he was found to have a broken nose and a cut requiring seven stitches. (Item 7, Letter to NJSIAA) M.M. was charged with aggravated assault. (Item 4, News Report)

4. The corrective action plan submitted by Principal Davis (Item 5) was in response to a letter from the NJSIAA, wherein Davis was asked to submit "the course of action which you plan to implement in addressing this situation." In the same letter, the NJSIAA noted that "quick and decisive action" by school administrators and police had limited the violence to the two students involved, that the incident in question was the "sole action of one Camden player," and that the NJSIAA was "confident that the administration of Camden High School [would] take the necessary and proper actions in dealing with this egregious action by this young man." (Item 3, Letter to Principal Davis) Upon receipt of Principal Davis's plan, the NJSIAA indicated that it would be reviewed by the Controversies Committee at the upcoming meeting of March 31. (Item 8, Letter to Principal Davis)

5. Principal Davis's plan had not been previously approved by the Board, which rejected it upon review as too severe and unjustly punitive toward players and personnel who had no role in the incident in question. At the Controversies Committee meeting, the Board proposed to submit instead a modified plan, most likely limited to action against M.M. (Item 10 at 106-109, Transcript of March 31 Hearing) In response to questioning regarding the Board's intentions with respect to Coach Turner, whose tenure was noted to have been marred by several serious incidents, the Board requested time to consider the issue and submit a plan at a later date. (*Id.* at 114-119, 121-22)

6. NJSIAA confirmed that the Controversies Committee would not make a final decision on Camden's corrective action plan until its May 16 meeting, before which it anticipated that the Board would advise as to "what steps it will take concerning the leadership of the basketball program at the school in the future." (Item 11 at 2, Letter to Counsel for Camden)

³ There is credible testimony on record that Camden school officials did contact the Deptford School District in an attempt to reach R.C.'s family to apologize and inquire about the young man's recovery, but were turned away as a result of Deptford's concerns about sharing R.C.'s personal information with unauthorized third parties. (Item 10, Transcript of March 31 Hearing, at 120-21)

7. In response, on May 9, 2006 the Board submitted a statement of position, wherein it vigorously argued that the "unfortunate incident" of March 7 was the sole responsibility of a single student, classified as Emotionally Disturbed and subject to "swift and wide mood swings," against whom appropriate action had been taken – in terms of both individual punishment and setting an example to the student body – in that he would be removed from school for the remainder of the year and deprived of participation in prom and graduation activities. Reference was made to news stories where: 1) M.M. claimed he thought R.C. was reaching for his hand to fight him, because he said "What, do you want to fight?" during the game, and M.M. and his family apologized; and 2) a Deptford Assistant Superintendent was quoted as urging that the entire Camden school and community not be blamed for the actions of one student. (Item 15, Letter Brief to NJSIAA at 1-3) The Board further argued that no action could properly be taken against Coach Turner as a result of this incident, since he violated no NJSIAA rule or bylaw, could not be held responsible for a student action completely out of his control – one which he neither incited nor instructed – and cannot be implicated in the present based solely on past transgressions for which he has already "served his time." (*Id.* at 4-6)

8. Consistent with its statement of position, the Board submitted to NJSIAA, on May 15, 2006, a corrective action plan consisting solely of removal of M.M. from Camden High School, placing him on homebound instruction for the remainder of the school year and precluding him from participating in any prom or graduation activities. (Item 16, Corrective Action Plan)

9. The Board had previously been advised that if it determined not to continue Coach Turner, he should be allowed to attend the May 16 hearing, with counsel, if he so chose (Item 11, April 25 Letter from Counsel for NJSIAA, at 2); however, upon learning that Camden did intend to continue Turner in his position, counsel for NJSIAA requested that he be produced at hearing. (Item 18, May 15 Letter from Counsel for NJSIAA) Coach Turner did not appear at the May 16 hearing due to "short notice." (Item 17, May 15 Letter from Counsel for Camden; Item 19, Hearing Sign-In Sheet)

10. At the hearing, NJSIAA framed the issue from its perspective as concern that there would be "no changes next year, no efforts made beyond what has been done up to the assault to deal with the whole issue of crowd control and violence***We'd like to zero in on***what steps are going to be taken to prevent this kind of occurrence in the future?" (Item 20, Transcript of May 16 Hearing, at 7-8) The Board responded that crowd control and violence were "not a part of this

incident,” and that, indeed, the district had been praised for its control of the situation once the assault occurred; thus, there were no issues of crowd or student body control before the Committee, and the severe punishment meted out to the individual student involved was the appropriate response on the part of the district. (*Id.* at 9-11)

11. The district’s sole witness – Athletic Director Mark Pease – testified that the assault was completely unforeseeable, but that his policy is to be prepared for any eventuality through the presence of police officers, who – in this instance – did, in fact, keep the incident from escalating beyond the two participants. He further testified to the importance he places on sportsmanship with his coaches and students, and to his respect for Coach Turner, with whom he has had no problems in the two years he has served as full-time Athletic Director. (Item 20, Transcript of May 16 Hearing, at 16-18, 24-25, 31-32, 37-38)

12. Under questioning from the Committee, Director Pease testified that, for reasons he cannot explain, he is generally left out of decision-making with respect to personnel issues affecting the basketball program (Item 20, Transcript of May 16 Hearing, at 25-26, 28-29), and that, although he is exploring ways of evaluating coaches, the district at present has no official written evaluation mechanism (*Id.* at 24).

Following the hearings on March 31 and May 16, 2006, the NJSIAA Controversies Committee issued a written decision on July 21, 2006 (Item 22) which made findings of fact as set forth above and concluded that the Camden team must be placed on probation for two years, during which time it would not be precluded from competition or qualification for the State championship, but would be required to submit specific progress reports and provide for Athletic Director attendance at appropriate NJSIAA seminars and workshops. It did so because – notwithstanding that the assault in question was found to be attributable solely to M.M., with Coach Turner, the team and Camden personnel having no responsibility for its commission – the NJSIAA deemed it clear from the record that tighter supervision of the Camden basketball program was necessary in light of its history of past problems, the Board’s overruling of the official (Principal Davis) responsible for the team’s activity under NJSIAA Bylaws, the absence

of mechanisms for supervising and evaluating coaching staff, and the limited-to-nonexistent involvement of the Athletic Director in the conduct of the program. (*Id.* at 5; see also Item 20, Transcript of May 16 Hearing, at 41-42)

Camden duly appealed the decision of the Controversies Committee to the NJSIAA Executive Committee, arguing that probation was not warranted because the team's past history could not be used to justify present punishment when there was no finding of violation of NJSIAA rules by any member of the Camden school administration or basketball team other than M.M. Thus, according to the Board, the decision wrongly punished individuals who were found by NJSIAA itself to have played no role in the incident in question. (Item 24, Letter-Brief of Appeal)

At the September 13, 2006 hearing of the Executive Committee, Camden consistently argued the impropriety of placing its basketball team on probation – regardless of how inconsequential some might have perceived that penalty to be – based on “past history in terms of incidences with Coach Turner” rather than on present facts. The Board proffered: “...in America, you have to define who did something wrong if you’re going to punish them***[and]*** in this particular situation, your Controversies Committee and everybody has said that [Camden High School, Coach Turner and Athletic Director Pease] did everything [they were] supposed to do” and that “the only person who did something wrong” was M.M., who was punished by the school district to a degree commensurate with the seriousness of his actions. (Item 26, Transcript of September 13 Hearing, quotations at 10-11) The Executive Committee was unpersuaded, voting unanimously (with one abstention) to adopt the decision of the Controversies Committee (*Id.* at 77), and stressing that the form of probation imposed in

this instance neither prevented team participation in games nor sanctioned any official, but was rather a constructive action aimed at ensuring greater communication and collaboration on the part of the Board, administration and athletic staff in their conduct of the basketball program. The Committee memorialized that decision in a letter of the same date. (Item 27)

CAMDEN'S POSITION ON APPEAL

On appeal before the Commissioner, Camden contends that the final decision of the NJSIAA must be overturned as arbitrary, capricious, unreasonable, and unsupported by substantial credible evidence in the record. Relying largely on arguments made throughout proceedings before the NJSIAA, Camden reiterates that there is neither evidence nor a finding that Camden High School violated any NJSIAA rule or regulation, and that past history cannot be used to find present fault or penalize innocent parties for the unapproved and unexpected acts of one individual. Indeed, the Board proffers, in order to affirm the NJSIAA's decision, the Commissioner "would have to find that the NJSIAA found fault in the entire Camden High School basketball program for the March 7, 2006 incident, essentially placing culpability of (*sic*) this vicious assault on each member of the Camden High School basketball program, its coach, or the school***, [which] review of the record [clearly] indicates***is not the case." (Camden's Brief at 7-8; see also 19-20)

Camden stresses that NJSIAA's own findings expressly exonerated Coach Turner, team members other than M.M., and district personnel from any responsibility for the assault or any violation of regulation, and that its own bylaws (Article IX, Section 3) state that "Unsportsmanlike conduct shall subject *the individual* to disciplinary action

[and the] member school with which the individual is associated may also be subject to disciplinary action if it is found that the member school's policies, actions, or failure to act, *substantially contributed to the individual's conduct.*" (emphasis supplied by Camden) Thus, according to Camden, in the absence of a determination that the school or its personnel instructed, provided policy or substantially contributed to a player's unsportsmanlike conduct – which in the case of M.M. was shown to be both unexpected and unpreventable – the school cannot be penalized for that individual player's actions, and the NJSIAA's decision to impose a two-year probationary period on the Camden team is both unsupported by the facts and contrary to NJSIAA regulation. (Camden's Brief at 9-12; see also 14-16, 19-20)⁴

The Board further contends that the NJSIAA improperly based its decision on the Camden team's past history rather than its present innocence, thereby violating the underlying intent of the New Jersey Rules of Evidence, *N.J.R. Evid.* 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith." According to the Board, this rule, which is reflected in decisional law clearly establishing that past wrongs cannot be admitted into evidence and used to prove a defendant's guilt of present charges,⁵ recognizes that, while past wrongdoing may be highly probative, it also encourages factfinders to ignore the facts and issues presently before them and rely instead upon information irrelevant to the current matter, as the NJSIAA did here in punishing

⁴ In support of its position on appeal, Camden additionally analogizes this matter to the case of *Nydegger v. Don Bosco Preparatory High School*, 202 N.J. Super. 535, 537 (Law Div. 1985), a tort matter wherein it was held that "in the absence of instruction by a coach to one of his players to commit a wrongful act...a coach is not responsible to a player on an opposing team who is injured," and to a recent incident in professional football where a star player was severely penalized for an on-field incident, while no other team members or personnel were punished. (Camden's Brief at 10-12)

⁵ The Board cites a number of criminal cases for this proposition. (Camden's Brief at 14)

individuals who played no part in the March 7, 2006 incident based solely on the team's past history. (Camden's Brief at 12-16; see also 19-20)

Finally, Camden argues that it acted properly in rescinding the unapproved corrective action plan submitted by Principal Davis and replacing it with a Board-approved plan that appropriately (and severely) penalized M.M. for his unacceptable actions without taking action against blameless personnel and team members. Notwithstanding the "confusing" language of NJSIAA bylaws with regard to the role of the principal in district athletic programs, the Board avers, *N.J.S.A.* 18A:10-1 and 18A:11-1 make it clear that the district board of education is the ultimate authority in matters of operating district schools and enforcing and maintaining State regulations, policies and resolutions, including those of the NJSIAA where the board has voted to participate in that organization. Thus, Camden concludes, Principal Davis erred in submitting a plan without Board approval, and the Board exercised its lawful authority in overriding his determination based on its own finding that M.M. was the sole responsible party and that NJSIAA regulations required no corrective action other than appropriate sanction of M.M. (Camden's Brief at 16-18; see also 19-20)

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 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; *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 demonstration by the petitioner that the Association applied such 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); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute his or her own judgment for that of the NJSIAA, even if he or she 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).

This standard has been codified to provide clear notice to the public and regulated parties:⁶

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:3-7.5(a).

The New Jersey courts have also spoken as to the narrow scope of "arbitrary, capricious, or unreasonable" in the context of challenges such as that herein:

⁶ See 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

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't. Protection*, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), *aff'd* 131 N.J. Super. 37 (App. Div. 1974).

Thus, the Board in this matter bears a heavy burden, and, upon careful consideration of the record in light of the prescribed standard of review, the Acting Assistant Commissioner cannot find that the NJSIAA action here at issue should be overturned as unreasonable or unsupported by credible evidence. To the contrary, the Acting Assistant Commissioner is satisfied that the decision of the NJSIAA to place the Camden High School basketball team on two years' probation as a result of the incident at the South Jersey Group III boys' basketball championship contest on March 7, 2006 was a reasonable exercise of the Association's authority and its responsibility for oversight of interscholastic athletic activity statewide, undertaken after affording full due process to the Board and grounded in the undisputed facts at hand.

While the Board persists in characterizing the NJSIAA's action as an unwarranted punishment of innocent students and staff and an impermissible finding of present guilt based on past transgressions, it is clear that the Association's purpose in imposing a two-year period of required reporting was not to punish individuals, but rather to compel the Camden Board -- which consistently took the stance that it did not have a problem beyond the bad behavior of one student -- to work constructively with the Association in addressing demonstrated flaws and gaps in the supervision and operation of its basketball program. All of these -- the lack of communication and cooperation

between the Board and Principal, the circumscribed role of the Athletic Director, and the absence of a formal system of supervision and evaluation with clear expectations as to the duties of coaching staff – had been identified in the present proceeding, and all were likely to have enabled in whole or part the incident of March 7 and the Board's limited reaction to it.

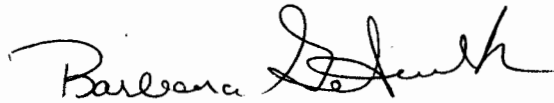
For instance, it is uncontroverted that a student was admitted to the team whose disability can have behavioral manifestations. Yet there was no policy that the team's coach – a teaching staff member – be required to read the student's IEP to determine whether there was relevant information regarding possible behavior, or strategies to address such behavior. This is quite apart from the very different question of whether onsite officials would be able to maintain crowd control – as they fortunately were here – and prevent further injuries once an incident had occurred. Nor did the Board give any indication that it intended in any way to reconsider its practices and procedures in light of the March 7 incident and the NJSIAA's obvious concerns regarding it, nor to better integrate the Athletic Director and High School Principal – key local officials in matters involving interscholastic athletic activity – into future decisions about the operations of the basketball team.

Given its responsibility to do everything possible to ensure the safety and good sportsmanship of student athletes, as well as staff and spectators, it was not at all unreasonable – given the facts educed at hearing and faced with Camden's insistence that nothing needed to change – for the NJSIAA to take the position that systemic adjustments were needed in the supervision of the Camden basketball program and to direct that the district report regularly to the Association on its progress in this regard. While awareness

that the district had a history of past problems clearly factored into the decisions of both the Controversies Committee and the Executive Committee, it is equally clear that such awareness was not the determinative basis for them.

Accordingly, the Camden Board of Education having failed to sustain its burden of establishing that the NJSIAA's decision in this matter was arbitrary, capricious, unreasonable, or contrary to law, the Acting Assistant Commissioner upholds that decision and dismisses the Petition of Appeal.

IT IS SO ORDERED.⁷



ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Mailing: 12/28/06

Date of Decision: 12/28/06

⁷ This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.5

OAL DKT. NO. EDU 969-05
AGENCY DKT. NO. 38-2/05

H.T., on behalf of minor children, A.T. AND I.T., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF EWING, MERCER COUNTY, :
RESPONDENT. :
_____ :

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

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/05

Date of Mailing: 8/18/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 969-05

AGENCY DKT. NO. 38-2/05

**H.T., ON BEHALF OF MINOR
CHILDREN, A.T. AND L.T.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, MERCER
COUNTY,**

Respondent.

H.T., petitioner, *pro se*

Jeffrey F. Belz, Esq., for respondent

Record Closed: July 28, 2005

Decided: August 1, 2005

BEFORE STEPHANIE M. WAUTERS, ALJ:

This matter was transmitted to the Office of Administrative Law on March 10, 2005 for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

August 1, 2005
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

8-3-05
DATE

M. Kathleen Duncan /ch
DEPARTMENT OF EDUCATION

AUG 4 2005

DATE

Mailed to Parties:

Stephanie M. Wauters
CLERK AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

H.T. O/B/O A.T. + I.T.

v.

Eriny Bee

CAL Packet No.: EP405 00969-2005

Agency Ref. No.: 38-2/05

Settlement Agreement

This matter having come before the Honorable Stephanie M. Winters on a Pro Se Residency Appeal, and the parties having reached a settlement on the date of hearing, It is hereby agreed as follows on July 28, 2005:

- 1) The petitioner's father, Dean Tye, agrees to move back into his mother's house with his two children, A.T. + I.T. by October 1, 2005.
- 2) Petitioner, H.T., agrees to allow Dean Tye, his fiancée, and A.T. and I.T. to move back into her Eriny residence.
- 3) Petitioner shall provide sufficient proof to demonstrate that D.T. and A.T. and I.T. have moved back into ^{her} residence, including written proof from D.T.'s current landlord.
- 4) Eriny Bee agrees to withdraw its counterclaim for removal of the students and for division ~~of the property~~ without prejudice. Petitioner withdraws her Petition.

Jeffrey Tye
Jeffrey Tye

Ida Hazel Tye
Ida Hazel Tye

Dean Tye
Dean Tye

OAL DKT. NO. EDU 1915-04
AGENCY DKT. NO. 475-12/03

GEORGE WATSON, JR., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
MARION P. THOMAS CHARTER SCHOOL, : DECISION
KAREN THOMAS,
DELORES A THOMPSON, MS. BOLES :
AND THE BOARD OF TRUSTEES OF THE
MARION P. THOMAS CHARTER SCHOOL, :
RESPONDENTS.
_____ :

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

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

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/05

Date of Mailing: 8/18/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 1915-04
AGENCY DKT. NO. 475-12/03

GEORGE WATSON, JR.,

Petitioner,

v.

**MARION P. THOMAS CHARTER
SCHOOL, KAREN THOMAS,
DELORES A. THOMPSON, MS. BOLES
AND THE BOARD OF TRUSTEES OF THE
MARION P. THOMAS CHARTER SCHOOL,**

Respondents.

George Watson, Jr., petitioner, *pro se*

Charles I. Auffant, Esq., for respondent

Record Closed: July 26, 2005

Decided: August 1, 2005

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

On or about December 31, 2003, petitioner, George Watson, Jr., filed a petition of appeal with the Commissioner of Education, alleging that he was improperly terminated from employment in violation of state and federal laws against discrimination. He further alleged harassment and the violation of various education laws. On or about January 23, 2004, respondents filed an answer denying the

allegations and asserting that the Commissioner of Education lacked jurisdiction to hear this matter. Petitioner filed an amended petition of appeal on February 9, 2004, and respondents filed an answer on March 3, 2004. On March 1, 2004, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The matter was assigned to the undersigned on April 5, 2004, and a telephone prehearing conference scheduled for June 7, 2004. The prehearing conference was held on June 8, 2004, at which time the issues were discussed. During a telephone conference on July 13, 2004, a settlement conference was scheduled for July 30, 2004. The scheduled settlement conference was adjourned to August 3, 2004 because petitioner was hospitalized. On that day, the parties agreed to settle this matter and petitioner signed the Stipulation of Settlement and Release. Despite repeated requests to respondents for the signed agreement, it was not filed and, thus, the case was scheduled for a hearing on July 26, 2005 at the OAL. On that date, counsel for respondents appeared and signed the Stipulation on behalf of all respondents as their representative. He also advised that petitioner had recently died and that he had been in contact with petitioner's son, who is the executor of the estate. He agreed that the estate would receive the \$3,000 payment provided in the Stipulation, if the payment had not previously been made to petitioner. However, it is clear that the Stipulation of Settlement and Releases have been signed by all the necessary parties and resolve this matter.

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

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 1, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

August 4, 2005
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 4 2005
DATE
al

James P. Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW COUNSEL
OFFICE OF ADMINISTRATIVE LAW

Rutgers Community Law Clinic
123 Washington Street
Newark, New Jersey 07102
(973) 353-5059
Attorneys for Defendant

GEORGE WATSON, JR.

Plaintiff,

vs.

MARION P. THOMAS CHARTER
SCHOOL, KAREN THOMAS,
DELORES A. THOMPSON, MS. BOLES,
THE BOARD OF TRUSTEES

Defendants.

: BEFORE THE COMMISSIONER OF
: EDUCATION, STATE OF NEW JERSEY
:
: AGENCY DOCKET NO. 475-12/03
: OAL DOCKET NO. EDU 1915-04

: **STIPULATION OF SETTLEMENT**
: **AND**
: **RELEASE**
:
:
:
:
:

It is agreed by and among George Watson (referred to as " Mr. Watson"), the Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School that this matter shall be settled upon the following terms:

1. The parties agree to the following in settlement of all claims, including claims for attorneys' fees, which Mr. Watson may have against the defendants, their present and former members, officers, employees, agents and/or representatives, successors and the estates and/or heirs thereof, their insurers and re-insurers:

A. Marion P. Thomas Charter School will pay Mr. Watson Three Thousand Dollars (\$ 3,000.00) within five business days from the receipt of the decision of the Commissioner of Education. Mr. Watson agrees that if it is determined that taxes, penalties or interest are due from him or the Board on this amount or any portion thereof, he will be solely responsible for payment of same.

B. Mr. Watson will withdraw his case against defendants and file a voluntary dismissal with prejudice in OAL Docket # EDU 1915-04

C. Mr. Watson will withdraw his case against defendants and file a voluntary dismissal with prejudice in the matter he filed with the Public Employees Relations Committee (PERC) Docket # CI-2004-038

D. Defendants will supply Mr. Watson with a letter stating that his employment record has been adjusted to reflect that he was in good standing at the time of his termination.

E. Mr. Watson will execute a General Release and Waiver in favor of all defendants ("General Release"), in the form annexed as Attachment A, and an Acknowledgment in the form annexed as Attachment B. Mr. Watson expressly acknowledges that this Agreement and the General Release are intended to extinguish all known claims which he may have against any person or entity identified as a Releasee in the General Release, resulting from anything which has happened up to the date of execution of the General Release and which were or could have been asserted in George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, Docket No. EDU 1915-04

F. Notwithstanding any provision in this Agreement, Mr. Watson does not release or waive any claim, cause of action, or right to sue arising after this Agreement and General Release are executed by her, and which may arise under the terms of this Agreement, or arising from any right to vested pension benefits that Mr. Watson may have.

The Marion P. Thomas Charter School shall pay to the N.J. State Teachers' Pension and Annuity Fund (N.J.S.A. 18A:66-32, employers duties), the required amount for Mr. George Watson, Jr., a member of the plan, of employer's contribution based on his earned salary prior to termination.

2. The parties and their attorneys agree that, except as expressly provided below, each of them will keep confidential the terms of this settlement. It is further agreed that the parties and their attorneys may state only that the matter "was concluded" or "was settled".

3. It is understood that neither the execution of this Agreement nor any other action taken by the Defendants in connection with this settlement constitutes an admission by the Defendants or any person or entity identified herein or in the General Release as a Releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to Mr. Watson's employment was unwarranted. The parties have entered into this Agreement solely to compromise disputed claims. No findings of fact have been made or issued by the Court on the merits of the claims in this action, and no party purports to be the prevailing party in this action.

4. The Defendants, their agents, officers and/or employees agree to provide any prospective employer of Mr. Watson with a neutral reference verifying only his employment dates and his rate of pay.

5. This Agreement and the General Release and Acknowledgment referred to herein set forth the entire agreement between Mr. Watson and the Defendants. This Agreement supersedes any and all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement.

6. All parties and their counsel participated in the negotiations and drafting of the Agreement as equals. No particular party shall be deemed to be the drafter of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the remaining portions shall remain fully valid and enforceable. This Agreement shall survive the termination of any arrangements contained herein.

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

Marion P. Thomas Charter School

Charles A. Huffart
By: Charles A. Huffart

Dated: 7/26/05

George Watson
GEORGE WATSON

Dated: 8/3/2007

for Charles A. Huffart
Karen Thomas

Dated: 7/26/05

for Charles A. Huffart
Delores A. Thompson

Dated: 7/26/05

for Charles A. Huffart
Ms. Boles

Dated: 7/26/05

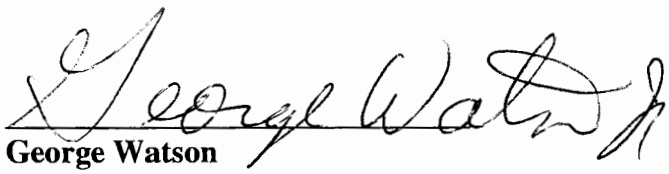
ATTACHMENT A

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings set forth in the attached Settlement Agreement, I release and discharge the Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles and The Board of Trustees of the Marion P. Thomas Charter School and their present and former officers employees, agents and/or representatives, successors, and the estates and/or heirs thereof, their insurers and re-insurers (hereafter the "Releasees"), from any and all claims which I, my estate and/or heirs has or may have against any of them. This releases all known claims, including claims for attorneys' fees, which were or could have been asserted in the action entitled George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, OAL Docket No. EDU 1915-04 and George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, PERC Docket No. CI-2004-038. I hereby promise not to commence or pursue, or authorize anyone to commence or pursue on my behalf, any action, legal or administrative, or otherwise seek to recover any damages, remedy or relief of any kind from any Releasee based upon any claim covered by this General Release and Waiver.

Without limiting the scope of the foregoing provision in any way, I specifically release all claims which were or could have been asserted in either of the above entitled actions filed in the New Jersey Office of Administrative Law Docket No. and the Public Employees Relations Commission Docket # . I also release all claims relating to or arising out of any aspect of my employment with the Board or the termination thereof including, but not limited to all claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866; 42 U.S.C. 1981, 1982, 1983 and 1985; The Civil Rights Act of 1991; The

Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. and specifically §626; The Americans With Disabilities Act; The Employee Retirement Income Security Act of 1974; The Rehabilitation Act; The Worker Adjustment and Retraining Notification Act; The Family and Medical Leave Act; The Equal Pay Act; The New Jersey Conscientious Employee Protection Act; The New Jersey Law Against Discrimination; New Jersey Workers' Compensation Act; The New Jersey Family Leave Act; any contract of employment, express or implied; any provision of the Constitutions of the United States or the State of New Jersey; and all federal, state and local law claims, whether statutory or common law, including but not limited to, claims of personal injury, unlawful discharge of employment, workplace harassment or discrimination on the basis of gender, race, color, religion, national origin, age, disability or handicap, marital status, sexual orientation or veteran's status; and any other law, common or statutory, of the United States, the State of New Jersey or any other State; and all claims growing out of any legal restrictions on the Boards right to terminate its employees.

 Dated: 8/3/2004
George Watson

STATE OF NEW JERSEY

:
: SS

COUNTY OF _____ :

I certify that on _____, 2004, George Watson personally came before me and acknowledged under oath, to my satisfaction that he is named in and personally signed this document.

Notary Public

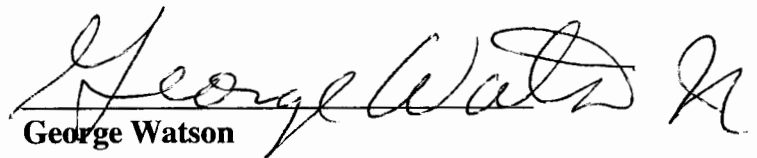
ATTACHMENT B

ACKNOWLEDGMENT

I have carefully read, fully understand and agree with the terms and conditions of this settlement agreement, release and waiver. I acknowledge that I had the opportunity and was advised by the Charter School and its attorney to review this settlement agreement, release and waiver with my attorney and to discuss with such person the terms and conditions thereof, as well as my rights upon execution. I agree and acknowledge that neither the Charter School nor its representatives made any representations concerning the terms or effect of this settlement agreement, release and waiver other than as set forth in the document and that I have voluntarily signed this settlement agreement, release and waiver as my own free act with full knowledge of its terms and conditions, which are final and binding upon me.

Dated:

8/3/2004


George Watson

STATE OF NEW JERSEY

:
: SS

COUNTY OF _____:

I certify that on _____, 2004 George Watson personally came before me and acknowledged under oath, to my satisfaction that he is named in and personally signed this document.

Notary Public

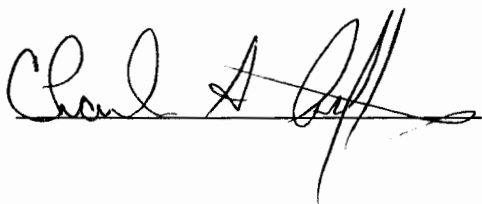
ATTACHMENT 6

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings set forth in the attached Settlement Agreement, I release and discharge George Watson, agents and/or representatives, successors, and the estates and/or heirs thereof, (hereafter the "Releasees"), from any and all known claims, including claims for attorneys' fees, which were or could have been asserted in the action entitled George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, OAL Docket No. EDU 1915-04 and George Watson v. Marion P. Thomas Charter School, Karen Thomas, Delores A. Thompson, Ms. Boles, The Board of Trustees of the Marion P. Thomas Charter School, PERC Docket No. CI-2004-038. I hereby promise not to commence or pursue, or authorize anyone to commence or pursue on my behalf, any action, legal or administrative, or otherwise seek to recover any damages, remedy or relief of any kind from any Releasee based upon any claim covered by this General Release and Waiver.

Without limiting the scope of the foregoing provision in any way, I specifically release all claims which were or could have been asserted in either of the above entitled actions filed in the New Jersey Office of Administrative Law Docket No. and the Public Employees Relations Commission Docket # . I also release all claims relating to or arising out of any aspect of my employment with the Board or the termination thereof including, but not limited to all claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866; 42 U.S.C. 1981, 1982, 1983 and 1985; The Civil Rights Act of 1991; The Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. and specifically §626; The Americans With Disabilities Act; The Employee Retirement Income Security Act of 1974; The Rehabilitation Act; The Worker Adjustment and Retraining Notification Act; The Family and Medical Leave Act; The Equal

Pay Act; The New Jersey Conscientious Employee Protection Act; The New Jersey Law Against Discrimination; New Jersey Workers' Compensation Act; The New Jersey Family Leave Act; any contract of employment, express or implied; any provision of the Constitutions of the United States or the State of New Jersey; and all federal, state and local law claims, whether statutory or common law, including but not limited to, claims of personal injury, unlawful discharge of employment, workplace harassment or discrimination on the basis of gender, race, color, religion, national origin, age, disability or handicap, marital status, sexual orientation or veteran's status; and any other law, common or statutory, of the United States, the State of New Jersey or any other State; and all claims growing out of any legal restrictions on the Boards right to terminate its employees.



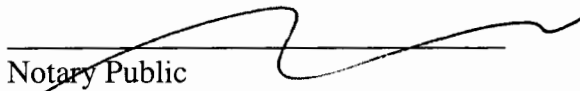
Dated: 7/26/05

STATE OF NEW JERSEY

:
: SS

COUNTY OF _____ :

I certify that on _____, 2004, George Watson personally came before me and acknowledged under oath, to my satisfaction that he is named in and personally signed this document.


Notary Public

Rutgers Community Law Clinic
123 Washington Street
Newark, New Jersey 07102
(973) 353-5059
Attorneys for Defendant

GEORGE WATSON, JR. : STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Petitioner,

: DOCKET NO. CI-2004-038

VS.

MARION P. THOMAS : STIPULATION OF DISMISSAL
CHARTER SCHOOL WITH PREJUDICE

Respondent

IT IS hereby stipulated by and between the parties hereto that the above captioned matter be and is hereby **DISMISSED** with Prejudice and without costs. .


George Watson


Charles I. Auffant

Dated:

8/4/2004

123 Washington Street
Newark, New Jersey 07102
(973) 353-5059
Attorneys for Defendant

Defendants.

DISMISSAL WITH PREDJUDICE


George Watson

Charles I. Auffant

Dated:

8/3/2004

HOWARD <u>SOLOMON</u> ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
PASSAIC COUNTY EDUCATIONAL	:	DECISION
SERVICES COMMISSION,	:	
PASSAIC COUNTY	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Former Superintendent of Passaic County Educational Services Commission (ESC) contended, among other allegations, that he was improperly terminated from employment in contravention of statute and the parties' contractual agreement. Petitioner claimed, *inter alia*, entitlement to automatic renewal because the ESC did not provide two years' notice of its intent not to renew his employment as required by contract. The ESC argued that the contractual two-year notice provision was invalid and that it had complied with the one-year statutory requirement.

In May 2004, the ALJ issued an order granting partial summary decision in favor of petitioner on the question of the two year notice provision in the contract, concluding that it was valid and enforceable pursuant to N.J.S.A. 18A:17-20. Although petitioner has been reinstated to his position as of January 3, 2005, the ALJ found that he was improperly and prematurely terminated from his employment from July 1, 2003 through this date. The ALJ ordered that: the petitioner be immediately reappointed, retroactively, to a new five year term commencing July 1, 2003; and the ESC pay petitioner any back pay due under the terms of the new retroactive contract, including all benefits and emoluments to which he is entitled.

Upon careful review and consideration of the record, the Commissioner concurs with the ALJ that petitioner is entitled to retroactive employment as Superintendent – along with back pay, benefits and emoluments – as a consequence of the renewal of his employment contract, by operation of law, for the period July 1, 2003 through June 30, 2008, and adopts the Initial Decision with the following modification: payment to the petitioner shall be subject to offset by any income received from substituted employment and/or unemployment compensation during the term at issue. Commissioner found no support for the granting of pre- or post-judgment interest.

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 22, 2005

OAL DKT. NO. EDU 9721-02
 AGENCY DKT. NO. 294-9/02

HOWARD SOLOMON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
PASSAIC COUNTY EDUCATIONAL	:	DECISION
SERVICES COMMISSION,	:	
PASSAIC COUNTY	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, Passaic County Educational Services Commission (ESC), were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and fully considered by the Commissioner in making his determination herein. Due to a substitution of attorney,¹ petitioner requested and was granted an extension of time, until Monday, August 8, 2005, within which to file reply exceptions. Although petitioner's reply exceptions were dated August 8, they were not *filed* with the agency until August 9, 2005, thereby rendering them untimely. (*N.J.A.C.* 1:1-18.4) Consequently, this submission was not considered herein.

Exceptions of the ESC essentially recast and reiterate its arguments advanced since the inception of this matter, *i.e.*, that since the ESC provided the minimally required notice pursuant to *N.J.S.A.* 18A:17-20, thereby satisfying the statutory requirement, and because automatic employment was not specified in the contract as a remedy for violation of the contractual 2-year notice provision, the ESC is not obligated to abide by the statutory

¹ By letter and advisement of Substitution of Attorney, dated August 1, 2005, Fiona M. Kolvek, Esq. reported that she had taken over representation of petitioner in this matter from withdrawing attorney, Joseph R. Morano, Esq.

requirement for reappointment. Again, it charges that to find to the contrary ignores “well established law prohibiting courts from rewriting better contracts for parties.” (ESC’s Exceptions at 4) Finding this argument to have been fully considered and resolved by the Administrative Law Judge (ALJ) in her prior Partial Initial Decision in this matter, which was clarified and adopted by the Commissioner and the State Board, and *again* clearly explained and resolved in the instant Initial Decision, the Commissioner finds any additional discussion on this issue unwarranted.

The ESC further objects to the ALJ’s failure to address the question of mitigation.

In this regard it proffers:

[r]espondent’s papers and oral argument noted that even though petitioner claimed that he is a highly qualified and experienced superintendent, petitioner did not present the Court with any evidence of mitigation. Despite the lack of mitigation evidence, the July 15, 2005 decision not only fails to address this point, but the decision also fails to adjust petitioner’s damages.
(ESC’s Exceptions at 4)

Upon careful review and consideration of the record in this matter, the Commissioner concurs with the determination of the ALJ that petitioner is entitled to retroactive employment as Superintendent of Schools – along with back pay, benefits and emoluments – as a consequence of the renewal of his employment contract, by operation of law, for the period July 1, 2003 through June 30, 2008. The Initial Decision is, therefore, adopted, as modified below.

Initially, although the ALJ’s decision indicates that oral argument was conducted in this matter (Initial Decision at 2), presumably – at a minimum – to elicit testimony with respect to the issue of petitioner’s mitigation of damages, the Initial Decision contains no discussion, nor does the record provide any details, on this topic. In this regard, the

Commissioner observes that petitioner claims entitlement to back pay as a consequence of his improper termination pursuant to *N.J.S.A.* 18A:6-30, which specifies:

Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension***.

The court in *Mullen v. Board of Education of Jefferson Township*, 81 *N.J. Super.* 151 (App. Div. 1963), in reviewing *N.J.S.A.* 18:5-49.1, the precursor to this statutory provision, found that “the Legislature must be taken as having meant that all claims made by illegally dismissed persons under [this statute] be subject to the common law rule of mitigation of damages, in light of the plain meaning carried by the word ‘compensation’,” such being the case because damages under this statute have been determined to be “compensatory” in nature and, thus, an individual should not be awarded more damages than actually sustained. (at 159) Therefore, under common law principles, the within petitioner was under a duty to mitigate his damages during the period of his improper termination by making reasonable efforts to secure alternative employment, notwithstanding that he was improperly terminated from his position. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 *S.L.D.* 759; *White v. Township of North Bergen*, 77 *N.J.* 538 (1978); *Miele v. McGuire*, 31 *N.J.* 339 (1960). Petitioner’s obligation in this respect is not conditioned on any action on the part of the Board or any other individual or entity involved in adjudication of the case in chief. Consequently, the Commissioner finds and determines that the Board is entitled to offset from petitioner’s award any money he received from alternative employment and/or unemployment compensation during the period of his illegal termination,² thereby according petitioner the full

² Although the Board is entitled to offset petitioner’s monetary award by any unemployment compensation he may have received, it has an obligation, pursuant to *N.J.S.A.* 43:21-5(b), to reimburse the Department of Labor any monies so offset.

measure of his *actual* damages. To find otherwise would violate public policy as petitioner would be provided compensation in excess of his economic loss at public expense. However, while it is without doubt that the amount of petitioner's award must be reduced by his actual earnings during the time of his improper removal, (*Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19 (1981)), it is, likewise, well settled that a charge of *failure to mitigate*, which apparently is the crux of the Board's charge here, is an affirmative defense and the burden to demonstrate such failure rests with the employer. See *Goodman*; *Zielenski*, *supra*. It is not sufficient for an employer to merely raise lack of mitigation as an issue. As stated in *Cartin v. Continental Homes of New Hampshire*, "Such burden [of failure to mitigate] is not met by merely arguing the possibility and, absent concrete evidence, the issue is merely speculative." 360 A. 2d. 96, 134 Vt. 362 (1976) (*Zielenski* at 764) Rather, as stated by the Supreme Court in *Goodman*, *supra*,

Mitigation *** is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer, in this case the employer *** [who] may establish a prima facie case by first showing that comparable employment opportunities were available and, *** that there were other suitable [available] jobs ***. (at 40-41)

Here, the Commissioner notes that the Board raised the question of failure to mitigate in its papers below but failed to sustain its burden under the *Goodman* case by bringing forth facts serving to demonstrate that comparable job opportunities were available to petitioner in similar types of employment, with reasonable and diligent efforts. Thus, the Board cannot now complain that it was denied a favorable ruling on this issue.

Finally, the Commissioner declines to grant petitioner's request for interest in this matter. With respect to pre-judgment interest, the Commissioner concludes that the record before him does not support a finding that respondent's actions were taken in bad faith or in

deliberate violation of the law (*N.J.A.C.* 6A:3-1.17(c)1). As to post-judgment interest, such a request is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders his decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)2).

Accordingly, the Initial Decision of the OAL, as modified above, is adopted as the final decision in this matter.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9721-02

AGENCY DKT. NO. 294-9/02

HOWARD SOLOMON,

Petitioner,

v.

PASSAIC COUNTY EDUCATION

SERVICES COMMISSION,

Respondent.

Joseph Morano, Esq., appearing for Petitioner
(Viola, Benedetti & Azzolini, LLC, attorneys)

Anthony Sciarrillo, Esq., appearing for Respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: April 16, 2005

Decided: July 15, 2005

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

Petitioner, Howard Solomon contends Respondent, Passaic County Educational Services Commission, improperly and prematurely terminated his employment as superintendent in contravention of law and the parties' agreement.

On November 27, 2002, the Department of Education transmitted the matter to the 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*.

Respondent applied for summary decision; Petitioner filed a cross application. On May 10, 2004, I entered an order granting partial summary decision in favor of Petitioner and denying the application of Respondent. That order concluded the two year notice provision contained in the contract between these parties was valid and enforceable. The Commissioner affirmed that determination on June 24, 2004; the State Board affirmed the determination of the Commissioner.

The parties then sought resolution of the remaining issues in the matter. To that end, on January 16, 2005, Petitioner filed an application for summary decision. Respondent replied and made a cross application for summary disposition. In addition, Respondent requested oral argument and, over the objections of Petitioner, the request was granted.

At the time of oral argument, I requested the parties to file further submissions and the record closed on April 16, 2005 upon my receipt and review of those submissions. The forty-five day period to issue an initial decision expired on May 31, 2005. During the months of April and May, I was assigned a number of cases which carry statutory deadlines for hearing and disposition, including two special education cases requiring multi-day hearings and a teacher tenure case. Accordingly, I requested and received an extension of time to file this decision until July 15, 2005.

FINDINGS OF FACT

In granting Petitioner's application for partial summary decision, I made specific findings of fact which are set forth in full in the order. Those findings of fact are incorporated into this initial decision and made a part hereof as if they were set forth in full.

In addition, based on the record before me I make the following additional findings of fact in this matter.

1. Petitioner has been reinstated to his position as Superintendent of Passaic County Educational Services Commission as of January 3, 2005.
2. Petitioner, Dr. Solomon, was improperly and prematurely terminated from his employment in contravention of both the statute and the agreement of the parties.¹

ANALYSIS AND CONCLUSIONS

Summary decision is appropriate when the papers and discovery, together with any affidavits in support or against the application, show there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. When an application is made and supported, an adverse party must set forth specific facts showing there is a genuine issue, which can only be determined in an evidentiary proceeding. *N.J.A.C. 1:1-12.5*. In this case, the parties have made cross applications. There are two issues to be resolved. The first is whether the provision in the contract providing for an automatic one year extension of the contract to include the 2003-04 school year is valid. The second is whether the Petitioner is entitled to a new contract for the same duration as the previous one.

Turning first to the issue of the extension of the previous contract to include the 2003-04, as Petitioner correctly notes, the Commissioner of Education has determined that automatic extensions, such as the one here, for one year, are illegal and have no force or effect on the remainder of the contract. *John Howard, Jr., v. Bd. of Educ. of East Orange*, C.#176-01 (June 5, 2001) (slip op. at 16), *aff'd* State Bd. of Educ. (November 7, 2001), *aff'd* Superior Court, App. Div. Dkt. No. A-1699-01T1 (unpublished) (October 11, 2002).

¹ Although I did find Respondent was in compliance with the statutory notice requirement, for the reasons set forth in full in this decision, that compliance does not affect the ultimate determination of the issues herein.

I take note of Respondent's assertion that unpublished decisions are not binding; they are, however, persuasive. In this case, the provision permits the addition of one year to a five year contract unless the Board notified the Superintendent before June 30, 1999. The operative statute provides a board may only appoint a superintendent by contract for a minimum of three years and a maximum of five years. *N.J.S.A. 18A:17-15*. Since Petitioner already enjoys a five year contract, extending it for one year is impermissible under the specific language of the statute. For the same reason, the assertion that the extension operated as a separate, new contract must also fail. Accordingly, I **CONCLUDE** the one year extension provision is invalid.

The savings clause contained in the contract provides protection for the remainder of the contract.

Turning now to the other issue to be resolved, *i.e.*, whether the Petitioner is entitled to an automatic reappointment of the same duration as the previous contract. Petitioner, the applicant herein, asserts the determination that the two year notice provision is valid and enforceable entitles him to a new contract for the same duration as the previous one, pursuant to the statute. Furthermore, he seeks a determination that he is entitled to back pay, benefits and emoluments of employment, including interest.

Respondent, on the other hand, continues to assert that Petitioner is not entitled to employment beyond June 30, 2003, the expiration date of his employment contract and, consequently, since he is not entitled to employment beyond that date, he is not entitled to receive back pay, benefits, or other emoluments for the same period. In support of its position, Respondent contends the court should not invoke the statutory remedy because Respondent did not breach the statute and the court cannot write a better contract for the parties.

The crux of Respondent's position is, apparently, the finding of fact in the order of May 2004 that the Commission had complied with the statutory one year notice

requirement. Since, according to the position of the Respondent, the contract in question is silent on the remedy for failure to provide the notice provided for in the contract and Respondent has not breached the statute, the statutory remedy of automatic renewal subject to the same terms, conditions and duration as the preceding contract should not be invoked.

This position completely ignores not only the determination of this court, but the determination of the Commissioner and the State Board affirming this court's conclusion. In determining to adopt the Partial Initial Decision in this matter, the Commissioner states:

. . . , the operative statute provides a *nonnegotiable framework* requiring *both* notice to the superintendent *and* reappointment to the superintendency upon the board's failure to provide it; all that is left to contractual agreement is *how much* more than one year's notice the parties may additionally choose to require. Given the plain language of the statute, it is disingenuous to argue that, since the ESC *did* give petitioner the minimally required *statutory* notice and automatic reemployment was not specified in the contractual agreement, the ESC is under no obligation to honor the statutory requirement for reappointment; . . . ² (Emphasis in the original).

The language of the Commissioner's decision is clear and unambiguous; the statute requires notice *and* reappointment to the superintendency upon the board's failure to provide to that notice. Moreover, clearly, the Commissioner dismissed as disingenuous the argument that since ESC did provide the minimally required notice and automatic reemployment was not specified in the contract, Respondent is under no obligation to honor the statutory requirement for reappointment.

Accordingly, I **CONCLUDE** Petitioner is entitled to employment under a contract of the same duration as the contract at issue here. The duration of that contract was five years and the termination date was June 30, 2003. Accordingly, I **FIND** Petitioner is entitled to retroactive employment under a contract which commenced on July 1, 2003

² Commissioner's Decision, pp. 9-10.

and continues for five years thereafter. I further **CONCLUDE**, therefore, Petitioner is entitled to back pay and *all* benefits and emoluments accruing to him pursuant to the contract of employment under which he was serving at the time Respondent improperly terminated his employment.

ORDER

I hereby **ORDER** Petitioner be and hereby is immediately reappointed, retroactively, to a new term commencing on July 1, 2003 and continuing for five years, to June 30, 2008, pursuant to the same terms and conditions as contained in the previous contract. I further **ORDER** Respondent to pay Petitioner any and all back pay due under the terms of the new, retroactive contract, and, further to ascribe to him all benefits and emoluments accruing to him pursuant to the contract of employment under which he is serving.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 15, 2005
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

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

July 15, 2005
DATE

JUL 18 2005
DATE
jb

Mailed to Parties:

Laure Sanders
DEPUTY AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

<u>N.G.</u> , on behalf of minor children, G.G., G.G.,	:	
AND V.G.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF WEST ORANGE, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that her children, G.G., G.G. and V.G., were not eligible for a free education in the Township of West Orange School District. Respondent Board filed an answer to the petition, and asserted a counterclaim for payment of tuition by petitioner to the District for the unlawful attendance of the minor children during the 2004-2005 school year. Petitioner subsequently failed to appear at the scheduled OAL hearing, offering no explanation.

The ALJ concluded that the petitioner, by virtue of her failure to appear at hearing, failed to carry her burden of proof, and therefore that the Board is entitled to tuition in the amount of \$14,633, representing the pro-rated tuition fee for the period of ineligible attendance of her three children, September 8, 2004 to January 13, 2005. The ALJ ordered the petition dismissed with prejudice.

The Commissioner adopts the Initial Decision of the OAL in this matter 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.

August 22, 2005

OAL DKT. NO. EDU 1131-05
 AGENCY DKT. NO. 403-11/04

N.G., on behalf of minor children, G.G., G.G.,
 AND V.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP
 OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner, who did not appear for the hearing in this matter, has failed to carry her burden of proof that G.G., G.G. and V.G. are entitled to a free public education in the West Orange Township School District. The Commissioner further agrees with the grant of the Board of Education's counterclaim for tuition in the amount of \$14,633.00 for the 80 days of G.G., G.G. and V.G.'s ineligible attendance in the schools of the West Orange Township School District from September 8, 2004 to January 13, 2005.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

Richard Rosenberg
 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05

* 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.*



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1131-05

AGENCY DKT. NO. 403-11/04

**N.G. ON BEHALF OF MINOR
CHILDREN, G.G., G.G., AND V.G.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,**

Respondent.

No appearance by or on behalf of petitioner

Stephen J. Christiano, Esq., for respondent.

Record Closed: July 28, 2005

Decided: August 1, 2005

BEFORE **EDITH KLINGER, ALJ:**

On November 15, 2004, petitioner, N.G., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the Township of West Orange (Board), to provide her children, G.G., G.G., and V.G. with a free public education in the West Orange schools pursuant to *N.J.S.A. 18A:38-1b*.

On December 13, 2004, the Board filed its answer to the petition and counterclaim for reimbursement of tuition. On January 11, 2005, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

A hearing was scheduled on July 27, 2005 at 9:00 a.m. at the Office of Administrative Law, 33 Washington Street, Newark, New Jersey. At the scheduled time, petitioner failed to appear and never contacted OAL to explain her non-appearance.

The record shows that N.G. was served with a Notice of Plenary Hearing, dated March 10, 2005, at the address she provided to the Board, to the Department of Education, and to the Office of Administrative Law. The Notice set forth the date, time and place of the hearing.

Respondent's attorney appeared and presented evidence in support of the Board's uncontested counterclaim for tuition. The record closed on July 28, 2005 when petitioner failed to explain the reason for her non-appearance within twenty-four hours. *N.J.A.C. 1:1-14.4(a)*.

The burden of proof is on the parent to show that the children were entitled to a free public education in the school district. *N.J.S.A. 18A:38-1b(2)*. Since the parent, N.G., failed to appear, I **CONCLUDE** that she has failed to carry her burden and is entitled to no relief as a result of her appeal.

I, therefore, **CONCLUDE** that the Board is entitled to tuition "on the basis of 1/180 of the total annual per pupil cost to the local Board multiplied by the number of days of ineligible attendance." *N.J.S.A. 18A:38-1b(2)*. This amount is to be collected in the manner in which orders of the commissioner are enforced. *Ibid.*

Josefa Lopez, Registrar for the school district, testified to the following: business records and provided the following evidence. Based upon her testimony, I **FIND** that:

1. G.G., the oldest child in this matter, was enrolled in the West Orange High School from September 8, 2004 to January 13, 2005 while ineligible. After this date, his mother, N.G., gave custody of the child to her brother and sister-in-law who reside in West Orange. The Board only seeks tuition for the eighty-day period of G.G.'s ineligible attendance. The daily cost per pupil in the high school was \$70.30 during the relevant time period, so that the Board is owed \$5624 in tuition for G.G. ($80 \times \$70.30$). G.G. has graduated from the high school.
2. The middle child, G.G., was enrolled in the West Orange Roosevelt Middle School from September 8, 2004 to January 13, 2005 while ineligible. After January 13, 2005, the child left the West Orange school district and, to the best knowledge of the Board, is now attending school in Jersey City. The daily per pupil cost for attendance at the Roosevelt Middle School was \$59.10 during the relevant time period. The Board is owed tuition in the amount of \$4728 for the eighty days of G.G.'s ineligible attendance ($80 \times \$59.10$).
3. The youngest child, V.G., was enrolled in the West Orange Hazel Elementary School from September 8, 2004 to January 13, 2005 while ineligible. After January 13, 2005, this child also left the West Orange school district and, to the best knowledge of the Board, is attending school in Jersey City. The daily per pupil cost for attendance at the Hazel Elementary School was \$53.51 during the relevant time period. The Board is owed tuition in the amount of \$4281 for the eighty days of V.G.'s ineligible attendance ($80 \times \$53.51$).
4. The total tuition due to the Board is \$14,633 ($\$5624 + 4728 + 4281$).

Based upon the above, I **CONCLUDE** that N.G. has failed to prove that her children, G.G., G.G., and V.G., were entitled to a free public education in the Township of West Orange between September 8, 2004 and January 13, 2005 and, therefore,

N.G. is liable to the Board for tuition in the amount of \$14,633 for this period of their ineligible attendance.

ORDER

It is, therefore, **ORDERED** that N.G. pay respondent tuition in the amount of \$14,633, pursuant to *N.J.S.A. 18A:38-1(b)*, for her children's ineligible attendance in the district's schools. It is further **ORDERED** that her petition is hereby **DISMISSED WITH PREJUDICE** because there is no relief to which she 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2005
DATE

Edith Klinger
EDITH KLINGER, ALJ

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

August 2, 2005
DATE

AUG 3 2005
DATE
pb

Mailed to Parties:

Laurel Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Respondent:

Josefa Lopez

Exhibits

For Respondent:

- R-1 Basic Information on G.G. (Middle School)
- R-2 Basic Information on G.G. (High School)
- R-3 Basic Information on V.G.
- R-4 Tuition Costs, 2004-2005

OAL DKT. NO. EDU 7115-05
 AGENCY DKT. NO. 145-6/05

<u>CONTROL BUILDING SERVICES, INC.,</u>	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE	:	DECISION
CITY OF PATERSON, PASSAIC COUNTY, AND	:	
PRITCHARD INDUSTRIES, INC.,	:	
RESPONDENTS.	:	

The record of this matter and the June 28, 2005 Order of the Office of Administrative Law (OAL), which was re-mailed to the parties on July 20, 2005 have been reviewed. No exceptions were filed by the parties.

In reviewing this matter, it is noted that the Administrative Law Judge (ALJ) first issued the Order on June 28, 2005, recommending denial of petitioner's application for emergent relief and concluding:

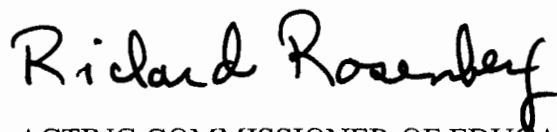
Should petitioner Control wish to press claims made against the School District and Pritchard for conduct that was to have occurred in 2003, counsel must contact the Clerk of the Office of Administrative Law within 14 days from the date of this decision and a hearing date will be arranged. Otherwise, the matter shall be considered moot and will be dismissed. (Order of June 28, 2004 at 5)

The ALJ's recommended Order was subsequently adopted by the Commissioner on June 20, 2005 with instructions that the matter "shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary."

The OAL file does not contain any documents or correspondence filed after issuance of the ALJ's recommended June 28 Order. Thus, it appears that petitioner did not notify the ALJ of its intent to pursue its claim within the 14 days specified by the ALJ. However, in that the Order mailed to the parties on July 20, 2005 is *exactly* the same Order which disposed of the emergent relief request noted above and does not indicate the ALJ's conclusion with respect to whether this matter should be dismissed as moot, the Commissioner cannot conclude that the ALJ's Order constitutes an Initial Decision within the meaning of *N.J.A.C. 1:1-18.1(b)*, which requires the issuance of an Initial Decision that is final in form and fully dispositive of all issues in the case.

Accordingly, this matter is remanded to the OAL for issuance of an Initial Decision in this matter, pursuant to *N.J.A.C. 1:1-18.1 et seq.*

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 7115-05

AGENCY DKT. NO. 145-6/05

**CONTROL BUILDING SERVICES,
INCORPORATED,**

Petitioner,

v.

**STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF PATERSON AND PRITCHARD
INDUSTRICES, INCORPORATED,**

Respondents.

Joseph B. Fiorenzo, Esq., appearing for petitioner Control Building Services, Incorporated (Sokol, Behot & Fiorenzo, attorneys)

Sydney A. Sayovitz, Esq., appearing for respondent State-Operated School District of the City of Paterson (Schenck, Price, Smith & King, attorneys)

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

Record Closed: June 21, 2005

Decided: June 28, 2005

BEFORE **DANIEL B. MCKEOWN**, ALJ (t/a):

STATEMENT OF THE CASE

Control Building Services, Inc., (petitioner), seeks emergency relief from the Commissioner of Education in the form of an Order by which Pritchard Industries, Incorporated (Pritchard), which submitted the low bid to supply custodial services to the

State-Operated School District of the City of Paterson (District) for the 2005-2007 school years, with the option for a third year, would be prohibited from commencing work under the contract on July 1, 2005 pending a plenary hearing on the asserted issue of its moral standing to be awarded a public contract. After the Commissioner of Education transferred the matter to the Office of Administrative Law on June 16, 2005, as a contested case under the provisions of *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*, an oral argument on the motion was heard June 21, 2005 at the Office of Administrative Law, Newark.

For the reasons that follow, the application of petitioner, Control Building Services, Incorporated, for a temporary stay of the commencement of work by Pritchard, successfully bid upon pending a hearing on the merits of petitioner's claim, Pritchard is not morally responsible is denied.

FACTS

The facts as can be discerned from the pleadings, exhibits, argument of counsel, certifications, and over which there is no dispute, are these. In 2003, the State-Operated School District sought bid submissions for its custodial work for the 2003-05 school years. Petitioner, Control, and respondent, Pritchard, were among those who submitted bids. Pritchard was declared the low bidder for custodial services in 2003. It appears issues arose regarding employee health benefits to be provided to existing custodial workers once Pritchard became the independent contractor providing the custodial services, and paid lunch breaks. It further appears that in order to resolve these issues, representatives of the District and of Pritchard conferred seeking a method and manner by which the issues could be resolved even to the extent of changing the terms of the contract just bid upon by Pritchard, but before its formal award. This communication between Pritchard and the School District and the subsequent change of the bids specifications from which bids were received and as reflected in the contract signed by Pritchard for 2003-05, formed the basis for a legal challenge to the awarding of the custodial contract to Pritchard.

Petitioner was successful at that time to secure a temporary restraining order on July 9, 2003 from New Jersey Superior Court, Law Division, The Honorable Joseph F. Scancarella, Presiding, against the contract being awarded Pritchard for 2003-05 pending a hearing into the merits of Control's claim regarding the post bid announcement of low bidder between Pritchard and the School District. On July 18, 2003, The Honorable Ralph L. DeLuccia, Jr., J.S.C., ordered the continuation of the restraints already issued in the matter, but transferred the case to the Office of Administrative Law for hearing on the merits. On August 22, 2003, Richard McGill, Administrative Law Judge, issued an initial decision on a motion by which he continued the restraint against the awarding of an actual contract to Pritchard for 2003-05 be continued pending a full hearing on whether the entire contract should not be rebid. The initial decision was affirmed by the Commissioner of Education on September 8, 2003. An appeal was taken to the State Board of Education which affirmed the Commissioner of Education in his determination to agree with Administrative Law Judge McGill in continuing the restraints pending a hearing. It is interesting to note several observations made by the State Board in its decision. It said

Initially, we recognize that the allegations made by Control are serious. However, as found by the ALJ and the Deputy Commissioner, they related to the original March 2003 invitation to bid and to actions that preceded the re-bidding process, and Control has made no allegations of wrong doing with respect to the re-bidding process as it has proceeded thus far.

And,

Moreover, given the circumstances, including the fact that the original specifications were erroneous, re-bidding is the appropriate course to follow.

Petitioner Control Services contends that on these facts it is entitled to a temporary restraining order against the commencement of the 2005-07 contract by Pritchard because Pritchard, although the nominal low bidder, is not the 'lowest responsible bidder' within the meaning of the Public Schools Contract Law, *N.J.S.A. 18A:18A -1, et seq.*, because it lacks the moral integrity to be so designated based on its conduct during the 2003 bidding process. Control says that these facts require Pritchard to be disqualified as the lowest responsible bidder and allow it, Control

Services, to continue providing the custodial services it has been providing the School District since 1996 and until it has a hearing to prove the truth of its allegations.

LEGAL DISCUSSION AND CONCLUSION

Resolution of the emergent relief request is govern by the provisions of *N.J.A.C.* 1:6A-12.1. Emergent relief shall be granted if it is determined from the proofs that:

- i. Petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal rights underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. When the equities are an interest of the parties or balance the petitioner will suffer greater harm than the respondent will suffer if their requested relief is not granted. [*N.J.A.C.* 6A:14-12.7(m)1].

It is well settled that petitioner must meet these four criteria to prevail on this application. See *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Regarding the first prong of irreparable harm, I **CONCLUDE** that petitioner has not shown irreparable harm. Control has not shown its right to continue in providing custodial services to the School District for 2005-07 in light of the fact it was not the low bidder on the contract for that period of time. I realize Control seeks to reach back to 2003 and use the efforts, misguided they may have been, of the School District and Pritchard to conclude such conduct is 'fraudulent' and 'collusive.' However, and despite the fact two superior court judges reviewed the facts on a preliminary basis, and an administrative law judge reviewed the 2003 bid facts on a preliminary basis, as did the Commissioner and State Board of Education, no such finding was entered in this record at any time. Control presented no evidence that it will suffer irreparable harm if

Pritchard is restrained from performing under the contract because it presented no evidence regarding its rights that will be harmed.

Petitioner Control must show that the legal right underlying the claim is settled. I **CONCLUDE** the record in this case, although voluminous at this point, does not settle Control's underlying claim.

Additionally, I **CONCLUDE** that petitioner has not demonstrated the likelihood of success on the merits. Despite the fact Control has been providing the School District custodial services since 1996, its reliance on events in 2003 that both the Commissioner of Education and State Board of Education held, could be cured by rebidding, provides no basis for the conclusion that Pritchard and the School District engaged in fraud or collusive conduct.

In sum, I **CONCLUDE** for the above reasons that petitioner has not prevailed on his application for emergent relief and this application must be **DENIED**. Should petitioner Control wish to press claims made against the School District and Pritchard for conduct that was to have occurred in 2003, counsel must contact the Clerk of the Office of Administrative Law within 14 days from the date of this decision and a hearing date will be arranged. Otherwise, the matter shall be considered moot and will be dismissed.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

June 28, 2005

DATE

jb



DANIEL B. McKEOWN, ALJ

OAL DKT. NO. EDU 2996-05
AGENCY DKT. NO. 94-4/05

IN THE MATTER OF THE TENURE :
HEARING OF JOHN GRISO, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF : DECISION
LAKEWOOD, OCEAN COUNTY. :

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

Upon review, the Commissioner approves the settlement terms as 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.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT

OAL DKT. NO.EDU 2996-05

AGENCY DKT. NO. 94-4/05

**IN THE MATTER OF THE
TENURE HEARING OF JOHN GRISO,
SCHOOL DISTRICT OF THE TOWNSHIP
OF LAKEWOOD, OCEAN COUNTY.**

Michael I. Inzelbuch, Esq., appearing for petitioner

Richard A. Friedman, Esq., appearing for respondent (Zazzali, Fagella, Nowak,
Kleinbaum & Friedman, attorneys)

Record Closed – August 1, 2005

Decided – August 2, 2005

BEFORE **DONALD J. STEIN**, ALJ

This matter was transmitted to the Office of Administrative Law on May 18, 2005, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement 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*.

8/2/05
DATE

Donald J. Stein
DONALD J. STEIN, ALJ

Receipt Acknowledged:

8-3-05
DATE

M. K. O'Hara
DEPARTMENT OF EDUCATION /CR

Mailed to Parties:

AUG 4 2005
DATE
/DJS

[Signature]
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

2005 AUG - 1 A 11:14
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609)392-8172
Attorneys for Respondent
John Griso

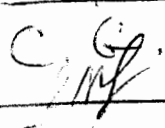
IN THE MATTER OF THE	: BEFORE THE OFFICE OF ADMINISTRATIVE
TENURE CHARGES AGAINST	: LAW
JOHN GRISO, LAKEWOOD	:
BOARD OF EDUCATION,	: Agency Docket N. 94-4/05
OCEAN COUNTY	: OAL Docket No.: EDUTH 02996-2005S
	:
	:
	: STIPULATION OF SETTLEMENT
	: AND SETTLEMENT AGREEMENT

The parties to this matter, the Lakewood Board of Education and John Griso, having reached an agreement to resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the tenure charge shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the tenure charge, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new,

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW





J. Griso

revised or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the petitioner shall withdraw the tenure charge.

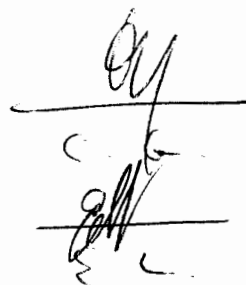
3. Rationale for Settlement

A. On or about April 21, 2005, petitioner filed the tenure charge with the Commissioner of Education against the respondent.

B. The charge alleges that respondent's actions permitted or encouraged students to fight, and that respondent was out of his classroom at times when he should have been present, thereby not providing the required supervision and instruction to his students, and that on such occasions, respondent's aide provided supervision and instruction that should have been provided by respondent.

C. In the course of their investigation and discovery in the case, information was exchanged between the parties which demonstrates to the petitioner's satisfaction that it is unlikely that petitioner could sustain the burden of proof with respect to the allegations that respondent permitted or encouraged students to fight.

D. In the course of their investigation and discovery in the case, information was exchanged between the parties which has demonstrated to respondent's satisfaction that it is likely that petitioner can prove the allegation that respondent was not present in his class at times when he should have been, and that during such time periods, respondent delegated the supervision of students in the class to his aide, and that such actions were improper. Thus, the parties believe that it is likely that petitioner can sustain its burden of proof with respect to these allegations.

Handwritten signatures and initials are present over two horizontal lines. The top line has a signature that appears to be 'JL' or 'JL' with a flourish. The bottom line has a signature that appears to be 'JL' or 'JL' with a flourish.

E. Both parties acknowledge that this settlement agreement is based upon their analysis and understanding of the evidence which would be proffered at the hearing, that these conclusions appear to be probable, but cannot be stated with certainty, and that in the event that this settlement agreement is not approved and the matter proceeds to a hearing, neither this agreement nor anything in this agreement shall be admissible in evidence, and that neither party will be deemed to have admitted or conceded any of the contents of or the statements in paragraph 3 (C) or (D) of this agreement, or in any other paragraph in this agreement.

F. Both parties agree that the most substantial allegation, that respondent permitted or encouraged students to engage in fighting, is unlikely to be proven, as per paragraph 3 (C) above, but that in view of the contents of paragraph 3 (D), the filing of the tenure charge was appropriate.

G. Petitioner is aware of the public interest in the proper pursuit and handling of tenure charges to assure that unqualified persons do not teach in the public schools in New Jersey. However, upon review of all the circumstances, which includes evaluation of the time and expense of pursuing tenure charges, the uncertainty of the result which might be obtained, both in terms of sustaining the charges and the penalty which might be imposed, respondent's tenured service in the district, and in all other respects favorable record, petitioner believes and respondent concurs that it is in the best interests of all parties and the public to resolve this matter by this settlement agreement.

4. The parties agree that the acts or omissions engaged in by respondent as referred to in paragraph 3 D may be deemed to constitute conduct unbecoming and were sufficient to warrant the filing of the tenure charge, but that the appropriate penalty in the circumstances is the

Handwritten signature and initials, possibly "C. L.", with a horizontal line above and below the signature.

withholding of respondent's employment and adjustment increments, and suspension with pay and benefits until December 31, 2005.

5. The parties agree that respondent's employment and adjustment increments for the 2005-06 school year shall be withheld as a result of this agreement. The parties also agree that if this settlement agreement is rejected, petitioner may file an appeal of any increment withholdings for the 2005-06 school year and that any such appeal shall be deemed timely filed, if filed within ninety (90) days of the rejection of this agreement by the Commissioner of Education.

6. By settling this matter, respondent acknowledges that he is waiving his right to a hearing before the Office of Administrative Law and Commissioner of Education, in which he could seek an adjudication on the merits of the tenure charge, and on the penalty, if any, if the charge is sustained. Respondent further acknowledges that he understands and agrees to the terms of this agreement and is satisfied with the legal representation that he received in this matter.

7. The parties understand that as a result of personal circumstances unrelated to the tenure charge, upon expiration of his suspension with pay, respondent will not return to employment with the petitioner, and has so advised petitioner. The parties further agree that the appropriate penalty for respondent's acts or omissions is as set forth in paragraphs 4 and 6 above, and that respondent's determination not to return to employment after his suspension does not constitute part of the consideration for this agreement.

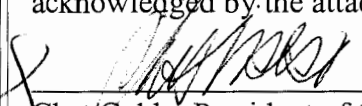
8. As per paragraph 7 above, the parties expressly agree that neither the tenure charge nor the settlement thereof shall be deemed to have resulted in respondent's loss of his tenured position.

Handwritten signature and initials, possibly "E.L.", written over a horizontal line.

9. The parties agree that the facts do not warrant suspension or revocation of respondent's certificate, but are aware that the Commissioner may refer the matter to the State Board of Examiners to initiate proceedings to revoke or suspend respondent's certificate.

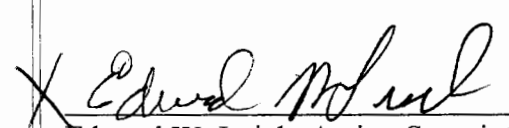
10. The parties agree that in the event that the Commissioner of Education does not accept any paragraph of this settlement agreement, this settlement agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for hearings without prejudice to either parties' position.

11. The petitioner board has approved the terms of this settlement agreement as acknowledged by the attached resolution.


Chet Galdo, President of the Board of
Education of Lakewood Public Schools

STATE OF NEW JERSEY :
: SS
COUNTY OF Ocean :

I certify that on 7/29, 2005, Chet Galdo, President of the Board of Education of Lakewood Public Schools, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

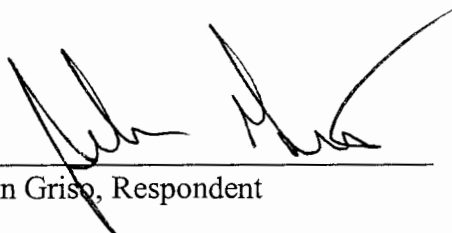

Edward W. Luick, Acting Superintendent
Lakewood Public Schools


Michael I. Inzelbuch, ESQ.
Attorney At Law
State of New Jersey

STATE OF NEW JERSEY :
: SS
COUNTY OF Ocean :

I certify that on 7/29, 2005, Edward W. Luick, Acting Superintendent of Lakewood Public Schools, personally came before me and acknowledged under oath, to my satisfaction,

that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.



John Griso, Respondent

STATE OF NEW JERSEY :

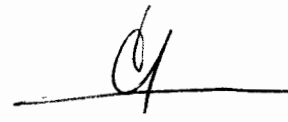
SS

COUNTY OF *Atlantic* :

I certify that on *7/28/05*, 2005, John Griso, Respondent in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.



ELEANOR CRANE
Notary Public of New Jersey
My Commission Expires *6/19/06*



C. L.

Motor Vehicle Services **NEW JERSEY**
C. Division of Motor Vehicles

CDL **G0258 12265 02324**

COMM **CLASS B** **ENDR**

OPERATOR LICENSE **DOB** **RESTR** **EXPIRES**

02-10-1932 **08-31-2005**

CHESTER E GALDO
7 QUICKSILVER CT
LAKENWOOD NJ 08701

SEX **EYES** **HT** **ISSUED**

M **BLU** **5-05** **12-21-2001**

X *[Signature]*

KD LK20013550204 REN 34.00



MICHAEL I. INZELBUCH
Attorney-at-Law
Independence Community Bank Building
555 Madison Avenue
Lakewood, New Jersey 08701
Member NJ and NY Bars
732-905-0325
Fax: 732-886-0806
E-Mail: michaelinz@aol.com

VIA OVERNIGHT MAIL

July 29, 2005

The Honorable Donald J. Stein, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Building 9
P.O. Box 049
Mercerville, New Jersey 08625-0049

2005 AUG - 11 A 11:14
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

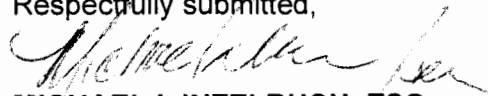
Re: **In the Matter of the Tenure Hearing of John Griso,
School District of the Township of Lakewood, Ocean County
OAL Docket No.: EDU-2996-05 / Agency Docket No.: 94-4/05**

Dear Judge Stein:

As Your Honor is aware the undersigned represents the interests of the Lakewood Board of Education in connection with the above-referenced matter.

Enclosed for Your Honor's review and docketing, please find one (1) original fully executed STIPULATION OF SETTLEMENT AND AGREEMENT entered into between the parties herein.

Respectfully submitted,


MICHAEL I. INZELBUCH, ESQ.

MII/sn
Enclosure

cc: Richard A. Friedman, Esq. – 1-609-392-8933
Edward W. Luick, Superintendent
Kathryn D. Fuoto, Business Administrator
Board President Chet Galdo
Board Members (through Edward Luick)

**LAKEWOOD BOARD OF EDUCATION
LAKEWOOD, NEW JERSEY**

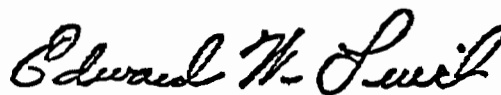
RESOLUTION

WHEREAS, the Lakewood Board of Education reviewed a proposed settlement agreement with employee John Griso and placed same on the agenda of Board of Education meeting of July 6, 2005 for formal action,

NOW, THEREFORE, BE IT RESOLVED, by a unanimous affirmative vote of the members present, the Lakewood Board of Education accepted and approved the settlement agreement pending approval from the Office of Administrative Law and the Commissioner of Education.

CERTIFICATION

I, Edward W. Luick, Board Secretary to the Board of Education of the Township of Lakewood, hereby certify the foregoing is a true copy of Resolution adopted by the Board of Education of the Township of Lakewood at a public meeting held on the 6th Day of July 2005.



**EDWARD W. LUICK
BOARD SECRETARY**

MOTION MR. GALDO **SECONDED** MR. SHAIN

AYES 6 **NAYS** 0 **ABSENT** 3 **ABSTAINED** 0

OAL DKT. NO. EDU 11298-03
 AGENCY DKT. NO. 155-5/97

BETH <u>EBLER,</u>	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF :		DECISION
THE CITY OF NEWARK, ESSEX COUNTY,	:	
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.

Richard Rosenberg
 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/05

Date of Mailing: 8/22/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 11298-03
AGENCY DKT. NO. 155-5/97

BETH EBLER,

Petitioner,
v.

**STATE OPERATED SCHOOL DISTRICT OF
THE CITY OF NEWARK (ESSEX COUNTY),**
Respondent.

John E. Croot, Jr., Esq. for petitioner
(Algeier, Tosti & Woodruff, P.C., attorneys)

Steven M. Fleisher, Esq., for respondent
(Sills, Cummis, Epstein & Gross, attorneys)

Record Closed: July 28, 2005

Decided: August 5, 2005

BEFORE SANDRA ANN ROBINSON, ALJ:

This matter was transmitted to the Office of Administrative Law on November 21, 2003, for determination as a contested case.

The parties informed the court that settlement negotiations were being discussed, and several status conferences were completed. Prior to the scheduled August 26, 2005 telephone status conference, the attached Stipulation of Settlement was submitted. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

8/5/05

DATE

8-10-05

DATE

AUG 11 2005

DATE

cml

Sandra Ann Robinson

SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

M. Kathleen Dunne

DEPARTMENT OF EDUCATION
John Sanders
Mailed to Parties: **DEPUTY AND**
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

SILLS CUMMIS EPSTEIN & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
Attorneys for Respondent,
State-Operated School District
of the City of Newark

RECEIVED
STATE OF NEW JERSEY
OFFICE OF THE CLERK
2005 JUL 28 A 11:18

BETH EBLER,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF
THE CITY OF NEWARK (ESSEX COUNTY),

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION

OAL DOCKET NO. EDUOR-11298-2003N

STIPULATION OF SETTLEMENT

WHEREAS, Petitioner filed a Verified Petition against the State-Operated School District of the City of Newark ("Newark" or "Respondent") on or about May 14, 1997 asserting claims under N.J.S.A. 18A:30-2.1; and

WHEREAS, Petitioner alleged that she was improperly charged 87 sick days for a period of time when she was out of work due to a valid, work-related injury; and

WHEREAS, Petitioner claims that she is entitled to have this sick leave restored; and

WHEREAS, Newark expressly denies any wrongdoing or liability and expressly denies violating petitioner's rights under N.J.S.A. 18A:30-2.1; and

WHEREAS, the parties have reached an amicable resolution of this matter which protects the interests of all parties and avoids the cost and time necessary to pursue litigation; and

WHEREAS, this resolution serves the public's best interest by avoiding further litigation costs and the uncertainty attendant to litigation;

NOW THEREFORE, the parties agree as follows:

1. In complete and full satisfaction of her claims, Petitioner will receive credit and reimbursement for 35 sick days previously charged against her accrued leave, for a total payment of \$11,749.85 by Newark to Petitioner. In consideration of her receipt of this payment, Petitioner expressly waives any and all claims she has or may have arising under N.J.S.A. 18A:30-2.1 through the date of this Agreement. An IRS form 1099 will be issued by Newark to Petitioner in connection with this payment. Petitioner agrees to pay any and all taxes found to be owed from payments made pursuant to this Agreement and to indemnify and hold Newark harmless from any and all claims, assessments, demands, penalties and interest owed, or found to be owed, as a result of any payment made pursuant to this Agreement.
2. Petitioner acknowledges that she has entered into this Agreement voluntarily and entirely of her own free will and that she was not subject to any duress and/or coercion. Petitioner further acknowledges that she has been advised and represented by counsel in this matter.
3. This Agreement is subject to and contingent upon the approval of the Administrative Law Judge and the Commissioner of Education. In the event such approval is not secured, this Agreement shall be null and void and the parties returned to their respective positions prior to the execution of this Agreement.

For the State-Operated School District
Of the City of Newark

By: 

MARION BOLDEN

Dated: April 20, 2005

By: 

BETH EBLER

Dated: April 23, 2005

PETER A. KEANEY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF BLOOMFIELD, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, employed as Supervisor of Maintenance by the Board from 1994 until a reorganization in 2003, claimed tenure entitlement to employment in a supervisory capacity and in a trade position with Bloomfield Township Schools.

The ALJ found, *inter alia*, that: petitioner had attained tenure as a janitorial employee with the Board and never knowingly waived tenure rights when he assumed the position of Supervisor of Maintenance; the Board selected other candidates for position vacancies after the reorganization for legitimate and non-retaliatory reasons; petitioner attained tenure in the general category of janitorial employee, not in any specific assignment within that broad grouping of job titles, and therefore petitioner did not earn tenure rights to a supervisory position. The ALJ ordered the Board to immediately reinstate petitioner to a trade position or other appropriate assignment within the scope of a janitorial employee, along with appropriate back pay and benefits, subject to mitigation.

Upon a thorough and independent review of the record in this matter, the Commissioner adopts the Initial Decision of the OAL as the final decision in this matter, with a clarification as to the nature of the petitioner's reinstatement.

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 31, 2005

OAL DKT. NO. EDU 5881-03
 AGENCY DKT. NO. 128-4/03

PETER A. KEANEY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF BLOOMFIELD, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and petitioner's reply thereto¹ were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 and these submissions were considered by the Commissioner in making his determination herein.

The Board's exceptions essentially recast and reiterate its arguments advanced below, which the Commissioner determines -- in all material part -- were fully addressed and considered in the Initial Decision and warrant no further discussion here.

Upon his full and independent review of the record in this matter, which included transcripts of only one of the three days of hearing in this case,² the Commissioner adopts the Initial Decision of the Administrative Law Judge (ALJ) for the reasons clearly articulated

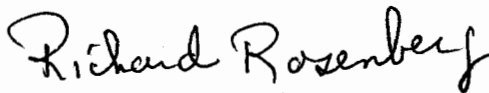
¹ It is, however, noted that petitioner's timely reply to the Board's exceptions, filed on August 15, 2005, also included a section identified as petitioner's exceptions to the Initial Decision. This portion of petitioner's submission, purporting to be primary exceptions filed in response to an Initial Decision mailed to the parties on July 29, 2005, is untimely pursuant to *N.J.A.C.* 1:1-18.4 and, therefore, was not considered. By letter dated August 16, 2005, the Board objected to petitioner's submission of untimely exceptions but, notwithstanding its urging that these be rejected, filed replies thereto. In light of the discounting of petitioner's primary exceptions, the Board's reply was similarly not considered herein.

² The record indicates that hearing in this matter was conducted on May 14, October 6 and 14, 2004. Transcripts of the May 14, 2004 hearing date are contained in the record.

therein. In so determining, the Commissioner concludes that the ALJ provided an accurate and comprehensive presentation of existing law in reaching each of his conclusions, with which the Commissioner fully concurs.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to reinstate petitioner immediately to an appropriate vacancy or to the position of a non-tenured individual within the scope of a janitorial employee. The Board is further directed to reimburse petitioner back pay and emoluments as may be appropriate (see footnote 1, Initial Decision at 2), offsetting from this award any money petitioner received from alternative employment and/or unemployment compensation during the period of his illegal termination.³

IT IS SO ORDERED.⁴



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

³ Although the Board is entitled to offset petitioner's monetary award by any unemployment compensation he may have received, it is obligated, pursuant to *N.J.S.A. 43:21-5(b)*, to reimburse the Department of Labor any monies so offset.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL Dkt. No. EDU 5881-03

AGENCY Dkt. No. 128-4/03

PETER A. KEANEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF BLOOMFIELD,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: December 2, 2004

Decided: July 28, 2005

BEFORE **KEN R. SPRINGER, ALJ:**

Statement of the Case

This is an appeal by a "supervisor of maintenance" from the elimination of his position as the result of a restructuring of custodial and maintenance services in a public school district. Petitioner Peter A. Keaney ("Keaney") alleges that the Bloomfield Board of Education ("Board") violated his tenure rights by failing to offer him the newly

created supervisory position as manager of facilities. In the alternative, Keaney contends that he is entitled to reinstatement to his former custodial position.

Basically, the pleadings raise four separate issues: First, whether Keaney acquired statutory tenure as a janitorial employee under *N.J.S.A. 18A:17-3* because he was hired by the Board for an indefinite as opposed to a fixed term. Second, whether he waived any tenure rights as a custodian by his acceptance of a promotion to a supervisory position. Third, whether he acquired tenure in a supervisory position by virtue of his service under a supervisory title. Fourth, whether the Board's failure to offer him a trade position constitutes retaliation in violation of the New Jersey Conscientious Employee Protection Act, *N.J.S.A. 34:19-1 to -8*.

For the reasons that follow, Keaney has a tenure right to a janitorial position, but did not acquire any tenure to a supervisory position.

Procedural History

On April 17, 2003, Keaney filed a verified petition with the Commissioner of Education ("Commissioner") seeking reinstatement and back pay for violation of his tenure rights.¹ Respondent Board filed its answer on June 11, 2003 and its amended answer on June 17, 2003. Subsequently, on July 3, 2003, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Thereafter, on August 22, 2003, Keaney filed an amended petition, and the Board filed its second amended answer on September 2, 2003.² The OAL held three days of hearing ending on October 15, 2004. Both parties filed post-hearing submissions on December 2, 2004.

¹ Keaney's claim for back pay is largely mooted by the stipulation that he obtained employment with another school district earning more money than he was making while employed by Bloomfield.

² On May 7, 2004, petitioner served written notice of the pendency of this matter on various current Board employees over whom he claims greater tenure rights. *N.J.A.C. 1:1-16*. None of them exercised their opportunity to move to intervene as parties or otherwise participate in this case.

Findings of Fact

General Background Information

All of the general background information is undisputed. Bloomfield Board of Education organizes its building support staff into two subdivisions: custodians (who clean buildings and do routine janitorial tasks) and maintenance/trade workers (who perform more skilled types of labor). Trade workers are further divided into various specialized categories, namely carpenters, electricians, plumbers and painters. No particular license is required to hold a trade worker position (e.g., electricians do not have to be licensed electricians; plumbers do not have to be licensed plumbers.)

Keaney began working for the district in April 1987 in a temporary "trade position." After serving a three-month probationary period, he was hired full-time at the start of the school fiscal year in July 1987. He was assigned primarily to do minor carpentry work such as repairing or installing shelves, radiator covers, bulletin boards and wooden flooring. There is evidence that a trade worker also helped in other areas if his services were needed. In February 1999, Keaney was promoted to supervisor of maintenance, a managerial position involving supervision of other trade workers.

Due to reorganization in July 2003, the Board abolished the position of supervisor of maintenance and, in its place, created the new position of manager of facilities. Although petitioner interviewed for the new title, he was not offered that job. Petitioner also interviewed for a vacant "trade position," but he was not hired because the district needed a plumber more than a carpenter. The Board did not offer any job to petitioner. Consequently, he brought suit claiming tenure both in a supervisory capacity and in a trade position.

Employment of Keaney in a Trade Work Position

When Keaney obtained his initial appointment for the 1987-88 fiscal year, the parties entered into a written employment contract specifying that his employment would run "from the first day of July, 1987 to the 30th day of June, 1988." Similarly, for the following year (1988-89), the written contract signed by the parties stated that Keaney's employment would continue "from the first day of July, 1988 to the 30th day of June 1989.

Starting in 1989-90, the Board stopped issuing formal written contracts limiting the length of Keaney's employment. Instead, the Board began using a different document, which petitioner calls a "short-form contract," but which the Board more accurately describes as a "salary notification." Each year from 1989-90 through 1992-93, the Board presented Keaney with such notice fixing his annual salary for the current school year. Unlike the earlier employment contracts, the salary notification did not contain language limiting the term of Keaney's employment. While the employment contracts include a standard clause allowing either party to terminate their relationship upon thirty days written notice to the other, the salary notifications lack a similar provision (giving rise to the reasonable inference that the Board cannot unilaterally terminate the relationship, except for just cause or as the result of a reduction in force.)

Moreover, the Board's own resolutions provide additional evidence of its intention to grant Keaney tenure as a janitorial employee from at least 1990-91 onward.³ Board resolutions approving the master payroll for the 1987-1988 and 1988-89 years have an asterisk beside Keaney's name and, in an explanatory note at the bottom, the asterisk is defined as meaning "non-tenure." Former assistant board secretary George Sutton, who served the Bloomfield public school district for over forty

³ The Board resolution approving the master payroll for 1989-90 is missing from the record.

years before retiring in June 1991, testified that the existence of an asterisk next to Keaney's name meant that he was not considered a tenured employee "at that point." Sutton explained that the Board subsequently utilized the device "(NT)" in place of an asterisk to designate which of its employees were "non-tenured." In his capacity as assistant board secretary, Sutton's duties included attending all board meetings and preparing board minutes

Significantly, there is no asterisk or "(NT)" alongside Keaney's name in the approved master payroll for 1990-91. Several custodial employees listed on the same payroll have the notation "(NT)" typed immediately after their names. George Sutton, who was still assistant board secretary at that time, interpreted the resolution as signifying that Keaney had acquired tenure, whereas the gentlemen with "(NT)" written next to their names had not. None of the Board's witnesses could persuasively rebut Sutton's first-hand knowledge of Board practice during the relevant time period. Heather Carr, Bloomfield's current director of personnel, only came to the district in May 2000 and has no personal knowledge of Board operations during the early years of Keaney's employment.

Notwithstanding the unambiguous language of its own contracts and resolutions, the Board sought to overcome petitioner's proofs by reliance on its tenure policy, adopted on July 19, 1982 and in effect on the date of Keaney's initial employment. Although the Board emphasizes that the policy provides that full-time custodial and maintenance employees "shall be employed on an annual fixed term basis," the full text of the policy actually provides a mechanism for granting tenure to janitorial employees. Entitled "Tenure of Certain Noncertificated Employees," the policy in context reads as follows:

It is the policy of the Board that full-time custodial/maintenance employees shall be employed on an annual fixed term basis. Renewal of annual contracts is a prerogative of the Board. After obtaining a fireman's license during the first full year of contractual employment and after completion of three consecutive full successful years contract service in this district, these employees will be placed in tenured status by Board

resolution and the employee advised of the change of status. Time served as a probationary employee shall not be applied to the three year requirement.

Keaney's circumstances admittedly do not satisfy the literal terms of this policy. He did, of course, meet the basic requirement of completion of three consecutive years of successful employment in the district. However, he did not possess a fireman's or boiler operator license during his first year of employment, although he ultimately obtained one in May 1991, long before his involuntary termination more than a decade later.

Nonetheless, the Board has not hesitated to disregard its official tenure policy when it suits its convenience to do so. On March 9, 1992, the Board adopted a blanket policy that, "Persons employed as janitors, custodian, and maintenance personnel, including supervisory personnel will be employed on fixed term contracts and will not acquire tenure in their positions." Thereafter, on September 9, 1997, the Board adopted a resolution authorizing the grant of tenure to twenty-three named custodial staff members "who had been employed by the district for more than three years prior to September 7, 1996."⁴ Thus, the Board had no difficulty making personnel decisions in violation of its supposed policy. Keaney's name was not included on the list, however, because, by that time, he had already been promoted to a supervisory title and the Board did not consider him to be eligible for tenure.

I **FIND** that that, as of the 1990-91 fiscal year, Keaney was employed as a carpenter for an indefinite term. Regardless of any generalized policy statement promulgated by the predecessor to the current Board, individuals who meet the statutory criteria automatically gain tenure by operation of law. Here the Board conferred tenure on Keaney when it stopped issuing employment contracts of limited

⁴ Heather Carr pointed out that an employee identified as T. Leo, who had been employed as a carpenter longer than Keaney, had no asterisk or (NT) next to his name on the 91-92 and 92-93 master payrolls, yet was included in the list of custodial and maintenance employees granted tenure by Board resolution on March 9, 2002. Whether or not T. Leo already had attained tenure and whether the 2002 resolution should be regarded as superfluous with respect to him depends on examination of his personnel records and is beyond the scope of this proceeding.

duration and began using annual salary notifications without a fixed term of employment. It was unnecessary for the Board to adopt a resolution awarding tenure to Keaney, since the existence of such status is a question of statutory application.

Promotion to Supervisor of Maintenance

At a meeting on February 8, 1994, the Board formally approved Keaney's appointment as supervisor of maintenance at a prorated salary for the remainder of 1994-95. Insofar as the record reflects, the Board never put Keaney on notice that it considered his acceptance of this promotion to be a waiver of whatever tenure rights he may have previously acquired. Indeed, a cheerful letter from the then Superintendent of Schools, Dr. Edward Glickman, advising Keaney of the Board's action simply says "Congratulations and good luck in your new position."⁵ Keaney continued in that position until his termination in July 2003.

Neither side produced a job description for supervisor of maintenance, so the record does not contain a precise specification of the duties of that position. During his testimony, Keaney described his duties as similar to those he had previously performed during his six years in a trade position. However, Charles Collins, the district's newly-appointed director of facilities in February 2003, maintained that Keaney's supervisory function involved delegating tasks to others and reviewing the work on completion, but that Keaney no longer did the actual work himself. According to Collins, the two positions are distinct and there is no overlap in their duties.

I **FIND** that Keaney never knowingly and intelligently waived his tenure as a janitorial employee when he assumed the title of supervisor of maintenance. His duties remained in the field of maintenance and skilled trades, although now he had greater

⁵ Once Keaney had become a supervisor, the Board reverted to its earlier custom of issuing employment contracts for one-year terms from 1995-1996 through 2000-2001. This change arguably might have served as a warning that Keaney would not be earning tenure as a supervisor, but would not necessarily have alerted him that he was giving up previously vested tenure rights.

responsibility to supervise the work done by others performing carpentry, electrical, plumbing and painting assignments.

Reorganization of the Custodial and Maintenance Department

Prior to the reorganization in July 2003, the organizational hierarchy of the district's custodial and maintenance department included a director of facilities at the top and various skilled maintenance/trade workers and custodians at the bottom. At the middle management level, a supervisor of maintenance and two foremen were in charge of the maintenance/trade workers. As a result of the reorganization, the Board inserted a new middle management position, known as manager of custodians, between the director of facilities and the custodians. In addition, the Board eliminated Keaney's former position, supervisor of maintenance, and the two foremen and replaced them with a single intermediary position known as manager of maintenance.

Ironically, the Board had originally offered Keaney the top position of director of facilities (the spot presently occupied by Charles Collins), but Keaney declined that offer because he felt that the salary was not high enough. Instead, Keaney applied for the new position of manager of maintenance, which he regarded as a lateral transfer from his prior job as supervisor of maintenance.⁶ By letter dated March 17, 2003, the Board informed Keaney that "another candidate's name will be taken to the Board for approval." Ultimately, the Board appointed Ralph Kries to the manager of maintenance position. Mr. Kries, a plumber, had been a maintenance worker in the district for more than thirty years. Director Collins, who served as a member of the interviewing committee, explained that Kries was the preferred candidate because he had displayed leadership in organizing the task of snow removal. Moreover, Collins noted that Keaney was opposed to the reorganization plan and did not seem to be the best choice to implement the Board's new direction.

⁶ A posting for this opening, dated July 1, 2003, lists the new job title as "manager of facilities-maintenance/trades."

Despite his disappointment that he did not get the managerial position he sought, Keaney was relatively certain that he could continue his employment in the district. In early April 2003, he applied for an immediate vacancy in a trade position. Keaney was interviewed for this position by a committee, which included Charles Collins and Heather Carr, and purportedly received assurances that he would be approved at the next Board meeting. Both Collins and Carr denied that any representations were made to him about his likelihood of obtaining the position. In any event, the Board never offered a trade position to Keaney. Collins explained that the district needed a plumber and that Keaney's area of expertise was as a carpenter. Joseph Follett, the candidate appointed to the position, is an experienced plumber who had worked for a plumbing company in the community.

Before learning that he would not be offered a trade position, Keaney filed his appeal from the Board's refusal to recognize his tenure as a manager of maintenance. When the Board also declined to offer him a trade position, Keaney amended his petition to allege retaliation against him for bringing his appeal.

I **FIND** that the Board selected someone else to serve as manager of maintenance because it regarded that candidate as better qualified for the job. Likewise, the Board preferred another candidate for the trade position because it wanted an employee with experience in plumbing. Members of the interviewing committee could make recommendations, but the decision on whom to appoint belonged to the Board. Regardless of what representations were made during the interview, the Board had a valid non-retaliatory reason for preferring a plumber over a carpenter.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Keaney has tenure in the position of janitorial employee, but not as a supervisor.

Custodial employees acquire tenure in one of two ways, either by statute or through collective negotiations. *Wright v. Board of Education*, 99 N.J. 112 (1985). N.J.S.A. 18A:17-3 provides, in pertinent part:

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 as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense[.]

This statute confers immediate tenure on any janitorial employee hired for an indefinite term. Keaney attained instant tenure as a janitorial employee when the Board stopped issuing annual contracts and began sending him salary notices. It is well established that salary notices, standing alone, do not establish yearly reappointments for definite terms. To the contrary, salary notices are commonly recognized as indicia of the tenure status of an employee. *McCullough v. Board of Educ. of Trenton*, 2002 WL 32590883 (N.J. Adm.) (Comm'r Jan. 15, 2002), *appeal dismissed*, 2002 WL 32590884 (N.J. Adm.) (St. Bd. April 3, 2002). *Gilliam v. Board of Educ. of Toms River*, 1974 S.L.D. 54 (Comm'r May 14, 1974), *modified on other grounds*, 1975 S.L.D. 302 (Comm'r May 1, 1975). As elaborated in *Smith v. Bd. of Ed. of the Twp. of East Brunswick*, OAL Dkt. No. EDU 5654-81 (June 13, 1983), *adopted* Comm'r of Ed. (August 15, 1983), *aff'd* State Board of Education (April 4, 1984):

Such salary notices or salary agreements are generally reserved for those employees who have acquired a tenure status in the employ of a board of education. Once an employee has acquired tenure, as for example, a teaching staff member, pursuant to N.J.S.A. 18A:28-5, the board's offer of a contract to the teacher becomes superfluous in regard to the term of employment. The term is indefinite and continuous; therefore, the only subject matter to be contracted for is the employee's annual salary and emoluments. . . [T]he need for a contract between a board of

education and a tenured employee, setting forth all the terms and conditions of employment is no longer necessary and the board resorts to the issuance of a salary notice or salary agreement, pursuant to the negotiated agreement to the tenured employee. (at 13)

Courts broadly construe the term "janitor" in this context to extend to all school employees generally engaged in cleaning, upkeep or repair functions. In light of the principle of liberal construction of tenure laws, the Appellate Division has declared that "the Legislature used the terms janitor, custodian, etc. in a generic sense with intent to include all janitorial and custodial employees." Rejecting the argument that tenure protection is limited to the positions expressly enumerated by the predecessor statute, the Court extended its reach to various positions of a similar nature, including janitorial supervisors, utility men and groundskeepers. *Barnes v. Board of Education*, 85 N.J. Super. 42, 45 (App. Div. 1964), *certif. den.* 43 N.J. 450 (1964). Similarly, the Commissioner has uniformly treated the current janitorial tenure statute as affording tenure rights to a wide range of janitorial-type job titles, such as maintenance man. *Lauffer v. Board of Educ. of Leonia*, 1984 S.L.D. 1290. *Accord*, *Atlantic City Educ. Ass'n v. Board of Educ. of Atlantic City*, EDU 10335-98 (Aug. 19, 1999), *adopted* (Comm'r Oct. 7, 1999), *aff'd* (St. Bd. March 1, 2000) (head custodian); *Reinersten v. Board of Educ. of East Brunswick*, EDU 10328-97 (Comm'r July 8, 1998) ("head custodian"); *Brunner v. Board of Educ. of Camden*, 1960 S.L.D. 155 ("chief janitor"). Accordingly, Keaney was eligible for tenure in a janitorial or custodial position.

Nor can Keaney be deemed to have relinquished his tenure rights by accepting the Board's invitation to assume greater responsibility in his area of tenure. Waiver of tenure protection requires that the tenure employee voluntarily relinquish a known right. *O'Toole v. Forestal*, 211 N.J. Super. 394 (App. Div. 1986). The Board has not presented any proofs tending to show that Keaney was aware that he was giving up vested rights by becoming a supervisor in the field in which he had been working all along. Rather, his situation is analogous to that of the tenured clerk who was entitled to resume her clerical duties after her interim appointment as a clerk-attendance officer had ended. *Quinlan v. Board of Education*, 73 N.J. Super. 40 (App. Div. 1962).

Indeed, the Commissioner has expressly rejected the argument that a janitorial employee relinquishes his existing tenure by accepting a higher job title as chief janitor. Referring to parallel reasoning with respect to teacher's tenure, the Commissioner stated:

Although tenure provisions for teachers and for janitors may vary greatly in several basic respects, in this regard they are similar. Thus, a teacher who is called a supervisor, co-ordinator, director, head teacher, vice-principal, or other title, while not acquiring tenure in these named positions, continues to hold tenure as a teacher. *Lascari v. Lodi Board of Education.*, 36 N.J. Super. 426 [App Div. 1955]. Also a principal may be given the title of supervising principal, administrative principal, etc. without losing his tenure protection as a principal. *Viemeister v. Prospect Park Board of Education*, 5 N.J. Super. 215. [App. Div. 1949]. Similarly a janitor may be named chief janitor without surrendering his tenure as a janitor.

Brunner, at 157

N.J.S.A. 18A:17-3 conveys tenure status to the janitorial category or class of employment and not to any specific position. Accordingly, in *Reinersten*, *supra*, the Commissioner held that a custodial employee acquired tenure in the general category of janitorial employee, but not in the particular job title of "head custodian." "The title 'head custodian' merely denotes a special assignment within the general classification of janitorial services." *Reinersten*, slip op. at 4. So too, in *Brunner*, *supra*, the Commissioner determined that "the position of chief janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute." 1960 S.L.D. at 157. See also, *Lauffer*, *supra*, wherein a person employed as a maintenance man for an indefinite period of time achieved tenure as a janitorial employee, although tenure status did not attach to his specific assignment as a maintenance worker. Under this controlling authority, Keaney attained tenure in the general category of janitorial employee, not in any specific assignment within that broad grouping of job titles. Therefore, he did not earn tenure status to a supervisory position.

Last, Keaney claims that the Board's failure to offer him a vacant trade position was in retaliation for filing his appeal to the Commissioner and constitutes a violation of the Conscientious Employee's Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -8. The Legislature enacted CEPA "to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." *Dzwonar v. McDevitt*, 177 N.J. 451, 461 (2003). Toward that end, N.J.S.A. 34:19-3(c) prohibits any employer from retaliating against an employee who objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes is in violation of a law, or a rule or regulation, is fraudulent or criminal, or is incompatible with a clear mandate of public policy concerning the public health, safety, or welfare.

Routine employment decisions do not automatically become CEPA causes of action simply because the parties happen to disagree over their respective legal rights. Here the triggering event leading to the filing of petitioner's original appeal to the Commissioner was the Board's belief that Keaney had not acquired tenure status as a supervisor. As it turned out, the Board was correct on that issue (although that would not be dispositive so long as Keaney had an objectively reasonable belief that improper conduct occurred.) One important limiting factor underlying CEPA, however, is that the offensive activity complained of must pose some threat of public harm, "not merely private harm or harm only to the aggrieved employee." *Mehlman v. Mobil Oil Corporation*, 153 N.J. 163, 199 (1998). Thus, in *Cosgrove v. Cranford Bd. of Educ.*, 356 N.J. Super. 518 (App. Div. 2003), *abrogated for other reasons*, *Dzwonar v. McDevitt*, 117 N.J. 451 (2003), the Appellate Division held that the filing of a grievance over distribution of overtime concerned a "personal objection" that is not cognizable under CEPA. Similarly, in *Alexander v. Kay Finlay Jewelers, Inc.*, 208 N.J. Super. 503 (App. Div. 1986), *certif. den.* 104 N.J. 466 (1986), the Appellate Division held that institution of legal proceedings concerning salary had "no significance beyond the private interests of plaintiff and defendant" and could not support a valid CEPA claim. Keaney is unable to point to any wrong to which he objected that rises above the level of a private dispute.

More importantly, Keaney has not shown that the Board's refusal to offer him the trade position of plumber was in retaliation for his bringing an appeal regarding the supervisory position. While the current law does not distinguish between various job assignments in trade positions, it is understandable that the Board would prefer to hire an experienced plumber to do plumbing work. Even though the Board's action was in violation of Keaney's tenure status, there is no good reason to believe that the Board sought to punish Keaney for asserting his legal rights.

Order

It is **ORDERED** that the Board immediately reinstate Keaney to a trade position or other appropriate assignment within the scope of a janitorial employee.

And it is further **ORDERED** that the Board restore full back pay and other benefits to Keaney, subject to mitigation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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 28, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

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

July 28, 2005
DATE

Mailed to James P. Anderson
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 29 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Peter A. Keaney, appellant
2. George Sutton, former assistant board secretary and director of business operations, Bloomfield public school district
3. Charles Michael Collins, director of facilities, Bloomfield public school district
4. Heather Carr, director of personnel, Bloomfield public school district
5. Michael Dederian, school business administrator and board secretary, Bloomfield public school district
6. Thomas Dowd, Superintendent of Schools, Bloomfield public school district

List of Exhibits

No.	Description
P-1	Copy of employment contract for 1987-88 school year.
P-2	Copy of revised employment contract for the 1987-1988 school year.
P-3	Copy of employment contract for the 1988-1989 school year
P-4	Copy of salary notification for the 1989-1990 school year

- P-5 Copy of salary notification for the 1990-1991 school year
- P-6 Copy of salary notification for the 1991-1992 school year
- P-7 Copy of salary notification for the 1992-1993 school year
- P-8 Copy of letter to Peter Keaney from Edward J. Glickmin, Ed.D., dated 8, 1994
- P-9 Copy of employment contract for the 1995-1996 school year
- P-10 Copy of employment contract for the 1996-1997 school year
- P-11 Copy of employment contract for the 1997-1998 school year
- P-12 Copy of employment contract for the 1998-1999 school year
- P-13 Copy of employment contract for the 1999-2000 school year
- P-14 Copy of employment contract for the 2000-2001 school year
- P-15 Copy of salary notification for the 2001-2002 school year
- P-16 Copy of salary notification for the 2002-2003 school year
- P-17 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1987 to June 30, 1989
- P-18 Copy of Article 19 extracted from the agreement between the Bloomfield Board of Education and Bloomfield Public School Service Association for the period July 1, 1989 to June 30, 1991

- P-19 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1991 to June 30, 1993
- P-20 Copy of excerpt from the agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period from July 1, 1993 to June 30, 1995
- P-21 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1995 to June 30, 1998
- P-22 Copy of agreement between Bloomfield Board of Education and Bloomfield Public School Service Association for the period July 1, 1998 to June 30, 2001
- P-23 Copy of resume of Peter A. Keaney, undated
- P-24 Copy of job posting for the position of manager of facilities-maintenance/trade, with the response date of February 12, 2003
- P-25 Copy of e-mail correspondence between Peter Keaney and Heather Carr, dated February 12 and 13, 2003
- P-26 Copy of letter to Peter Keaney from Heather Carr, dated March 17, 2003
- P-27 Copy of e-mail correspondence between Peter Keaney and Heather Carr, dated March 27 and March 31, 2003
- P-28 Copy of job posting for the position of trade position, with a response date of April 16, 2003

- P-29 Copy of e-mail correspondence between Peter Keaney and Heather Carr, dated April 9, 2003
- P-30 Copy of letter to Peter Keaney from Heather Carr, dated April 3, 2003
- P-31 Id. Copy of spreadsheet of important dates prepared by Peter Keaney on May 13, 2004
- P-32 Id. Copy of resolution of the Bloomfield Board of Education, with an effective date of April 20, 1987
- P-33 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1987-1988
- P-34 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1988-1989
- P-35 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1990-1991
- P-36 Copy of minutes of the Bloomfield Board of Education approving master payroll for 1992-1993
- P-37 Diagram of positions before and after reorganization, prepared at the hearing on October 15, 2004
- P-38 Id. Copy of interview form for director of facilities, dated November 2002
- P-39 Copy of letter to Daminen Roszkowski from Heather Carr, dated April 3, 2003

- P-40 Copy of letter to Peter Keaney from
- R-1 Copy of agreement between Bloomfield Board of Education and Bloomfield Public Schools Service Association for the period July 1, 1985 to June 30, 1987
- R-2 Copy of black seal boiler operator license from the New Jersey Department of Labor, issued on May 24, 1991
- R-3 Copy of letter to Peter Keaney from Robert E. Schiller, Ed.D., dated April 30, 1987
- R-4 Copy of letter to Peter A. Keaney from George L. Sutton, dated April 13, 1987
- R-5 Copy of notification of salary for the 1997-1998 school year, dated May 14, 1997
- R-6 Copy of letter to Gerard Nazzaretto, dated January 20, 1998
- R-7 Copy of letter to Peter Keaney from Gerry Nazzaretto, dated January 22, 1998
- R-8 Copy of minutes of a regular meeting of the Bloomfield Board of Education held on September 9, 1997
- R-9 Copy of letter to Peter Keaney from Thomas J. Dowd, dated September 24, 1999
- R-10 Copy of letter to Peter Keaney from heather Carr, dated June 28, 2000
- R-11 Reserved

R-12 Reserved

R-13 Copy of minutes of the Bloomfield Board of Education, dated July 19, 1982

(a) Copy of excerpt from Bloomfield Board of Education policy manual, revised September 7, 1996

R-14 Copy of interview form for manager of custodians, dated February 2003

R-15 Copy of interview form for manager of maintenance, dated March 2003

R-16 Copy of interview form for trade position, dated April 2003

IN THE MATTER OF THE TENURE :
HEARING OF JULIETTE KERSANT, : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION
OF CAMDEN, CAMDEN COUNTY. :

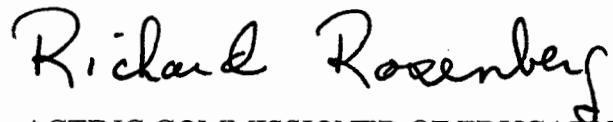
Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April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

1

tenure proceedings are concluded prior to adjudication because the charged party has resigned or retired.

Accordingly, a copy of this decision shall be transmitted to the State Board of Examiners for its consideration.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/30/05

Date of Mailing: 8/30/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8382-04

AGENCY DKT. NO. 318-9/04

**IN THE MATTER OF THE TENURE
HEARING OF JULIETTE KERSAINT,
BOARD OF EDUCATION OF THE
CITY OF CAMDEN, CAMDEN COUNTY**

Jennifer Mazaway, Esq., for Board of Education of the City of Camden (Genova, Burns
& Vernola, attorneys)

Arnold M. Mellk, Esq., for Juliette Kersaint (Wills, O'Neill & Mellk, attorneys)

Record Closed: August 11, 2005

Decided: August 12, 2005

BEFORE **BRUCE M. GORMAN, ALJ**:

This matter was transmitted to the Office of Administrative Law on October 5, 2004, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

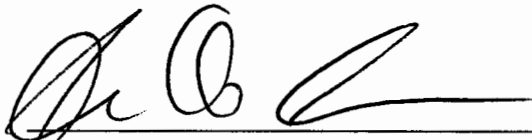
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

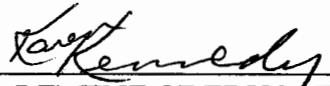
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

8/12/05
DATE


BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

87605
DATE


DEPARTMENT OF EDUCATION

AUG 16 2005

Mailed to Parties: 
**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

OFFICE OF ADMINISTRATIVE LAW

DATE
/sd

AGREEMENT

THIS AGREEMENT is made this _____day of July, 2005 by and between the Camden City Board of Education ("Board"), with principal offices at 201 N. Front Street, Camden, New Jersey 08102, and Juliette Kersaint ("Employee"), residing at 48 Petunia Lane, Willingboro, New Jersey 08046.

WITNESSETH

WHEREAS, Employee has been employed in the Camden City School District for more than 10 years; and

WHEREAS, from the commencement of her employment until the winter of 2003, Employee had a competent record of service with the Board; and

WHEREAS, Employee was served with thirteen tenure charges of unbecoming conduct, and denied the allegations therein; and

WHEREAS, the charges which are currently pending against Employee do not arise out of any conduct which is alleged to be criminal, but rather, from allegations of negligent performance, and from certain personal differences with co-workers; and

WHEREAS, The Board is aware of the risks involved in litigating this matter to conclusion, in that the Employee may not ultimately be dismissed from her position; and

WHEREAS, it is believed to be in the best interest of the community to resolve the outstanding issues without the necessary expense and time constraints placed on district employees to testify at hearing; and

WHEREAS, it is the position of the Board—accepted by Employee—that this Agreement appropriately effectuates the Board's interest in discontinuing her employment, while not unreasonably compensating her for the loss of her tenure in the absence of an administrative proceeding; and

WHEREAS, both parties, represented by counsel, enter into this Agreement with a full understanding of their rights, and Employee has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate, pursuant to N.J.A.C. § 6A:3-5.6, and both parties enter into this Agreement free of coercion, and without reservation;

NOW THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly set forth below, it is hereby **AGREED** that the tenure charges against Employee shall

be **WITHDRAWN** on the following conditions:

1. Upon its approval by the Commissioner of Education, pursuant to N.J.A.C. 6A:3-5.6, this Agreement shall constitute Employee's irrevocable resignation of her employment with the Board. Employee will sign or otherwise authorize any statement of said resignation as the Board may require, provided that any such statement be limited solely to resignation, without other explanation or admission, within ten (10) days of said approval.
2. The Board will pay Employee a lump sum of twenty thousand (\$20,000.00) dollars within thirty (30) days of this Agreement's approval by the Commissioner of Education.
3. Employee agrees to waive any and all claims she has or may have against the Board with regard to the subject matter of this Agreement, including any claims for counsel fees or other monetary relief.
4. The Board agrees to waive any and all claims it may have against Employee with regard to the subject matter of this Agreement, including any claims for counsel fees or other monetary relief.
5. The Board will not oppose, obstruct, or hinder Employee's application for a disability retirement.

This Agreement constitutes the sole, entire, and integrated agreement between the Employee and Board, and may be modified only in writing. All terms of this Agreement are deemed material. This Agreement

is contingent upon approval by the Commissioner of Education, and shall be entirely void if such is not granted.

Camden City Board of Education

Witness:

By: Philip E. Flanagan

J. P. [Signature]
Date: 8/8/05

Juliette Kersaint
Juliette Kersaint

State of New Jersey:

SS:

County of Mercer:

BE IT REMEMBERED that on this 25th day of July, 2005, before me, the subscriber, a Notary Public of the State of New Jersey, personally appeared **JULIETTE KERSAINT**, who I am satisfied is the individual mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

[Signature]
JANET HOLMLUND
A Notary Public of New Jersey
My Commission Expires October 29, 2006

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF : COMMISSIONER OF EDUCATION

MARY SAVINO, RAHWAY BOARD : DECISION

OF EDUCATION, UNION COUNTY. :

SYNOPSIS

The Board sought to suspend the instructional certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 for not providing adequate notice of resignation from her position as a teacher in the Rahway Middle School. The Board submitted that there were no material facts in dispute, and that the Board was entitled to summary judgment pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. Respondent contends that she had mitigating circumstances and was compelled to resign due to her unfitness to teach middle school.

The ALJ found, *inter alia*, that: respondent is guilty of unprofessional conduct for failure to provide 60 days written notice of resignation; respondent was stressed and fearful regarding her reassignment to teach at the middle school rather than an elementary school; respondent had no motive of self-interest in her action; and respondent's honesty regarding her professed unfitness to teach middle school should be considered a mitigating factor in determining the appropriate penalty in this case. The ALJ concluded that a suspension of respondent's teaching certificate for one year is unnecessarily harsh punishment, and recommended a penalty of 60 days suspension of respondent's teaching certificate.

Upon a thorough and independent review, the Commissioner agrees that the respondent is guilty of unprofessional conduct, but disagrees with the ALJ's assessment of respondent's behavior, finding that there is nothing in the record to suggest any mitigating factors in this matter; he concludes that respondent's desire for early release from her professional obligations was based on personal motives and convenience. Respondent is therefore deemed guilty of unprofessional conduct and – consistent with the penalty assessed in similar matters – her teaching certificate is hereby suspended for a period of one year commencing upon the date of this decision. A copy of this decision will be forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

August 30, 2005

OAL DKT. NO. EDU 11688-04
AGENCY DKT. NO. 360-10/04

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF : COMMISSIONER OF EDUCATION

MARY SAVINO, RAHWAY BOARD : DECISION

OF EDUCATION, UNION COUNTY. :

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

As noted by the Administrative Law Judge (ALJ), it is undisputed that respondent entered into an employment contract with the Rahway Board of Education (Board) on or about May 11, 2004 to serve as a teacher in the Rahway School District from September 1, 2004 to June 30, 2005. The contract signed by the parties provided that either party could terminate the contract with 60 days written notice. Notwithstanding this notice requirement, respondent did not report to work on September 1, 2004, but, instead, submitted her resignation to the Board via e-mail on September 2, 2004, one day after the start of the 2004-2005 school year, with an effective date of September 7, 2004.

N.J.S.A. 18A:28-8 establishes the procedure by which a teaching staff member must provide notice of resignation to a board of education and authorizes the Commissioner to suspend a teacher's certificate if that teacher fails to comply, as follows:

Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve or 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.

Additionally, pursuant to *N.J.S.A.* 18A:26-10, the Commissioner has both the authority and the discretion to suspend a teacher's certificate for a period of up to one year for ceasing to perform her duties before the expiration of her employment obligations. *N.J.S.A.* 18A:26-10 provides that:

Any teaching staff member employed by a board of education, who shall, without the consent of the Board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

In the instant matter it is undisputed that respondent resigned without proper notice to the Board. Additionally, respondent acknowledges that Superintendent Petrino, in a telephone conversation on September 3, 2004, reminded her of the 60-day notice requirement and explained that failure to honor the 60-day notice requirement could place her certification to teach in the State of New Jersey in jeopardy. Accordingly, the Commissioner concurs with the ALJ's determination that respondent is guilty of unprofessional conduct for her failure to provide the 60-day notice required by her contract, *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

The Commissioner, however, is unable to conclude that there are factors which would mitigate the imposition of a one-year suspension of respondent's teaching certificate and, thus, rejects the ALJ's conclusion that a lesser penalty is appropriate in this instance. In so concluding, the Commissioner disagrees that petitioner's failure to give the required notice is mitigated by factors similar to those applied in *Mooney, supra*, and *Rogers, supra*. The situation herein is substantially different. Unlike *Mooney* and *Rogers*, respondent does not provide compelling reasons for needing early release, and respondent does not make any claim that she attempted to communicate with the Board to negotiate a mutually beneficial and agreeable earlier release date than the required 60 days' notice. Instead, the record reflects that respondent clearly made a unilateral decision to resign with full knowledge that her notice did not satisfy the notice requirement.

Moreover, although respondent claims that she is “unfit” to teach middle school students, petitioner has presented nothing to suggest that she is not fully certified to teach the middle school classes to which she was assigned. It is apparent, though, that respondent both prefers to teach elementary students and that she is uncomfortable in a middle school environment. Respondent’s preferences, however, do not excuse her failure to act in a professional manner. Respondent was aware in the Spring of 2004 that she was going to be re-assigned from her elementary Special Education teaching position to the position of Special Education Teacher at the middle school for the 2004-2005 school year. Instead of declining to sign the teaching contract for the 2004-2005 school year or giving notice of her resignation by July 1, 2004, as required by her contract, respondent spent the summer trying to find another position. When she was unsuccessful, respondent gave her notice of resignation on September 2, 2004, one day after school began. It is evident from these actions that respondent was trying to keep her options open without any consideration of her responsibilities to the school district and her students. The Commissioner, therefore, concludes that respondent’s desire for an early release from her professional obligations was based solely on personal motives and convenience.

Additionally, the ALJ found that respondent’s actions of blocking any incoming email messages from the school district, not accepting telephone calls, and lying to the superintendent about having another job were mitigating factors because they demonstrated that respondent was under stress. The Commissioner disagrees. Unlike the ALJ, the Commissioner finds these actions only serve to support the conclusion that respondent acted unprofessionally. Moreover, respondent’s offer to surrender her teaching certificate for the 2004-2005 school year and the *de facto* suspension she imposed on herself by not seeking employment as a teacher since her September 2004 resignation demonstrate respondent’s attempt to control the situation for her personal convenience.

The Commissioner emphasizes that “[t]he obvious purpose of *N.J.S.A. 18A:26-10* is to provide notice to the school so that a suitable replacement can be hired without adversely impacting

students****” (*Bd. of Ed. of Penns Grove-Carneys Point Reg. Sch. Dist. v. Leinen*, 94 N.J.A.R.2d (EDU) 405, 407, citations omitted). By resigning from her teaching position with only five days notice on the second day of school, petitioner showed a blatant disregard for the middle school students assigned to her care and the District’s ability to find a suitable replacement on such short notice. Even if the Board were able to find a replacement quickly, however, such replacement would not negate respondent’s unprofessional conduct. (*See Aiken, supra*, at 2821)

For the reasons set forth above, therefore, the Commissioner agrees with the Board that, in resigning abruptly, respondent’s actions of putting her own self-interest above the interests of her students and her professional obligation to provide adequate notice to the Board dictate the maximum penalty. Accordingly, pursuant to *N.J.S.A. 18A:26-10* and consistent with the penalty assessed in similar matters, respondent Mary Savino is deemed guilty of unprofessional conduct and her teaching certificate is hereby suspended for a period of one year, which period shall commence upon the date of this decision. (See, e.g., *Montalbano, supra*; *Farran, supra*; and *Aiken, supra*.) A copy of this decision is being forwarded to the State Board of Examiners for the purpose of effectuating the within decision and taking such further action, if any, as it deems appropriate.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/30/05

Date of Mailing: 8/30/05

* 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.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION

OAL DKT. NO. EDU 11688-04

AGENCY DKT. NO. 360-10/04

**IN THE MATTER OF THE SUSPENSION OF
THE TEACHING CERTIFICATE OF MARY
SAVINO, RAHWAY BOARD OF EDUCATION,
UNION COUNTY**

John A. Boppert, Esq., for Appellant
(Oxfeld Cohen, PC),

Alan J. Schnirman, Esq., for Respondent
(Schwartz, Simon, Edelstein, Celso and Kessler)

Record Closed: July 27, 2005

Decided: July 28, 2005

BEFORE **SANDRA ANN ROBINSON, ALJ:**

STATEMENT OF THE CASE

Petitioner, the Rahway Board of Education, seeks the prospective suspension of the teaching certificate of Respondent, Mary Savino, for failing to provide a 60-day notice of resignation to the District. Respondent contends she had mitigating circumstances and was compelled to resign due to her unfitness to teach middle school.

PROCEDURAL HISTORY

On September 24, 2004, the Rahway Board of Education filed documents with the Commissioner of Education seeking an Order to suspend Respondent's teaching certification for a period not to exceed one year. The Department of Education Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL) on November 23, 2004 for determination as a contested case pursuant to *N.J.S.A. 52:14B-1 to B-15* and *N.J.S.A. 52:14F-1 to F-13*. On January 3, 2005, the undersigned was appointed to the case; and on January 13, 2005 the OAL Clerk scheduled a plenary hearing for June 3 and 6, 2005. The June hearing dates were adjourned because of an attorney scheduling conflict. The OAL rescheduled the matter for a *de novo* hearing on December 21, 2005. In the interim, counsel for Respondent requested that the matter move forward on a Summary Decision. Motions, cross-motions and briefs were received at OAL by May 31, 2005. Oral arguments and/or joint stipulation of facts were accepted on July 27, 2005 at 11AM; thereafter on the same date the record closed.

UNDISPUTED FACTS

1. Respondent Mary Savino is the holder of a New Jersey teaching certificate.
2. On or about May 11, 2004, Respondent entered into an employment contract with Petitioner, Board of Education of Rahway.
3. The employment contract terms required Respondent to serve as a teacher in the public schools, under the control of the Rahway Board of Education from the 1st day of September 2004, to the 30th day of June 2005.
4. The employment contract signed by Respondent specified that:

"It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice that contract shall run for the full term named above."

5. On September 2, 2004, one day after the start of the 2004-2005 school contract year, Respondent tendered her resignation via e-mail to the Rahway Board of Education, effective September 7, 2004.
6. Respondent indicated in her e-mail that she resigned because she wanted an elementary school position, and not the middle school position she was assigned to.
7. Respondent did not report to work as a teacher at the beginning or at any time during the 2004-2005 school year.
8. The Rahway Board of Education did not consent to Respondent's resignation on less than 60 days' notice.
9. On November 3, 2004, Respondent wrote a letter to the Commissioner of Education, Bureau of Controversies and Disputes, explaining the reasons for the sudden nature of her resignation.
10. On November 15, 2004, Respondent wrote a letter to M. Kathleen Duncan, Director of Controversies and Disputes for the Department of Education, offering through counsel to refrain from contesting a suspension of her certificate through June 30, 2005.

LEGAL DISCUSSION AND FINDINGS

N.J.A.C. 6A:3-1.12(a), the Commissioner of Education shall apply the standard set forth in the Uniform Administrative Procedure Rules in deciding motions for

summary decision. Under R.1: 1-12.5(b) of the Uniform Administrative Procedure Rules, a motion for summary decision shall be rendered:

if the papers and discovery which have been filed, together with the affidavits,

if any, show that there is no genuine issue as to any material fact challenged

and that the moving party is entitled to prevail as a matter of law.

In *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520 at 541 (1995), the New Jersey Supreme Court determined that "when the evidence is 'so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment..." Also, in *Celotex Com. v. Catrett*, 477 U.S. 317, 323 (1986) the U.S. Supreme Court explained that: "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses"...

The instant case is ripe for Summary Judgment / Decision, except it is the undersigned's opinion that a limited oral presentation setting forth the resolutions of the parties during a spring 2004 meeting was required. Respondent requested the meeting to discuss a middle school teaching assignment versus an elementary school assignment.

The Rahway Board of Education contends it should prevail as a matter of law because respondent failed to give the requisite notice of resignation. As per N.J.S.A. 18A:28-8, teaching staff members employed by a local board of education must adhere to the following statute when resigning from their teaching positions:

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.

Further, *N.J.S.A.* 18A:26-10 provides that:

Any teaching staff member employed by a board of education, who shall, without the consent of the Board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

Under *N.J.S.A.* 18A:28-8 and *N.J.S.A.* 18A:26-10, a resignation on less than 60 days' notice, absent consent from the local board of education for a lesser notice period, constitutes unprofessional conduct. In the present matter, it is undisputed that Respondent did not report to work nor at any time did the Board approve of Respondent's early release from her teaching duties. Therefore it is clear that Respondent violated the provisions of *N.J.S.A.* 18A:28-8 and *N.J.S.A.* 18A:26-10 and is guilty, *per se*, of unprofessional conduct.

The Commissioner has discretionary authority to suspend a teaching certificate for up to one year for failure to provide such notice. *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. See also, *N.J.A.C.* 6A:9-17.9. The duration of any penalty is discretionary and the maximum penalty of up to one year is not mandatory or automatic, even in cases where the employee did not obtain the employer's consent to resign. *In The Matter of the Suspension of the Teaching Certificate of Burgess*, 1983 S.L.D. 183, adopted, Comm'r, 1983 S.L.D. 195. *N.J.A.C.* 6A:9-17.9 states, in pertinent part:

- (a) A teacher employed by a district board of education who, without the consent of the board, ceases to perform his or her duties prior to the expiration of the employment, shall be deemed guilty of unprofessional conduct.
- (b) The Commissioner *may*, upon receiving notice of the fact, suspend the certificate for a period not to exceed one year. (Emphasis supplied).

Since it is undisputed that Respondent is guilty of unprofessional conduct under N.J.S.A. 18A:26-10, N.J.S.A. 18A:28-8, and N.J.A.C. 6A:9-17.9, the issue in this case is what constitutes an appropriate term for the suspension of Respondent's teaching certificate, under the circumstances. The applicable statutes and regulations afford the Commissioner the discretion to impose a suspension of a lesser term. Petitioner is requesting that the maximum term be imposed: a one-year suspension, starting from the date of this decision. Respondent is specifically asking for a suspension from September 1, 2004 to June 30, 2005.

A violation of the 60-day resignation notice requirement does not automatically trigger a flat 365-day suspension. The Commissioner has found mitigating circumstances in some cases which justified a lesser suspension term. Less than one-year suspensions were imposed in the following three cases, due to mitigating factors: *The Board of Education of Black Horse Pike Regional School District v. Mooney*, 1984 S.L.D. 810, adopted, *Comm'r*, 1984 S.L.D. 821; *In the Matter of the Suspension of the Teaching Certificate of Burgess*, 1983 S.L.D. 183, adopted, *Comm'r*, 1983 S.L.D. 195; and *In the Matter of the Suspension of the Teaching Certificate of Rogers*, 1989 S.L.D. 1962, adopted, *Comm'r*, 1989 S.L.D. 1968.

In *Burgess*, *supra*, the Commissioner held that suspension of a teaching certificate was not warranted for a teacher who had left employment without providing the requisite notice. The teacher had provided notice on January 29, 1982 that he would resign as of February 15, 1982. The board accepted his resignation and advised him that it would do all it could to find a replacement for him by February 15, but that he would not be released earlier than 60 days from the date of his notice unless the board found a suitable replacement. The Commissioner concluded that a suspension was not warranted because the board had not carried out its promise to the employee to do all that it could to secure a replacement by February 15.

The language in the statutes and regulations "may upon receiving notice" clearly indicates that the Legislature did not intend the suspension of a teacher's certificate to be automatic, "even absent the board's consent". As set forth in *Mooney*, *supra*, in exercising its discretionary authority, the Commissioner must consider all the attendant

circumstances, including any mitigating factors specific to the case which may compel the conclusion that a suspension for less than one year is appropriate. In *Mooney*, the Commissioner held that suspension was not warranted in light of the teaching staff member's considerable efforts to assist the board of education in ensuring a smooth transition for her replacement. In *Mooney*, the teacher assisted in the development of a program through the end of the school year, met with her successor in order to establish the program, and left final grades for her classes.

A less-than-one-year suspension has been deemed appropriate where the teacher's conduct in seeking an early release was driven not simply by a desire to "feather his own nest" by obtaining employment elsewhere, but rather from "honest" and more "noble" motivations. In *Rogers, supra*, a non-tenured teacher of the handicapped resigned on short notice to take a position working with severely handicapped children.

At the last minute he had questions about what work he was best suited to. He had worked in another school district for a year as well as worked with the severely and multiply handicapped at New Libson. The children served by the Board are much less and differently handicapped than the New Libson population. Different teaching qualities, techniques and temperaments are required in serving these very different groups. Notwithstanding the burdens of New Libson's work, school districts almost invariably pay better than does the State and the State has considerable difficulty obtaining sufficient dependable staff for that work. Civil service decisions out of the State developmental centers demonstrate a continuing theme of inability to obtain and hold staff due to the pay and working conditions there.

Although Rogers in fact left to take another position, the desire to work with severely handicapped children was considered a mitigating factor that precluded a one-year suspension; a three-month suspension was found to be appropriate. The ALJ wrote:

I am persuaded that it was not to feather his own nest that Rogers failed to fulfill his contract with the Board, but rather from honest and most noble motivations...

Conversely, the Commissioner will impose the maximum one-year suspension,

starting from the date of decision, in cases where a teacher violates the 60-day notice requirement for strictly personal reasons. In *East Amwell Township Board of Education v. Acken*, 86 S.L.D. 2803, a teacher failed to provide the Board with the required notice, and resigned one week before the start of school. The failure to provide unequivocal oral notice of her intention to relinquish her position was found to be based upon personal motives. She and her spouse were living in Florida, he was unemployed, and their house in New Jersey had not sold. The teacher's uncertainty as to their future continually delayed her decision. The ALJ determined that the teacher wished to resign her post, but considered herself financially unable to do so. The ALJ wrote:

In effect, she keeps her irons in the fire right up to the week before school is to begin, thus guaranteeing herself employment in East Amwell, if nothing else became available in Florida or her husband remained unemployed. Ms. Acken also suggests that her resignation was tendered so late and without the 60-day notice because of her concern for the students. She suggests that she wished the students to have one teacher for the year instead of switching teachers in mid-stream. While the concern she expresses may be genuine, the purpose of the notice requirement is to provide the School and the administrator with sufficient time to locate and hire an acceptable replacement so that the students are not switched from substitute to substitute until a replacement is hired.

In the case captioned, *In the Matter of the Suspension of the Teaching Certificate of Vincent Montalbano*, OAL Dkt. No. EDU3588-00, Initial Decision (April 24, 2001), adopted, *Comm'r.* (June 11, 2001), the Commissioner of Education ordered a one year suspension of the teaching certificate of Montalbano following his departure from the Ridgefield School District on twelve days' notice. In *Montalbano*, the ALJ determined that the employee's need for an early release from his teaching contract was motivated by purely personal reasons, specifically his desire to secure alternative employment as a police officer in the State of New Jersey. The Commissioner found that the facts surrounding Montalbano's mid-term departure could not obviate his obligation to continue serving in his teaching position for the required 60 days.

In the recent case, *In The Matter of the Suspension of the Teaching Certificate of*

Mary Farran, School District of the Chathams, Morris County (Agency Docket No. 415-11/04) the Commissioner concluded that Farran was guilty of unprofessional conduct, and ordered that her teaching certificate be suspended for one year. She resigned her position without proper notice, after deciding that it was a hardship for her to continue to teach while caring for an infant child and commuting from her new home in Pennsylvania. The Commissioner said, even though she was aware of her obligation to provide 60 days' notice, that Farran had "put her own self-interest above the interests of her students and her professional obligations to provide adequate notice to the Board." Additionally, the Commissioner found no merit in Farran's argument that her unprofessional conduct could be excused due to the lack of notification by the school district of its intent to seek suspension of her license.

In the present case, Petitioner contends that Respondent intended to abandon her class for another job, as indicated in Respondent's letter of November 3, 2004 to the Commissioner:

"This summer, after an unsuccessful search for an elementary school position in another district, I felt that I had no choice but to return to Rahway" (document attached).

Unlike the facts in *Montalbano*, the undisputed facts in Respondent's case set forth that she did not take other employment. Respondent has neither worked as nor sought employment as a teacher since her resignation in September of 2004. Respondent's letter allows a reader to reasonably believe that the job search was a result of her fear of failure and of her own inadequacy for the middle school special education assignment. As Respondent continued in her letter:

"I have reached a point, at 55 years of age, where I can no longer force myself to do what I feel so uncomfortable with and for which I feel so ill suited. Even if I could start the year, I was sure that I could not muster the strength to finish the school year" (document attached).

Dr. Petrino, Superintendent of Schools, telephoned Respondent on September 3,

2004, to speak about the letter of resignation. He said she signed a contract to work in the Rahway Public Schools for the 2004-05 school year and that she was obligated to honor the contract. He specifically explained to that her failure to honor the 60-day required advance notice could jeopardize her teaching certificate. Dr. Petrino submitted an Affidavit regarding his communications with Respondent (document attached).

In regard to Respondent's reference to starting another job, she explains the situation in the November 3, 2004 letter to Commissioner Librera:

"In an effort to end a very unpleasant conversation, I told him (Dr. Petrino) that I could not return because I would be starting with another school system. *This was untrue.* In hindsight, if I had told the truth and told him why I felt that I couldn't return, things would not have gotten so ugly. He threatened to sue the district that hired me and said that he would begin the process to have my certificates suspended. Knowing this, I discontinued my job search and I am still unemployed" (emphasis added).

Petitioner contends that on September 3, 2004, Respondent could have reconsidered and returned to work for the requisite 60 days so as to comply with the governing notice statutes; but since she did not, the full suspension period of one year under *N.J.S.A. 18A:26-10* should be imposed.

The most weighty factor in reviewing an appropriate length of suspension for a Respondent is motivation. The statute defines sudden cessation of duty as unprofessional conduct and upon the occurrence of unprofessional conduct the Commissioner may suspend a teaching certificate for up to one year. I **FIND** the following circumstances in the present case:

Respondent, a fifty-five (55) year old teacher, returned to teaching after an eleven (11) year break in service;

Petitioner interviewed Respondent for a teaching position and offered her a position at the middle school: Respondent declined the position, saying that she was unfit;

One year later, Petitioner offered Respondent a teaching position in the elementary school; she accepted the position and at the end of the first year was asked to return for a second year of teaching in the elementary school: she accepted;

At the end of the second year, Petitioner asked Respondent to continue teaching in the district and advised her that the position would be in the middle school;

Respondent requested a meeting in an effort to obtain an assignment in the elementary school; no promises were made at the meeting but Petitioner's representative said she would "sleep on" the matter;

Respondent looked for another elementary school teaching position for most of the summer without success and beyond the 60-day notice deadline on July 1, 2004;

Respondent's reluctance to teach in a middle school environment continued;

Respondent became so stressed and fearful by September 1, 2004, the commencement date for the 2004 school year, that she took matters into her own hands and emailed the school to resign; Respondent lied to the superintendent when he confronted her during a subsequent telephone conversation;

Respondent's actions of blocking any incoming email messages from Petitioner, not accepting telephone calls, lying to her superior about another job, and volunteering to surrender her teaching certificate for one year is an indication of the extreme stress and fear she was experiencing;

Respondent believed, for whatever reasons, that she was unfit to teach at the middle school level; her talents in elementary school were proven two years in a row when Petitioner asked her to return to elementary school;

Respondent was not trying to "run away" from the district; no motive of self-interest was ever suggested by Petitioner;

Respondent did not violate the 60-day notice requirement in order to "feather her own nest";

Respondent's contention that she could not perform or carry out her teaching responsibilities because of her unfitness to teach in the middle school environment is undisputed and is credible;

Respondent imposed a de facto suspension on herself, by not seeking employment as a teacher since her resignation in September of 2004.

CONCLUSION

Based on all of the above, I **CONCLUDE** that a suspension for one year is unnecessarily harsh in this case. Respondent did not teach for the entire 2004-2005 school year because of her resignation due to her belief that she would jeopardize the training needs of her students because of her fear of unfitness for the job. In this case Respondent's honesty should be considered a mitigating factor. Imposing the suspension sought by Petitioner would, realistically, preclude Respondent from working as a teacher until September of 2006. Therefore, I **CONCLUDE** that Respondent's teaching certificate should be suspended for sixty (60) days from the date of this decision, which will enable her to seek a teaching job for at least a portion of the upcoming school year.

ORDER

I hereby **ORDER** that the teaching certificate of Mary Savino be and hereby is suspended for a period of sixty (60) days, commencing July 28, 2005 and ending September 26, 2005.

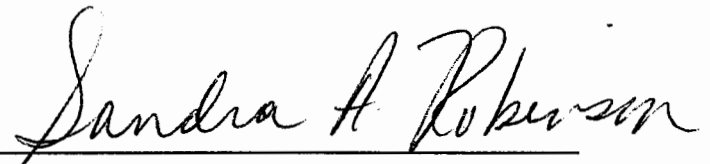
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 28, 2005

DATE


SANDRA A. ROBINSON, ALJ

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

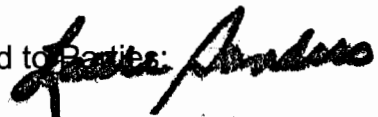
7/28/05
DATE

JUL 29 2005

DATE

sej

Mailed to Parties:


**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

OFFICE OF ADMINISTRATIVE LAW

DOCUMENT SUBMISSIONS

Order To Show Cause with Supporting Affidavit for Initiation of Suspension Proceedings

Signed by Commissioner Dr. William Librera October 4, 2004;

Proof of Mailing

Certification of Attorney Alan J. Schnirman re: Facsimile Signature

Letter Brief together with Respondent's Certified Statement In Support of Respondent's Motion For Summary Decision dated May 3, 2005:

Respondents Letter to Commissioner Librera dated November 3, 2004;

Respondent's Counsel's Letter to the Director of the Division of Controversies and Disputes dated November 15, 2004;

Certification of Respondent in Support of Motion For Summary Decision

Letter Brief In Support of Petitioner's Cross Motion For Summary Decision and In reply To Respondent's Motion For Summary Judgment dated May 25, 2005:

Employment Contract between Respondent and Petitioner dated May 11, 2004;

Affidavit of William D. Petrino, Ed. D., Superintendent of Rahway Public Schools dated September 23, 2004;

Letter of resignation from Respondent to Eleanor Peris date September 2, 2004;

Letter from Rahway Public School Superintendent Petrino to respondent dated September 3, 2004;

Email attempt from Petrino to Respondent via AOL dated September 3, 2004;

Notice to Petrino of Email failure via AOL dated September 3, 2004;

Notice to DiGiovanni of Email failure via AOL dated September 3, 2004;

Notice of successful Email "sent" to Respondent via MSN Hotmail dated September 3, 2004;

Letter from Superintendent Petrino to Commissioner Librera dated September 7, 2004.

OAL DKT. NO. EDU 9527-04
AGENCY DKT. NO. 259-7/04

JOSEPH MUNIZ, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE :
 DEPARTMENT OF EDUCATION, :
 :
 RESPONDENT. :
 _____ :

The Commissioner has reviewed the file in this matter. While there is correspondence referencing a settlement, there is neither an executed settlement agreement nor a clear statement of withdrawal from the petitioner. Accordingly, the Commissioner hereby remands the matter to the OAL for final resolution.

IT IS SO ORDERED*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

* 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.*

OAL DKT. NO. EDU 6143-05
AGENCY DKT. NO. 186-8/05

EXECUTIVE COMMITTEE OF THE
VINELAND SCHOOL DISTRICT'S
PARENT ADVISORY COMMITTEE
ON BILINGUAL EDUCATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY
OF VINELAND, CUMBERLAND COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

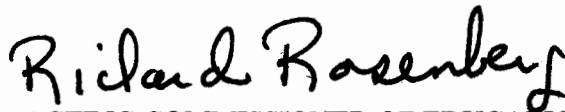
DECISION ON MOTION

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law on August 23, 2005, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the Order denying emergent relief as he concurs with the ALJ's determination that petitioner has not satisfied any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits, scheduled for September 9 and September 23, 2005, as directed by the ALJ.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER – EMERGENT RELIEF

OAL DKT. NO. EDU 6143-05

AGENCY DKT. NO. 186-8/05

**EXECUTIVE COMMITTEE OF THE
VINELAND SCHOOL DISTRICT'S
PARENT ADVISORY COMMITTEE
ON BILINGUAL EDUCATION,**

Petitioners,

v.

**BOARD OF EDUCATION OF
THE CITY OF VINELAND,**

Respondent.

Lazlo Beh, Esq. for petitioner (South Jersey Legal Services, Inc., attorneys)

Paul Kalac, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

BEFORE BRUCE M. GORMAN, ALJ:

The New Jersey Department of Education (DOE) Bureau of Controversies received a request for relief on July 29, 2005. Petitioner contends the Board of Education's Mennies Pilot Program does not meet the requirements of a full-time program of bilingual education and seeks reinstatement of a compliant program. The matter was transmitted to the Office of Administrative Law (OAL) on August 3, 2005. *N.J.S.A.* 18A:38-1. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o.

The New Jersey Department of Education, Bureau of Controversies and Disputes, received a petition for emergent relief on or about July 29, 2005. The matter was transmitted to the Office of Administrative Law (OAL) on August 3, 2005, to be heard as an emergent contested case. .

The matter was scheduled for oral argument for August 11, 2005, but was adjourned as respondent's counsel was on vacation. The matter was rescheduled for August 23, 2005, at the OAL office in Atlantic City, New Jersey.

Petitioner brings this matter on an emergent basis seeking an Order enjoining respondent from enrolling third and fourth grade students in its Pilot Program at its Mennies School and transferring them into an existing bilingual program at the district's Johnstone School. Additionally, petitioner seeks an Order compelling respondent to provide a full-time bilingual program to all eligible third and fourth grade students.

The petition is grounded in *N.J.S.A.* 18A:35-18, which states:

a. When, at the beginning of any school year, there are within the schools of the district 20 or more pupils of limited English-speaking ability in any one language classification, the board of education shall establish, for each such classification, a program in bilingual education for all the pupils therein; provided, however, that a board of education may establish a program in bilingual education for any language classification with less than 20 children therein.

b. The Commissioner of Education may waive the requirement that a board of education establish a full time bilingual education program when the board is able to demonstrate that due to the age range, grade span or geographic location of the eligible pupils it would be impractical to provide a full time bilingual education program. The waiver shall permit the district to implement a special alternative instructional program for as long as the conditions exist that justified the waiver.

Petitioner argues that respondent has failed to provide the mandated program. In support of that contention, petitioner relies primarily upon the Certification of Minerva Negrón. Ms. Negrón is the mother of S.R., a third grade student in the Pilot Program during the 2004-2005 school year. Ms. Negrón's certification states that her daughter never brought home books or assignments in Spanish. An open house for parents in the Spring of 2005 was conducted entirely in English. At the conclusion of the school year, S.R. was unable to either read or write in Spanish.

Petitioner also relies upon a newspaper article from the Vineland Daily Journal wherein Millie Ramos, District Supervisor of Instruction for Bilingual Programs appeared to be critical of respondent's handling of bilingual education.

Petitioner argued that respondent obtained a waiver from the Department of Education for its 2004-2005 program, but has failed to do so for 2005-2006. Petitioner asserted that DOE has approved no program for bilingual instruction to the present time.

Respondent submitted no affidavits or certifications, but relied solely on the argument of counsel and brief testimony by Annette Rudd, Principal. Ms. Rudd testified respondent had prepared a program (R-1), but admitted that State approval was pending.

Respondent's counsel argued that no irreparable harm existed because respondent already had in place a program that complies with State requirements. Although respondent offered no proof that such is the case, petitioner offered no proof that such is not the case. Respondent contended that since a program exists, petitioner's children will be properly educated, and therefore the equities and interests should be balanced in favor of respondent.

Petitioner argued that the law on this issue is settled, citing *N.J.S.A. 18A:35-18*. Respondent retorted that while that statute required a program, no case law exists on the subject.

Respondent argued that there is insufficient likelihood that petitioner will prevail on the merits, because petitioner is relying solely on the opinions of certain parents.

The requirements for granting emergent relief are well settled. Petitioner carries the burden in seeking emergent relief. The standard is set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982), necessary for the awarding of this relief. See also, *Princeton Ins. Co. v. 349 Associates, L.L.C.* 147 N.J. 337, 340(1997). *Crowe* requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;
2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;
3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and
4. The relative hardship to the parties in granting or denying relief must be considered. *Id.* at 132-34.

Petitioner's application for emergent relief falls short in all of the *Crowe* criteria, essentially for one reason. Petitioner has submitted only the certification of Ms. Negron to form a factual basis for its allegations. The newspaper article quoting Ms. Ramos is hearsay, and I have no way of determining whether her statements were taken out of context.

The allegations and legal arguments raised by petitioner are significant, but at this juncture, the record contains an insufficient factual basis for me to determine that petitioner has a reasonable probability of ultimate success on the merits. A far greater quantum of proof will be necessary for petitioner to prevail at trial.

Similarly, Ms. Negron's allegations that S.R. received no instruction in Spanish cannot alone establish that the students in the Pilot Program will suffer irreparable harm if the emergent relief is not granted. Respondent argues it has a program in place. While the lack of DOE approval is troubling, to date DOE has not rejected the proposed program. And I note that, should the program subsequently be found inadequate, either by me at trial or by DOE following

its review, the affected students could be provided with remedial education to make up for what the program lacked.

Finally, while the law is settled that respondent must provide an appropriate program, whether the current program meets the legal standard is a fact-driven issue. Questions of fact can only be resolved at trial.

Accordingly, I **FIND and CONCLUDE** that petitioner has failed to show a reasonable probability of success on the merits. I **FIND and CONCLUDE** that petitioner has failed to establish the children in question will suffer irreparable harm. And I **FIND and CONCLUDE** that the balancing of relative hardship weighs in favor of respondent.

Therefore, I **FIND and CONCLUDE** that emergent relief should be denied.

During oral argument, an issue was raised regarding the standing of petitioner to bring this action. The parties disputed petitioner's origins and could not agree on what authority it had. That issue will be easily resolved by petitioner filing an amended petition joining at least one child, together with the child's guardian, who is affected by the 2005-2006 program.

ORDER

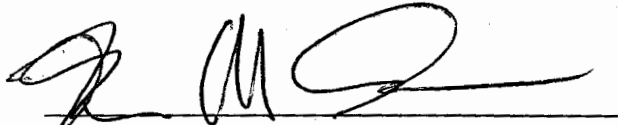
I **ORDER** that petitioner's application for emergent relief by **DENIED**.

I **ORDER** that petitioner be granted leave to file an amended petition adding one or more children affected by the 2005-2006 program as parties hereto, within ten (10) days from the date of this **ORDER**.

A plenary hearing is scheduled for September 9 and September 23, 2005, at 9:30 a.m. at the OAL office located at 1601 Atlantic Avenue, Atlantic City, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

8/24/05
DATE


BRUCE M. GORMAN, ALJ

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

None

For Respondent:

Annette Rudd, Principal

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 3 Year Program

OAL DKT. NO. EDU 1805-04
 AGENCY DKT. NO. 461-12/03

ENRICO <u>CIAMILLO</u> , JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF	:	
THE BOROUGH OF RIDGEFIELD,	:	
BERGEN COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been thoroughly and independently reviewed. After considering the facts and applicable law, the Commissioner is constrained to adopt the Initial Decision.

The underlying facts in this case are not disputed. Petitioner holds certifications as a teacher (art), school social worker, guidance counselor, guidance director, and principal and supervisor. He began employment for respondent in 1994 as a guidance counselor, and has continued working in the Ridgefield schools to the present. Under the terms of a contract between respondent and the Ridgefield Education Association, guidance counselors must work for two weeks each summer.

In 1996-1997 petitioner accepted a position with the "unrecognized title" of "Guidance Consociate Teacher." The job description for Consociate teacher required an administrative certificate with a supervisor endorsement, and tenure in that position would be earned under the legal title of "Supervisor." The salary was to be the appropriate step on the

teachers' salary guide plus a stipend. The position of "Consociate Teacher" was listed in "Extra Service Guides" (annexed, *inter alia*, to the 1995-1996, 1996-1997 and 2001-2004 contracts between respondent and its employees), which set forth negotiated amounts payable to employees performing various "extra" positions. Thus, petitioner's annual salary notices from the 1996-1997 school year through the 2003-2004 school year showed petitioner's base salary as per petitioner's placement and step on the salary guide, and separately set forth the amount of remuneration petitioner was to receive for summer work and for extra work as a Consociate Teacher.

For the school years beginning in 1996, 1997, 1998, 1999, 2000, 2001 and 2002, petitioner did the extra work of Consociate Teacher, in addition to his guidance position. The extra consociate work in 1996-1997 brought petitioner \$4,084 over his "contractual" salary of over \$76,500. In 1997-1998 the stipend for consociate work was \$4,235; in 1998-1999, \$4,396; in 2002-2003, \$6,061, bringing his total remuneration for that year to \$96,334.

Petitioner was not reappointed to the Guidance Consociate Teacher position for the 2003-2004 school year. An "Annual Salary Notice to Tenure Personnel" dated April 29, 2003 and received by petitioner in May 2003 shows that for the 2003-2004 school year petitioner's contractual salary would be \$90, 694, representing his step on the salary guide plus \$4,319 for two weeks of summer work. The reduction in pay from 2002-2003 to 2003-2004 represented primarily the absence of any stipend for consociate work.

On May 7, 2003 the high school principal, Dr. Robert Jack, met with petitioner and explained that economic restraints caused him to conclude that the consociate position would not be viable for the coming school year. They met again on May 13, 2003. Dr. Jack advised petitioner that cost efficiencies mandated by the diminution of the district's magnet school

program (and the associated special education funding) had been the basis of his recommendation not to renew petitioner's consociate work.

Petitioner acknowledges that sometime in May 2003 he received the annual salary notice that revealed the elimination of the consociate work. The Administrative Law Judge (ALJ) found that petitioner admitted "that he knew no later than June 15, 2003 that he was not going to be the Guidance Consociate Teacher." (Initial Decision at 9)

As a result of an administrative reorganization, the duties of Guidance Consociate Teacher were incorporated into the Vice-Principal's job. Respondent has not subsequently appointed any other individual to the position of Guidance Consociate Teacher, and has stipulated that petitioner has tenure/seniority rights to the position. Petitioner has not disputed that the reorganization was driven by economic reasons, or argued that the reorganization was a sham or perpetrated in bad faith.

Petitioner filed his appeal on December 11, 2003.

Allegations by petitioner to which respondent does not subscribe are as follows. Petitioner contends that at their May meetings Dr. Jack told petitioner that the departure of the district superintendent would allow petitioner to be reinstated to the consociate work during the summer of 2003. Petitioner also maintains that at the school prom in June 2003, members of the respondent board of education told him they would correct the situation. Petitioner says he relied upon these statements and consequently did not realize that he was not reappointed until September 15, 2003, the date of his first paycheck. Petitioner also noted that he did not know of any other consociate whose salary was reduced.

Petitioner also suggested that the consociate position was not an "extra service" position. He testified that it was not posted in the same manner that other extra service positions

were posted, he never received a separate extra-service contract, and his last consociate appointment had not been acted upon at the June 11, 2002 meeting of the respondent board of education. (Initial Decision at 11) He also opined that extra service payments were made quarterly and were not pensionable, while he received payment on a biweekly basis and all his income was reported for pension purposes. (*Ibid.*)

On cross examination petitioner conceded that he did not know whether there had been job postings that he had not seen, that he did not know whether the respondent Board might have acted upon his last consociate position at a meeting other than the one on June 11, 2002, and that he was not actually familiar with the regulations regarding pensionable income. (*Ibid.*)

The ALJ found that petitioner's appeal of respondent's action was time barred, and determined that it was consequently unnecessary to reach the merits of petitioner's claim of tenure violation. In his exceptions, petitioner argues that since respondent conceded that petitioner had tenure in the position of Guidance Consociate Teacher, the ALJ should have first determined whether respondent violated petitioner's tenure rights and then decided "whether tenure rights are subservient to the 90-day rule." (Petitioner's Exceptions at 2)

Citing no authority, petitioner contends that the 90-day rule does not apply to alleged tenure violations. In the alternative, petitioner maintains that even if the 90-day rule applies to appeals of alleged tenure violations, that rule should be relaxed in petitioner's case because of the alleged "assurances" of reinstatement from the principal, Mr. Jack, and certain Board members, and because he did not know until his first paycheck that his salary had been lowered.

The Commissioner finds no merit in petitioner's exceptions. The question of whether petitioner has tenure in the position of Guidance Consociate Teacher is not

determinative of the applicability of the 90-day rule. Assuming, *arguendo*, that petitioner has such tenure, he was none-the-less obliged, under *N.J.A.C.* 6A:3-1.3(d), to “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.” (Initial Decision at 13) See, e.g., *Gordon v. Passaic Twp. Bd. Of Educ.*, 1985 *S.L.D.* 1929, *aff’d*. No. A-3294-84T7 (App. Div. May 27, 1986) (unreported), *certif. den.* 105 *N.J.* 534 (1986) (the statute of limitations specified in *N.J.A.C.* 6:24-1.2 [predecessor of *N.J.A.C.* 6A:3-1.3] applies to claims . . . which allege the violation of tenure or seniority rights).

The event which triggers the limitations period is the petitioner’s receipt of adequate notice of the Board’s action, *i.e.*, notice that is “sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate.” *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 *N.J.* 572, 587 (1993). Petitioner received an official written communication in May 2003 that he was not reappointed to the consociate position and that his salary would be lowered. No subsequent written notice was produced that contradicted same. Thus, the period of limitations began in May 2003 and ended in August 2003.

Further, petitioner’s statement that he did not know that the Board’s action had not been “corrected” until he received his first paycheck seems disingenuous. Clearly, as of the first day of school in September, petitioner knew that he was not performing consociate work, and would thus not be paid for it. In all likelihood, December 11, 2003, the day petitioner filed, was more than 90 days after the first day of school in September 2003. In any event, as the ALJ stated, “[t]he 90-day clock begins to tick once notice of the final order, ruling or other action is

given, and not when the injury is felt by the petitioner.” (Initial Decision at 14, citing *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island*, 272 N.J.Super. 373, 379-81 (App.Div.), *certif. den.* 137 N.J. 315 (1994). Not even settlement negotiations negate the receipt of adequate notice or toll the running of the limitations period. *Kaprow, supra*, 131 N.J. at 588.

The Commissioner also notes that this controversy arose in the context of a reduction in force (RIF). It is undisputed that the Guidance Consociate Teacher position was eliminated for economic reasons, and no one else was subsequently given the position. N.J.S.A. 18A:28-9 allows such a RIF. While N.J.S.A. 18A:28-12 entitles petitioner to be on a preferred eligibility list for reemployment if the position is restored, petitioner has no statutory right to retain the salary he had before the RIF. In any event, if petitioner wished to challenge the effects of the RIF upon him, he was required to do so within the 90-day period. *Kaprow, supra*, 131 N.J. at 585-586 (Rights resulting from RIFs in the local school districts do not constitute a statutory entitlement; the limitations period of N.J.A.C. 6:24-1.2(c) [N.J.A.C. 6A:3-1.3], therefore, applies).

Finally, for the reasons set forth in pages 23-25 of the Initial Decision, the Commissioner declines to exercise his discretion, under N.J.A.C. 6A:3-1.16, to relax the 90-day rule. In May 2003 the petitioner had the information he needed to challenge respondent’s action. In this matter there is no constitutional issue or compelling public interest beyond the concern of the petitioner. *Bogart v. Bd. of Educ. of the City of East Orange*, OAL DKT. EDU 6245-82 at 4 (January 26, 1983), *adopted*, Commissioner March 14, 1983. Nor has there been any showing that respondent acted in bad faith, as was found in *New Jersey School Boards Ass’n. v. Bd. of Educ. of the Twp. of Wyckoff*, Agency Dkt. No. 281-9/99 (Commissioner, February 3, 2000),

where, for six years, the respondent had not forwarded to petitioner the dues that were deducted from employee paychecks for the express purpose of transmittal to petitioner.

Accordingly, the Initial Decision of the OAL is adopted and petitioner's appeal is hereby dismissed.

IT IS SO ORDERED*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05

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



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

OAL DKT. NO. EDU 1805-04
AGENCY DKT. NO. 461-12/03

ENRICO CIAMILLO, JR.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF RIDGEFIELD,
BERGEN COUNTY,**

Respondent.

Harold N. Springstead, Esq., for petitioner (Springstead and Maurice,
attorneys)

Stanley Turitz, Esq., for respondent (Ferrara, Turitz, Harraka & Goldberg,
attorneys)

Record Closed: February 28, 2005

Decided: July 15, 2005

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

STATEMENT OF THE CASE

In this matter, petitioner alleges that he acquired tenure in the position of Guidance Consociate Teacher and the Board of Education of the Borough of Ridgefield (the Board) unlawfully reduced his salary stemming from the abolishment of that position effective September 1, 2003. The Board maintains that petitioner's claim is time barred pursuant

to the 90-day limitation embodied in *N.J.A.C.* 6A:3-1.3. Alternatively, the Board contends that the abolished position previously held by petitioner was a stipend position, which is not tenurable, and upon the abolishment of the position petitioner is no longer entitled to the stipend salary attributable to that position.

PROCEDURAL HISTORY

On December 11, 2003, petitioner filed a Petition of Appeal with the Commissioner of Education (the Commissioner). Petitioner avers that he is a tenure teacher employed by the Board, petitioner was paid \$96,334 pursuant to a contract during the 2002-2003 school year, and petitioner "received his first paycheck in September and realized that his salary had been reduced." Petitioner alleges that the Board's action in reducing his salary violates *N.J.S.A.* 18A:6-10 and is arbitrary, unreasonable and illegal. Petitioner seeks a determination requiring the Board to pay his former salary plus increments. On or about January 9, 2004, the Board filed its Answer. The Board asserts, as one of its affirmative defenses, that petitioner's claim is time barred by *N.J.A.C.* 6A:3-1.3(d) in that it was filed beyond the required 90-day time period.

The Department of Education transmitted the matter to the Office of Administrative Law where, on February 26, 2004, it was filed for determination as a contested case. The matter was assigned to the undersigned on March 29, 2004 and scheduled for hearing on September 10 and September 24, 2004. The hearing scheduled for September 10, 2004 was adjourned at the joint request of counsel. The undersigned heard the matter on September 24, 2004. At the hearing, counsel agreed that the hearing should proceed on all issues notwithstanding the timeliness issue, which the parties would address in post-hearing submissions. Following the conclusion of testimony, the record remained open for the receipt of post-hearing briefs. The parties submitted briefs in support of their respective positions and petitioner submitted a reply brief. Thereafter, petitioner provided a copy of an unreported decision cited in his reply brief. The record was closed upon receipt of the last submission.¹

¹ Orders were entered extending the time within which to complete this Initial Decision.

ISSUES PRESENTED

The threshold issue concerns the timeliness of the petitioner's Petition of Appeal pursuant to *N.J.A.C. 6A:3-1.3*. Should petitioner's claim be determined to have been timely filed, the issue then presented is whether the Board violated petitioner's tenure rights when, as a result of the Board's abolishment of the Guidance Consociate position previously held by petitioner, petitioner's salary was reduced as of the 2003-2004 school year.

FACTUAL DISCUSSION

The majority of the facts surrounding this matter are not disputed. Based upon a review of the testimony and the documentary evidence, I **FIND** the following **FACTS**:

1. Petitioner Enrico Ciamillo, Jr. is a tenured teacher employed by respondent, the Board of Education of the Borough of Ridgefield (the Board).
2. Petitioner holds certifications as a Principal-Supervisor, Director of Guidance, Guidance Counselor, School Social Worker and Art Teacher.
3. Petitioner commenced employment with the Board in January 1994 as a Guidance Counselor.
4. Petitioner has served in the position of Guidance Counselor from January 1994 to the present.
5. The Board and petitioner entered into an Employment Contract providing for petitioner's employment as a Guidance Counselor for the period of January 1994 to June 30, 1994. (P-1). Subsequently, the Board and petitioner entered into respective Employment Contracts providing for petitioner's employment as a Guidance Counselor during the 1994-1995 and 1995-1996 school years. (*Ibid.*). The Employment Contracts set forth

petitioner's salary, along with a breakdown of that salary attributable to petitioner's placement and step on the negotiated Salary Guide and for summer work.

6. Pursuant to an agreement between the Board and the Ridgefield Education Association (REA), Guidance Counselors are required to work two weeks during the summer. Schedule B of the negotiated Agreement between the Board and the REA for the period of July 1, 2001 through June 30, 2004 (the 2001-2004 Agreement) (J-1) states in pertinent part:

Guidance Counselors shall be placed on a ten (10) month Teacher Contract and shall be required to work one (1) week before and one (1) week after the regular teachers work year.

Compensation shall be at the Counselor's per diem rate....

7. The former Superintendent of Schools, Dr. Richard Sabella, requested and received approval from the County Superintendent to use the unrecognized title of "Consociate Teacher (Special Education)" during the 1994-1995 and 1995-1996 school years (P-9). For the 1996-1997 and 2002-2003 school years, Dr. Sabella requested and received approval to use the unrecognized title of "Consociate Teacher." (*Ibid.*). The issued approvals reflect the "Authorizing Endorsement" and "Legal Title" as "Supervisor." They further instruct: "You are advised that while you may use the unrecognized title(s) below, the person(s) employed will accrue seniority upon the attainment of tenure under the legal title."
8. Schedule D of the 2001-2004 Agreement, entitled "Extra Service Guide," lists negotiated amounts payable to employees performing various extra positions. (J-1). The position of "Consociate Teacher" is included on that Extra Service Guide, along with the Extra Service Guides for 1995-1996 and 1996-1997. (R-1). "[A] stipend for consociate teachers has appeared on Schedule D since 1990." (J-2, PERC Decision at 5).

9. The additional pay listed on the Extra Service Guide is granted for extra duties which a staff member undertakes that are beyond the staff member's regular teaching or guidance duties.
10. A separate written Job Description exists for the position of Consociate Teacher, which was adopted in May 1996 (P-5; J-2, PERC Decision at 7). Pursuant to the Job Description, a New Jersey Supervisor Certificate is required, coupled with a minimum of three years successful teaching experience, proven leadership ability, demonstration of effective human relation skills and utilization of motivational techniques. The Consociate Teacher reports to the Building Principal where assigned. The Job Description lists the following "Performance Responsibilities":
 - a. Assists the principal in the administrative functioning of the building, e.g., scheduling, assembly programs, student conduct, classroom observations.
 - b. Assists teachers in the improvement of instruction through modeling, workshops, and dissemination of professional information.
 - c. Assists in the accomplishment of professional improvement plans prepared by the teaching staff.
 - d. Assumes other such responsibilities as assigned by the Principal or the Superintendent of Schools.

The Job Description further states, as "Terms of Employment," "10 or 11 month year. Salary to be on appropriate teacher salary guide plus stipend."

11. In 1996, petitioner sent a letter to Dr. Sabella, dated June 6, 1996, at the suggestion of then Building Principal, Marcella Gleie. (P-2). The letter reflects that, per Dr. Sabella's memo, petitioner was enclosing his resume for consideration regarding a Guidance Consociate position.

12. Petitioner was appointed to and held the position of Guidance Consociate Teacher during the 1996-1997 school year in addition to his Guidance Counselor position.
13. After petitioner acquired tenure, the Board provided annual salary notices to petitioner ("Annual Salary Notice To Tenure Personnel") for the 1996-1997 through 2003-2004 school years. (P-3). The respective Notices include petitioner's base salary in accordance with petitioner's placement and Step on the negotiated Salary Guide. The Notices also separately set forth remuneration associated with petitioner's Consociate position(s) and for summer work.
14. An Annual Salary Notice To Tenure Personnel, dated April 25, 1996, reflects that for the 1996-1997 school year petitioner's "contractual salary" would be \$74,746, representing "MA+30-Step M \$71,187 + \$3,559 (2 weeks summer)." (P-3). In a subsequent Annual Salary Notice To Tenure Personnel, dated July 11, 1996, petitioner's "contractual salary" for that school year was increased to \$80,610 representing, in part, \$4,084 related to petitioner's "Guidance Consociate Teacher" position. (*Ibid.*)
15. For the 1997-1998 school year, petitioner was appointed to and held the positions of Guidance Consociate Teacher and Transition Consociate in addition to his Guidance Counselor position.
16. An Annual Salary Notice to Tenure Personnel, dated April 22, 1997, sets forth petitioner's "contractual salary," subject to negotiations, for the 1997-1998 school year, including a breakdown of that amount attributable to petitioner's placement on the Salary Guide, summer work and Consociates positions. A later Annual Salary Notice was issued, presumably after negotiations were finalized, dated October 28, 1997, which reflects that for the 1997-1998 school year petitioner's "contractual salary" was \$85,317, representing "MA + 30-Step M \$73,187 + \$3,660 (2 weeks summer) +

\$4235 Guidance Consociate Teacher + \$4235 Transition Consociate." (P-3).

17. For the 1998-1999 school year, petitioner was not reappointed to the position of Transition Consociate. Petitioner was reappointed to and held the position of Guidance Consociate Teacher in addition to his Guidance Counselor position. Although petitioner (then a tenured employee) was not reappointed to the Transition Consociate position, petitioner acknowledges that he did not claim an entitlement to the pay attributable to that position.
18. An Annual Salary Notice To Tenure Personnel, dated August 4, 1998, reflects that for the 1998-1999 school year petitioner's "contractual salary" was \$83,237, representing "MA+30-Step M \$75,087 + \$3,754 (2 weeks summer) + \$4,396 Guidance Consociate Teacher." (P-3).
19. Petitioner was reappointed to the position of Guidance Consociate Teacher for the 1999-2000, 2000-2001, 2001-2002 and 2002-2003 school years. The Annual Salary Notices for those years similarly reflect petitioner's "contractual salary," along with a breakdown of that amount attributable to his placement on the Salary Guide, summer weeks and position as Consociate Teacher. (P-3).
20. As reflected in petitioner's Employment Contracts and Annual Salary Notices, commencing with the 1994-1995 school year and through the 1999-2000 school year, petitioner received extra pay for working two weeks in the summer. (P-1, P-3).
21. As reflected in petitioner's Annual Salary Notices, an additional week of summer work was added for the 2000-2001, 2001-2002 and 2002-2003 school years. (P-3).
22. The pay associated with the additional summer work weeks was listed separately from petitioner's base salary in his Employment Contracts and Annual Salary Notices. (P-1, P-3).

23. The pay associated with petitioner's positions as Transition Consociate and Guidance Consociate Teacher was listed separately from petitioner's base salary in his Annual Salary Notices.

24. An Annual Salary Notice To Tenure Personnel, dated May 9, 2002, reflects that for the 2002-2003 school year petitioner's "contractual salary" was \$96,334, representing "MA-Step 18 \$83,975," "\$6,298 3 Weeks Summer," and "\$6,061 Consociate Teacher." (P-3).

25. Petitioner was not reappointed to the Guidance Consociate Teacher position for the 2003-2004 school year.

26. An Annual Salary Notice to Tenure Personnel, dated April 29, 2003, reflects that for the 2003-2004 school year petitioner's "contractual salary" would be \$90,694, representing "MA-30 Step 18 \$86,375" and "\$4,319" for two weeks of summer work. (P-3).

27. The difference in salary from the 2002-2003 to 2003-2004 school years relates to the pay associated with petitioner's former Guidance Consociate Teacher position and a reduction of petitioner's summer work from three to two weeks.

28. Petitioner explained that he did not sign the April 29, 2003 Annual Salary Notice because it did not reflect the Consociate position.

29. Dr. Robert Jack, High School Principal, met with petitioner on May 7 and May 13, 2003. The matters addressed at the meetings are memorialized in a memorandum from Dr. Jack to Dr. Sabella dated May 13, 2003 (P-4), the accuracy of which Dr. Jack confirmed at the hearing.

30. On May 7, 2003, Dr. Jack met with petitioner to discuss his observation for the 2003-2004 academic school year. During the meeting, Dr. Jack indicated to petitioner that, given the current economic restraints faced by

the District, Dr. Jack believed that the position of Consociate would not be tenable during the upcoming year. (P-4).

31. As further reflected in Dr. Jack's memorandum, upon receipt of petitioner's guidance contract, Dr. Jack again met with petitioner on May 13, 2003, during which petitioner asked why his position of consociate had not been "renewed" for next year. (P-4). The reason given by Dr. Jack is memorialized in aforesaid memorandum. More particularly, Dr. Jack stated that his "building recommendation had been offered to Dr. Sabella in the context of the necessary cost efficiencies mandated by the diminution of the Magnet School Program," Dr. Jack "made this recommendation in the belief that this recommendation would assist the district in coping with a pending fiscal crisis," and "the motivation for this building recommendation was cost efficiency, not performance." (P-4).
32. Petitioner admits that he received the Annual Salary Notice, dated April 29, 2003, "sometime in May," 2003. Based on the evidence, I further **FIND** that petitioner had received his Annual Salary Notice no later than the May 13, 2003 meeting with Dr. Jack, and discussions transpired during that meeting regarding why petitioner was not appointed to the Consociate position. Petitioner further admits that he knew no later than June 15, 2003 that he was not going to be the Guidance Consociate Teacher.
33. Petitioner filed his Petition of Appeal with the Commissioner on December 11, 2003.
34. As a result of an administrative reorganization, petitioner's former position of Guidance Consociate Teacher was incorporated into the Vice Principal's position and the job duties previously undertaken by petitioner as a Guidance Consociate Teacher were subsumed under the Vice Principal's job title.

35. The Board has not appointed another individual to the Guidance Consociate Teacher position. The Board stipulated that petitioner has seniority to the position of Guidance Consociate Teacher.

The Testimony

In addition to the evidence which forms the foundation of the aforesaid findings of fact, a summary of other testimony presented at the hearing follows.

Enrico Ciamillo

Petitioner described his duties as a Guidance Consociate Teacher. Petitioner testified that he "was there for the Principal for the overall running of the operations of the school." For example, if the principal left the building, petitioner would be in charge of the building. Petitioner "would work closely with the Dean of Students as well as the Assistant to the Principal . . . and the overall operations as well, investigations, student conduct, what have you." In addition, petitioner conducted observations of other teachers. Petitioner was not interviewed for the Guidance Consociate position and, as far as petitioner knew, the position was not posted. When petitioner became a Consociate, the building principal asked petitioner if he would take on an extra week in the summer because she needed more assistance.

Petitioner met with Dr. Jack on May 7 and May 13, 2003. According to petitioner, on May 7, 2003, Dr. Jack stated that the Board was looking to reduce positions and save money. Dr. Jack was not sure at that point which Consociates may be affected. Petitioner acknowledged that he later had a discussion with Dr. Jack about not being appointed to the Consociate position. Dr. Jack also showed petitioner a copy of his May 13, 2003 memorandum to Dr. Sabella. According to petitioner, Dr. Jack told petitioner that, since Dr. Sabella was resigning, Dr. Jack saw no reason why petitioner would not be reinstated during the summer. Petitioner further testified that, during the high school

prom in June 2003, three newly elected Board members approached him. In describing his encounter with one of the Board members (Mrs. Fugnitti) petitioner stated:

"[S]he came over to me and she said that what. . . the new Board members felt what was done to me was wrong and that they were going to correct the situation. But they needed some time. That's what they said.

Petitioner indicated that the first time he knew they did not correct the situation was when he received his first paycheck on September 15, 2003. Petitioner was not aware of any other Consociate Teacher who was, in essence, demoted in salary.

Petitioner testified that his salary, including that associated with the Consociate position and the summer work, was paid in bi-weekly installments and the extra pay is reported for pension purposes. Petitioner noted that pay for stipend positions is made quarterly and opined that it is not pensionable. He further described the procedure with respect to filling extra service positions. Each year the building principal would put a list of extra service positions in the staff's mailboxes. Anyone who was interested in an extra service position would return the letter of interest to the building principal. Petitioner testified that the position of Consociate Teacher was never posted. He presented notifications distributed for extra service contracts during the 2000-2001 to 2004-2005 school years, which do not include Consociate Teacher. (P-6, P-10). Petitioner stated that extra service positions are filled through appointments approved by the Board and presented a sample "Extra Service Contract." (P-8). Petitioner never received an Extra Service Contract relating to the Consociate Teacher position and his name does not appear in the list of appointments made for Extra Service Contracts at a Board meeting on June 11, 2002. (P-7). On cross-examination, petitioner acknowledged that he did not know the number of times throughout the year that the Board may appoint individuals to various positions, there may have been other postings for open extra service positions and petitioner lacked knowledge regarding the regulations addressing what is included in pension payments.

Dr. Robert Jack

Dr. Jack has been employed as the High School Principal for two and one half years. He explained the basis for his recommendation, which culminated in the elimination of the Guidance Consociate position previously held by petitioner. The Ridgefield School District runs a Magnet School Program. In connection with that program, the District receives special education students and related tuition from approximately sixty-seven other districts. The funds received are instrumental to the running of the high school and defray costs, including salaries for special and regular education staff. Based on a percentage wide ratio which is established administratively, if a staff member functions in a capacity with special education, a percentage of their salary is paid through the special education funds. Petitioner's salary was not paid specifically by special education funds. Dr. Jack stated that, if the projections for the special education revenue are lowered, this would have a devastating effect on the high school program, staffing, personnel and programmatic issues. He explained that this is what the District was facing at the time petitioner's position was eliminated.

Dr. Sabella directed Dr. Jack to find cost efficiency measures which could be implemented, in lieu of a potential lack of funding in the District. One of the measures Dr. Jack recommended was the elimination of the Guidance Consociate position. The Guidance Consociate position, when it existed, came directly under Dr. Jack's line of authority. As a result of an administrative reorganization, the job previously undertaken by petitioner as a Guidance Consociate is currently done by the Vice Principal. Dr. Sabella indicated that, from the cost efficiency measures Dr. Jack provided, he would recommend that the District eliminate the Guidance Consociate position. Dr. Sabella directed Dr. Jack to implement the elimination of the consociate position in guidance, which ultimately affected petitioner. Dr. Jack testified that, at the time of his conversations with petitioner, Dr. Jack had no indication Dr. Sabella was leaving the District and, when they discussed the future of petitioner's Consociate position, Dr. Jack indicated that the circumstances as to the elimination of the position would be dictated as to cost efficiency.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The initial issue to be determined is whether petitioner's Petition of Appeal is time barred pursuant to *N.J.A.C. 6A:3-1.3*. The regulation dictates in salient part:

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.²

The New Jersey Supreme Court reaffirmed the validity of the 90-day limitation period (then codified as *N.J.A.C. 6:24-1.2(c)*) in the seminal case of *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 N.J. 572 (1993). The Supreme Court concluded that the rule "falls within the scope of statutory authority granted to the Commissioner and the State Board" and "represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." *Id.* at 582. In explaining the underlying purpose of the rule, the Court said:

The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. 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. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements....

[*Id.* at 582.]

The 90-day period for filing an appeal with the Commissioner is triggered at the point in time that the affected individual has received "adequate notice" of the "final

² During the relevant period, this 90-day limitation was codified in *N.J.A.C. 6A:3-1.3(d)*. As a result of an amendment to the regulation effective April 4, 2005, it is now set forth in *N.J.A.C. 6A:3-1.3(i)*.

order, ruling or other action," which is the subject of the requested contested case. Although the regulation does not specify what constitutes adequate notice, the decisional law provides guidance. The Supreme Court has instructed that "[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow, supra*, 131 N.J. at 587. It must also be sufficient to further the purpose of the 90-day limitation period. *Ibid*. The intendment of the rule is two-fold. It 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." *Ibid*. The rule is further intended to "'penalize dilatoriness and serve as a measure of repose' by giving security and stability to human affairs." *Ibid*. (citation omitted.) In recognition of these dual considerations, the Supreme Court held that "the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a . . . cause of action" and, "[a]t 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.'" *Ibid*. In *Kaprow*, the Court concluded that a letter from the secretary of the local board, which informed the petitioner that the board had created and filled two positions in which the petitioner claimed a tenure right, while "unofficial and informal, was sufficient to trigger the ninety-day limitations period." *Id*. at 588.

The 90-day clock begins to tick once notice of the final order, ruling or other action is given, and not when the injury is felt by the petitioner. See *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island*, 272 N.J. Super. 373, 379-81 (App. Div. 1994), *certif. den.* 137 N.J. 315 (1994). In *Nissman* the Appellate Division held that a principal, who was informed in April 1990 that the Board had adopted a resolution not to offer her a contract and not to grant her tenure, was required to file a challenge within 90 days of that notice, even though it was not until the last day of her contract on August 31, 1990 that petitioner claimed she acquired tenure rights. The Appellate Division reasoned that, "[u]pon receipt of the Local Board's resolution, petitioner knew or should have

known that she was not going to be offered a new contract for the following academic year; that she was going to be required to serve out the remaining time on her existing contract; that she would complete three full years of service in the district thereby granting her tenure rights under *N.J.S.A. 18A:28-5*; and, notwithstanding that fact, the Local Board had voted not to grant her tenure." *Id.* at 379. The court went on to find that "the Local Board had the right to know within 90 days whether its action was going to be challenged," "[u]ndoubtedly the Local Board had to secure and contract with another elementary school principal to take petitioner's place" and, "[t]o allow a teaching staff member, such as petitioner, to file a claim after the commencement of a new academic year in these circumstances defeats the principle of 'repose, an essential element in the proper and efficient administration of the school laws.'" *Id.* at 380 (citation omitted). As the court observed, pursuant to the provision of the rule, "the 90 days begin on the date on which the final action of the Local Board took place, April 23, 1990, not the date on which petitioner claims that a substantive right accrued," and "[a]n agency regulation that focuses on the date of the employer's wrongful act as the accrual date for a cause of action, rather than the date on which the consequences of the act is directly felt by the employee (termination), is not inherently arbitrary or capricious." *Id.* at 381.

Equally recognized is that attempts to resolve a claim through negotiations with the local board do not negate the receipt of adequate notice nor do they toll the running of the limitations period. *Kaprow, supra*, 131 *N.J.* at 588; *Giannetta v. Bd. of Educ. of the Twp. of Egg Harbor*, Agency Docket No. 357-10/04 (Comm'r. April 25, 2005) at 6.

In this matter, petitioner acknowledges that the within "action was filed December 11, 2003 or over seven months from the date petitioner was first noticed that his position as consociate teacher was being eliminated." Petitioner's post-hearing brief at 8. The crux of petitioner's argument is that "the 90-day rule cannot apply to defeat his claim because it is grounded in statute," citing *N.J.S.A. 18A:6-10* and *18A:28-5*, and "his salary was reduced in violation of that statute...." *Ibid.* Petitioner principally relies on *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982) in support of his stance.

In *Lavin*, a teacher filed an action seeking military service credit pursuant to *N.J.S.A. 18A:29-11* nine years after her employment began. The Court found that because *N.J.S.A. 18A:29-11*, which allows employment credit to teachers for time served in the military, is an emolument that "bears no relationship to the services to be rendered as an employee," the six year contract statute of limitations should not apply. *Id.* at 150. In its words:

Whether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employee's contract of employment depends upon the nature of the benefit and its relationship to the employment. Stating the problem in terms of incorporation in the employment contract or as a statutory benefit begs the question. Rather, attention should be directed to the purpose of the statute and its relevance and materiality to the employment.

xxx

Where the benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such . . .

xxx

The legislative purpose of *N.J.S.A. 18A:29-11* is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract. That being so, the statute of limitations is inapplicable.

[*Id.* at 150-51.]

The Supreme Court revisited the statutory entitlement concept in *North Plainfield Educ. Ass'n. v. Bd. of Educ. of North Plainfield*, 96 N.J. 587 (1984). At issue in that case was whether the regulatory 90-day limitation barred two tenured teachers' statutory claims to credit on the salary scale for time spent on a sabbatical under N.J.S.A. 18A:29-8. The Appellate Division determined that because the teachers had a statutory right to credit on the salary scale without regard to performance, the time bar (then codified as N.J.A.C. 6:24-1.2) could not affect that right. *Id.* at 590. The Supreme Court disagreed and distinguished the teacher's claims under N.J.S.A. 18A:29-8 from *Lavin's* claim under N.J.S.A. 18A:29-11:

[S]alary increments accruing under N.J.S.A. 18A:29-11 are distinctly different from those awarded under N.J.S.A. 18A:29-8. The annual increment under N.J.S.A. 18A:29-11 accrues because of time spent in military service without regard to performance as a teacher. By contrast, the annual increment under N.J.S.A. 18A:29-8 is subject to annual evaluation of teacher performance. Consequently, [the Appellate Division's] . . . analogy of an annual increment to the statutory entitlement for veterans is invalid.

[*Id.* at 594.]

Concluding that the Appellate Division had misperceived "the increment as a 'statutory entitlement unrelated to the teachers' qualifications, performance or quality of teaching services rendered,'" *Id.* at 593, the Supreme Court stated:

Because the award of the annual increment is not a matter of statutory right, but is subject to 'denial for inefficiency or other good cause,' N.J.S.A. 18A:29-14, it is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute. . . .

[*Id.* at 594.]

The Court further rejected the teachers' attempt to circumvent the time bar by requesting relief for future years. It explained that the teachers' asserted right to advance an additional step in the next year, 1980-81, depends on the propriety of the board's action in not advancing then on 1979-80 guide and, thus, "[t]he time bar of the

original action also precludes the dependent action for relief in future years." *Id.* at 595. And, the Court did not agree that the withholding of the increment constitutes "a continuing violation," holding that "[s]uch a claim, which is associated with the assertion of discrimination in employment, has no relevance to this case" and "the fact that the teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations." *Ibid.*

The Appellate Division in *Polaha v. Buena Regional School District*, 212 N.J. Super. 628 (App. Div. 1986), addressed the applicability of the 90-day limitation to a claim arising out of an alleged violation of statutory tenure rights under N.J.S.A. 18A:28-5. The Commissioner concluded that the 90-day requirement did not bar the petition "because a statutory right with respect to tenure is involved." *Id.* at 632. The State Board reversed this determination and the Appellate Division concurred with the State Board's conclusion that the 90-day rule (then codified as N.J.A.C. 6:24-1.2) "is applicable to appellant's claim notwithstanding the assertion of his statutory right to tenure under N.J.S.A. 18A:28-5." *Id.* at 632-33. The court found the case similar to *North Plainfield* and distinguishable from *Lavin*. *Id.* at 633. It held that because the "decision necessary to confer tenure is undoubtedly carried out based on [an] evaluation of teacher performance, behavior and efficiency," N.J.A.C. 6:24-1.2 is applicable to the appellant's claim. *Id.* at 634.

More recently, the Supreme Court in *Kaprow* provided further guidance as to the intended reach of the regulatory provision. In *Kaprow*, the Court considered the timeliness of a claim by a tenured assistant superintendent who was terminated during a reduction in force (RIF) pursuant to N.J.S.A. 18A:28-9. The employee contended that his RIF right is an "absolute statutory entitlement" and, therefore, exempt from the 90-day limitation period. *Kaprow, supra*, 131 N.J. at 583. The Court reviewed the prior decisions in *Lavin*, *North Plainfield* and *Polaha* and observed that *Lavin* "is the only reported case that found a statutory benefit to constitute an absolute statutory entitlement." *Id.* at 584. In explaining the appropriate inquiry, the Court stated:

That there exists a statutory basis for rights on the reduction in the school's work force is not enough to establish a statutory entitlement. Rather, the critical inquiry focuses on whether a 'functional relationship' exists between the statutory benefit, the RIF right, and Kaprow's employment as a tenured assistant superintendent in the school district.

[*Id.* at 585.]

The Court rejected Kaprow's position on the basis that -

Kaprow's RIF rights stem from his termination for reasons related to fiscal efficiency in the administration of the school system and from his status as a tenured assistant superintendent. . . . If Kaprow had not acquired tenure pursuant to *N.J.S.A. 18A:28-5*, he would have no right to seniority nor to a place on the preferred eligibility list.

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, see *Polaha, supra*, 212 *N.J. Super.* at 634..., 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 assistance superintendent. Instead, his RIF rights have 'a relationship to the services *** rendered as an employee.' *Lavin, supra*, 90 *N.J.* at 150....

Because RIF rights are inextricably tied to employment in a school system and to tenure rights, a 'functional relationship' exists between Kaprow's RIF right to preference in reemployment and his service in the school district. Rights resulting from RIFs in the local school districts do not constitute a statutory entitlement. The limitations period of *N.J.A.C. 6:24-1.2(c)*, therefore, applies to Kaprow's petition.

[*Id.* at 585-86.]

Similarly, in *Gordon v. Passaic Twp. Bd. of Educ.*, 1985 S.L.D. 1929, *aff'd.* No. A-3294-84T7 (App. Div. May 27, 1986) (unreported), *certif. den.* 105 *N.J.* 534 (1986),

the State Board ruled "that the statute of limitations specified in *N.J.A.C. 6:24-1.2* applies to claims ... which allege the violation of tenure or seniority rights," and the petitioner's failure to comply with the requirement bars his claims to both retroactive and prospective relief. *Id.* at 1930-32. It reasoned that "the tenure and seniority rights of teachers, unlike the right to military service credit, are predicated on the rendering of services as a school teacher" and, "[i]n both cases, the rights acquired are functionally related to teaching experience." *Id.* at 1931. In contrast, "the kind of statutory right that renders the statute of limitations inapplicable is one that, like the right to military service credit, does not bear a functional relationship to service as a teacher." *Ibid.* The Appellate Division affirmed the determination substantially for the reasons stated in the State Board's decision. In holding that 90-day rule was applicable to the petitioner's claim, the Appellate Division stated:

While there is a statutory basis for tenure, see *N.J.S.A. 18A:28-5...*, and rights upon reduction in the school's work force, *N.J.S.A. 18A:28-9, et seq.*, just as there is a statutory basis for the salary increment involved in *North Plainfield*, the issue herein relates to administration of the school system, *i.e.*, the termination of a teacher for reasons related to expenses and efficiency of the system, and the role of petitioner as a teacher. It does not concern credits or rights to which he is entitled under statute independent or irrespective of the administration of the school system or his performance or standing as a teacher.

xxx

We conclude that issues resulting from reduction in force in local school districts do not give rise to the type of rights by virtue of statutory entitlement as in *Lavin*, where there was no 'functional relationship' between the military service credit required by statute and Ms. Lavin's experience as a teacher.... Here, unlike *Lavin* (but as in *North Plainfield*), tenure and reduction in benefits have a 'relationship to the services to be rendered [by petitioner] as an employee.' *Lavin, supra*, 90 N.J. at 150.

[*Gordon, slip op* at 7-8.] (footnote omitted.)

See also *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island*, 92 N.J.A.R.2d (EDU) 621, *aff'd.* on other grounds, 272 N.J. Super. 373 (App. Div. 1994) (State Board

held that the ALJ erred in concluding that tenure acquisition "is a creature of statute and cannot be cut short by a rule of repose" and the Commissioner erred in adopting that conclusion). *Contrast East Orange Educ. Ass'n. v. East Orange Bd. of Educ.*, 94 N.J.A.R.2d (EDU) 364, 365 (holding that the 90-day rule did not bar the claims of permanent building-based teaching substitutes (PBBS) to sick leave and health benefits because sick leave and health benefits are not tied to a teacher's status or performance and there is no "functional relationship" between their employment as a PBBS and eligibility for statutory sick leave and health benefits).

Against this backdrop, petitioner argues that the 90-day rule should not be applied because his salary was reduced in violation of N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5. Petitioner contends that, unlike *Kaprow* and *Polaha*, a "[r]eduction of tenured teachers' salaries in violation of statute is independent of petitioner's standing as a teacher." Petitioner's post-hearing brief at 11. Alternatively, petitioner postulates that, "[i]f the 90 day limitation is found to apply, it should only limit petitioner's claim for compensation effective December 11, 2003, the day he filed the Petition." *Ibid.* In short, the Board maintains that the rights claimed by petitioner are similar to those asserted in *Kaprow*, (*i.e.*, a claim of statutory benefits flowing from employment as a tenured employee), and there is no statutory entitlement which would preclude the application of the 90-day limitation period of N.J.A.C. 6A:3-1.3. Board's post-hearing brief at 3, 6.

Succinctly stated, the undersigned embraces the Board's position. The decisional law supports the conclusion that petitioner's claim does not involve a statutory entitlement insulated from application of the 90-day rule. Rather, the rights claimed by petitioner in this matter stem from a claim of tenure. Similar to the RIF rights in *Kaprow*, protected salary stems from tenure rights, which have a relationship to the services rendered as an employee in the district. Stated differently, protected salary is not independent from the administration of a school system or from petitioner's tenured status. See *Kaprow, supra*, 131 N.J. at 585-86; *Nissman, supra*, 92 N.J.A.R.2d (EDU) at 621. A "functional relationship" exists between the statutory benefit arising

from tenure rights and petitioner's employment in the school system. Accordingly, I **CONCLUDE** that petitioner's claim is subject to the 90-day limitation of *N.J.A.C. 6A:3-1.3(i)* (formerly *N.J.A.C. 6A:3-1.3(d)*).

The record is clear that petitioner received the Annual Salary Notice to Tenure Personnel, dated April 29, 2003, in May 2003 and Dr. Jack met with petitioner on May 13, 2003 to discuss why his Guidance Consociate position had not been "renewed." In other words, as of May 13, 2003, petitioner received adequate notice that he would not be appointed to the Guidance Consociate position and would not be receiving the monetary remuneration associated with that position to which, in this case, petitioner claims an entitlement. As of that date, petitioner possessed the state of facts sufficient to enable him to file a timely claim. Even considering the facts in a light most favorable to petitioner, petitioner had notice of the disputed action no later than June 15, 2003 when petitioner candidly acknowledges knowing that he would not be the Guidance Consociate Teacher. Irrespective of whether petitioner's claim is deemed to have accrued in May or June 2003, no debate exists that petitioner did not file his petition with the Commissioner within 90 days of either date but waited until approximately six to seven months later on December 11, 2003.

Petitioner contends that the rule should be relaxed in the interest of justice because "he was lulled into believing that his salary would not be reduced" emanating from Dr. Jack's advice and petitioner's conversation with the Board member at the prom. Petitioner's post-hearing brief at 17. Petitioner claims that "[h]is first actual knowledge" that his pay was not restored was when he received his pay check on September 15, 2003 and petitioner then filed the instant appeal within 90 days. *Ibid.* Additionally, petitioner urges that the Board "intentionally and flagrantly disregarded the proscriptions of *N.J.S.A. 18A:28-5* by reducing petitioner's salary" and "there are public policy considerations involved which create a fundamental public interest beyond that which concern the parties in this matter," citing *New Jersey School Boards Ass'n. v. Bd. of Educ. of the Twp. of Wyckoff*, Agency Dkt. No. 281-9/99 (Comm'r. February 2, 2000). Petitioner's brief at 17-18.

N.J.A.C. 6A:3-1.16 confers on the Commissioner the authority to relax the procedural rules in his discretion "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." The decisional law makes clear, however, that the 90-day rule is to be strictly applied. *Gordon, supra*, 1985 S.L.D. at 1931; *American Federation of Teachers, Local 3417 v. Bd. of Educ. of the Twp. of Berkeley Heights*, EDU 5355-97, Initial Decision (October 13, 1998), *adopted*, Comm'r. (November 30, 1998) <<http://lawlibrary.rutgers.edu/oal/search.html>>; *Bd. of Educ. of Elmwood Park v. Farrell*, 95 N.J.A.R.2d (EDU) 375, 377. Although the Commissioner has the authority to relax the 90-day rule, such authority is rarely invoked. *DeMaio v. New Providence Bd. of Educ.*, 96 N.J.A.R.2d (EDU) 449, 453. Relaxation or waiver of the rule is reserved for cases presenting compelling reasons or exceptional circumstances such that strict adherence would be inappropriate, unnecessary or where injustice would result. *Kaprow, supra*, 131 N.J. at 590-91; *Gordon, supra*, 1985 S.L.D. at 1931-32; *DeMaio, supra*, 96 N.J.A.R.2d (EDU) at 453; *American Federation of Teachers, supra*. As articulated in *Bogart v. Bd. of Educ. of the City of East Orange*, OAL Dkt. EDU 6245-82 at 4 (January 26, 1983), *adopted*, Comm'r. (March 14, 1983), the 90-day rule will be relaxed "only where there is some compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves."

I **CONCLUDE** that no compelling reason or exceptional circumstances exist in this case to warrant relaxation or waiver of the 90-day rule. Petitioner admittedly received notice of his 2003-2004 annual salary in May 2003, discussed his non-appointment to the Guidance Consociate position with Dr. Jack that same month and knew by no later than June 15, 2003 that he would not be the Guidance Consociate Teacher. The triggering event for purposes of the limitation period is when the petitioner received notice of the Board's action, not when the petitioner felt the injury, *i.e.*, petitioner's receipt of his first paycheck. See *Nissman, supra*, 272 N.J. Super. at 379-81. The undersigned affords little weight to petitioner's testimony vis-à-vis Dr. Jack's alleged advice and the alleged comment by the new Board member at a school

function. Nor does the undersigned concur with petitioner's argument that any such comments justifying an elongation of the regulatory time period and operate to nullify petitioner's receipt of notice concerning his salary and the Guidance Consociate position in September 2003. As recognized in *Kaprow*, and recently restated by the Commissioner in *Giannetta*, attempts to resolve a claim through negotiation do not negate the receipt of adequate notice and do not toll the running of the limitations period. *Kaprow, supra*, 131 N.J. at 588; *Giannetta, supra*, at 6. Based upon a review of the totality of the evidence, I **CONCLUDE** that no compelling reasons or exceptional circumstance exist to warrant relaxation of the 90-day time requirement.

The facts presented in *New Jersey School Boards Ass'n., supra*, are inapposite and provide no solace to petitioner. That case involved a petition by the New Jersey School Boards Association (NJSBA) seeking an order directing the Board of Education of the Township of Wyckoff to pay the NJSBA \$106,206 in dues assessed for its fiscal years 1993-1994 through 1999-2000 and to make future timely payment of assessed dues. The Commissioner concluded that the Board's intentional disregard of the statutory provision of N.J.S.A. 18A:6-50, by refusing to pay dues assessed by the NJSBA, warranted relaxation of the 90-day rule "because a compelling public interest is presented." *Id.* at 5. The Commissioner further commented that he "cannot and will not countenance a board of education's long-standing refusal to fulfill its statutory obligation." *Id.* at 6.

Suffice it to say, the instant case concerns petitioner's individual claim to a higher salary. No constitutional issues are involved and the matter does not implicate issues of significant public interest beyond the present parties. See *Giannetta, supra*, at 6. Given this, the greater public interest lies with the enforcement of the 90-day rule and the dismissal of petitioner's appeal as untimely. *Ibid.* If the rule was relaxed every time that a harsh result occurred, the rule and its salutary public policy of encouraging prompt resolution of disputes would be nullified. *Pacio v. Bd. of Educ. of Lakeland Regional High School School District*, 1989 S.L.D. 2060, 2064.

In sum, I **CONCLUDE** that petitioner's claim is subject to the 90-day time limitation embodied in *N.J.A.C. 6A:3-1.3(i)* (formerly *N.J.A.C. 6A:3-1.3(d)*). I further **CONCLUDE** that petitioner received adequate notice that he would not be appointed to the Guidance Consociate position and would not receive the remuneration previously associated with that position in May 2003 and by no later than June 15, 2003. I further **CONCLUDE** that, irrespective of whether petitioner's cause of action is deemed to have accrued in May or June 2003, petitioner failed to file his Petition of Appeal with the Commissioner within the mandated 90-day period and waited until six to seven months later on December 11, 2003. I further **CONCLUDE** that no compelling or exceptional circumstances exist to justify a waiver or relaxation of the regulation. Accordingly, I **CONCLUDE** that petitioner's claim is time barred pursuant to *N.J.A.C. 6A:3-1.3(i)* (formerly *N.J.A.C. 6A:3-1.3(d)*) warranting dismissal of the within appeal. I further **CONCLUDE** that petitioner's failure to timely file his petition bars both retroactive and prospective relief and reject petitioner's contention that the matter involves a continuing violation. See *North Plainfield Educ. Ass'n., supra*, 96 N.J. at 595; *Gordon, supra*, 1985 S.L.D. at 1930-32; *Sasse v. Bd. of Educ. of the Borough of Point Pleasant*, 92 N.J.A.R.2d (EDU) 339, 344. In view of the foregoing, the undersigned will not address the merits of petitioner's claims alleging that he has tenure as a Guidance Consociate, the Board's reduction of his salary relating to this former position and/or the extra work week during the summer violates petitioner's tenure rights, and petitioner should have preferred eligibility in the position of supervisor.

ORDER

It is hereby **ORDERED** that petitioner's Petition of Appeal be and hereby is **DISMISSED** for failure to comply with *N.J.A.C. 6A:3-1.3(i)* (formerly *N.J.A.C. 6A:3-1.3(d)*).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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 15, 2005
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

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

July 18, 2005
DATE

JUL 18 2005
DATE

Mailed to James Anderson
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej/pb/jb

APPENDIX

List of Witnesses

For Petitioner:

Enrico Ciamillo

For Respondent:

Robert Jack

List of Exhibits

Joint Exhibits:

- J-1 Agreement between Board of Education of the Borough of Ridgefield and Ridgefield Education Association, July 1, 2001 thru June 30, 2004 (31 pp)
- J-2 Letter from Dr. Edmund A. Eyernan, President, Ridgefield Board of Education, to Staff Members of the Ridgefield School System, dated January 29, 1998 (5 pp); Memorandum from Dr. Richard A. Sabella, Superintendent of Schools, to All Staff dated December 24, 1996 (2 pp); Memorandum from Evan M. Goldman to Colleen Loughlin dated November 21, 1996; Letter from Colleen Loughlin, REA President, to REA Teaching Staff; dated December 19, 1996 (2 pp); Letter from Edmund G. Gerber, Director of Representation, Public Employment Relations Commission, to Stanley Turitz, Esq. and Alfred Maurice, Esq., dated December 3, 1997 (13 pp); and Decision of Edmund G. Gerber, Director of Representation, Public Employment Relations Commission, In the Matter of Ridgefield Board of Education and Ridgefield Education Association issued December 26, 1997 (10 pp; double sided)

For Petitioner:

- P-1 Employment Contracts dated November 21, 1995, April 18, 1995, September 14, 1994, April 26, 1994, February 10, 1994 and December 8, 1993 (6 pp)
- P-2 Letter from Enrico D. Ciamillo, Jr. to Dr. Richard A. Sabella, Superintendent of Schools, dated June 6, 1996
- P-3 Annual Salary Notice To Tenure Personnel dated April 29, 2003, May 9, 2002, September 26, 2001, June 29, 2000, April 28, 1999, August 4, 1998, April 14, 1998, August 4, 1998, October 28, 1997, April 22, 1997,

- July 11, 1996 and April 25, 1996 and Memorandum from Marcella Gleie to Dr. Richard A. Sabella dated July 30, 1998 (13 pp)
- P-4 Memorandum from Dr. Jack to Dr. Sabella dated May 13, 2003
- P-5 Job description – Consociate Teacher
- P-6 Memorandum from Gary Behan, Larry Dunn and Marcella Gleie to Staff dated May 20, 2002 (2 pp)
- P-7 "Appointments – Contractual Schedule E-14D" at Special Meeting on June 11, 2002 (3 pp)
- P-8 Extra Services Contracts dated July 9, 2003
- P-9 Memoranda from Aaron R. Graham, Ed.D to Dr. Richard A. Sabella, Superintendent, dated September 4, 2002, and October 22, 1996 and memoranda from Anthony C. Scalzo to Richard A. Sabella, Superintendent, dated July 25, 1995 and August 22, 1994 (4 pp).
- P-10 Memorandum from Gary Behan, Larry Dunn and Marcella Gleie to Staff dated June 2000; Memorandum from Gary Behan, Larry Dunn and Dr. Robert Jack to Staff dated May 13, 2003 and Memorandum from Dr. Robert Jack to Staff dated May 12, 2004 (6 pp)

For Respondent:

- R-1 Schedule D, Extra Service Guides, 1995-1996 and 1996-1997
- R-2 Description of Consociate Position, Duties of Position

OAL DKT. NO. EDU 4883-03
AGENCY DKT. NO. 208-6/03

JULIE A. MOONEY

PETITIONER,

V.

BOARD OF EDUCATION OF
THE TOWNSHIP OF CLINTON,
HUNTERDON COUNTY,

RESPONDENT.

AND

COMMISSIONER OF EDUCATION
DECISION

OAL DKT. NO. EDU 2818-04
AGENCY DKT. NO. 73-2/04

MELANIE B. BIGSBY,

PETITIONER,

V.

BOARD OF EDUCATION OF
THE TOWNSHIP OF CLINTON,
HUNTERDON COUNTY,

RESPONDENT.

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

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

IT IS SO ORDERED.

Richard Rosenberg

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/31/05

Date of Mailing: 8/31/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT

OAL DKT. NO. EDU 4883-03

AGENCY DKT. NO. 208-6/03

JULIE A. MOONEY,

Petitioner,

v.

**BOARD OF EDUCATION OF
OF CLINTON TOWNSHIP,
HUNTERDON COUNTY**

Respondent.

And

OAL DKT. NO. EDU 2818-04

AGENCY DKT. NO. 73-2/04

MELANIE B. BIGSBY

Petitioner,

v.

**BOARD OF EDUCATION
THE TOWNSHIP OF CLINTON,
HUNTERDON COUNTY.**

Kathleen Naprstek Cerisano, Esq., appearing for petitioner, (Zazzali, Flagella, Nowak,
Kleinbaum & Friedman, attorneys)

Anthony P. Sciarrillo, Esq., appearing for respondent, (Lindabury, McCormick &
Estabrook, attorneys)

Record Closed – July 22, 2005

Decided – July 25, 2005

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

These consolidated matters were transmitted to the Office of Administrative Law (hereinafter OAL) on July 25, 2003 and May 5, 2004, respectively, 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 consolidated matter was scheduled for hearing at the OAL, Mercerville, N.J. but rather than litigate the issues, the parties met and negotiated the matter.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 26, 2005
DATE

Israel D. Dubin
ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

7-28-05
DATE

M. Kathleen Dunne
DEPARTMENT OF EDUCATION

JUL 29 2005

DATE

mamf

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

JULIE A. MOONEY,
Petitioner,

v.

BOARD OF EDUCATION OF
CLINTON TOWNSHIP,
HUNTERDON COUNTY,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION/OFFICE OF
ADMINISTRATIVE LAW

Dkt. No. EDUOR 04883-2003S
Agency Ref. No. 208-6/03

MELANIE B. BIGSBY,
Petitioner,

v.

BOARD OF EDUCATION OF
CLINTON TOWNSHIP,
HUNTERDON COUNTY,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION/OFFICE OF
ADMINISTRATIVE LAW

Dkt. No. EDUOR 02818-2004S
Agency Ref. No. 73-2/04

STIPULATION OF SETTLEMENT

The above-captioned matters having been brought before the Commissioner of Education upon the Petitions of Appeal filed by Julie A. Mooney (hereinafter "Mooney") and Melanie B. Bigsby (hereinafter "Bigsby") against the Board of Education of Clinton Township, Hunterdon County (the Board), and the parties having agreed to resolve the dispute between them now pending before the court, subject to the terms and conditions set forth below:

1. The Board agrees to pay Mooney the gross amount of \$1,066.65, subject to standard and ordinary deductions and taxes.

ZAZZALI,
A. NOWAK,
KLEINBAUM
& FRIEDMAN
ATTORNEYS AT LAW

2. Payment shall be made to Mooney within thirty (30) days.
3. The Board agrees to pay Bigsby the gross amount of \$1,308.35, subject to standard and ordinary deductions and taxes.
4. Payment shall be made to Bigsby within thirty (30) days.
5. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.
6. The petitioners shall withdraw the Petitions of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, bearing the above-captioned docket numbers.
7. This Settlement Agreement resolves all claims between Mooney and the Board arising during the 2002-03 school year and all claims between Bigsby and the Board arising during the 2003-04 school year.
8. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.
9. Neither this Agreement nor anything contained herein, nor any action taken by the parties in performance of their obligations hereunder, shall be construed as evidence of the validity of the claims set forth in the actions nor an admission of the same by any of the parties.

ZAZZALI,
E.L.A. NOWAK,
KLEINBAUM
FRIEDMAN
ASSOCIATES, P.C.
ATTORNEYS AT LAW

Julie A. Mooney
Julie A. Mooney

4/12/05
Dated:

Melanie B. Bigsby
Melanie B. Bigsby

4/16/05
Dated:

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioners

Kathleen Naprstek Cerisano
By: Kathleen Naprstek Cerisano, Esq.

4/21/05
Dated:

LINDABURY, McCORMICK & ESTABROOK
Attorneys for Respondent,
Board of Education of Clinton Township

Anthony P. Sciarillo
By: Anthony P. Sciarillo, Esq.

7/19/05
Dated:

CLINTON TWP. BOARD OF EDUCATION

By: Elizabeth Nastus, Ed.D.
Elizabeth Nastus, Ed.D.
Superintendent

6/27/05
Dated:

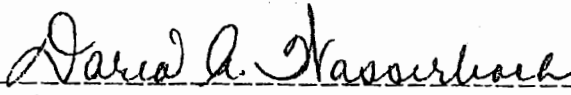
THIS AGREEMENT IS SUBJECT TO RATIFICATION BY THE CLINTON
TOWNSHIP BOARD OF EDUCATION.

CLINTON TOWNSHIP PUBLIC SCHOOLS

CERTIFICATION OF DARIA A. WASSERBACH

I, Daria A. Wasserbach, Secretary of the Board of Education of the Township of Clinton in the County of Hunterdon, State of New Jersey, hereby certify, that the annexed extract is from the draft of minutes of the meeting of the Board of Education duly called and held on June 27, 2005, is true, complete and correct copy of the original minutes so far as they relate to the subject matter referred to in the extract.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Board of Education this 28th day of June 2005.



Daria A. Wasserbach, Secretary

[Seal]

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

1 2005 JUL 21 A 10:18

RECEIVED

-2B-

JUNE 27, 2005

A. Facilities/Finance

Thomas Marron, Chairperson Facilities
Sandra Kotter, Chairperson Finance
Christopher Yula

- A-15 Motion to approve transfer of 2004-2005 excess surplus to operating account 11-000-230-331 (legal expenses).
- A-16 Motion to authorize use of 2004-2005 Capital project interest to offset debt service in the 2006-2007 budget.
- A-17 Motion to award contract for renovations project to lowest bidder pending attorney review.
- A-18 Motion to approve the Stipulation of Settlement between Clinton Township and J. Mooney in the gross amount of \$1,066.65.
- A-19 Motion to approve the Stipulation of Settlement between Clinton Township and M. Bigsby in the gross amount of \$1,308.35.
- A-20 Motion to approve the 2005-2006 regular education tuition contract for 7th and 8th grade Lebanon Borough students to attend Round Valley Middle School, Clinton Township, in the amount of \$238,890 (30 students @ \$7,963 per student).

OAL DKT. NO. EDU 1351-05
 AGENCY DKT. NO. 397-11/04

L.C., on behalf of minor children, J.C. AND J.C., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE CALDWELL-: DECISION
 WEST CALDWELL SCHOOL DISTRICT,
 ESSEX COUNTY, :
 RESPONDENT. :

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

Upon review, the Commissioner observes that the Superintendent of the Caldwell-West Caldwell School District signed the Settlement Agreement on behalf of the Board of Education (Board). Neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating the superintendent to sign the agreement on its behalf, nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner, therefore, cannot approve the within Settlement Agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and the Initial Decision 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.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/1/05

Date of Mailing: 9/7/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1351-05

AGENCY DKT. NO. 397-11/04

**L.C., ON BEHALF OF MINOR CHILDREN,
J.C. AND J.C.,**

Petitioner,

v.

**BOARD OF EDUCATION OF CALDWELL-
WEST CALDWELL, ESSEX COUNTY,**
Respondent.

L.C., pro se

Mark A. Wenzcel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed and Decided: August 12, 2005

BEFORE **BARRY N. FRANK, ALJ:**

Petitioner appeals the district's determination of the children's attendance at a particular school in the district. This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 21, 2005, for hearing as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

A hearing was scheduled for August 12, 2005 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

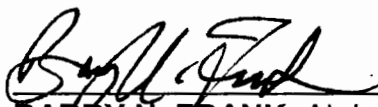
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

August 12, 2003
DATE

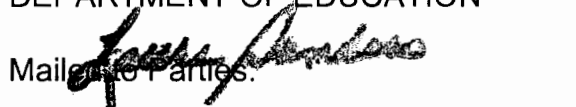

BARRY N. FRANK, ALJ

August 17, 2005
DATE

Receipt Acknowledged:


DEPARTMENT OF EDUCATION

Mailed to Parties.


OFFICE OF ADMINISTRATIVE LAW

AUG 22 2005
DATE

jb

L.C. 01/6/0 J.C.

Caldwell-West Caldwell
Board of Education

BEFORE NEW JERSEY
COMMISSIONER OF EDUCATION
ENJ05 0135T-2005N
DAL Docket No.: ~~397-11/04~~
Agency Reference No.: 397-11/04
SETTLEMENT AGREEMENT

The above-referenced matter having been amicably settled, the parties hereby agree as follows:

1. The petition will be dismissed with prejudice.

2. The district ~~agrees~~ represents that it will keep John Carroll at the Wilson School for the remainder of his elementary school years.

3. The district represents that it will keep James Carroll at Washington School for the remainder of her elementary school years.

Lisa Carroll
Lisa Carroll

Daniel A. Gerardi
Daniel A. Gerardi

Dated: August 12, 2005

OAL DKT. NO. EDU 4209-05
AGENCY DKT. NO. 97-4/05

M.N. and D.N., on behalf of minor child, P.B., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF HAMILTON,
MERCER COUNTY, :

RESPONDENT. :

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

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/1/05

Date of Mailing: 9/7/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4209-05

AGENCY DKT. NO. 97-4/05

M.N. AND D.N., O/B/O P.B.,

R.B. III, AND R.B,

Petitioners,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF HAMILTON,

MERCER COUNTY,

Respondent.

M.N. and D.N., petitioners, *pro se*

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee and Staub, attorneys)

Record Closed: August 18, 2005

Decided: August 18, 2005

BEFORE PATRICIA M. KERINS, ALJ:

This matter was transmitted to the Office of Administrative Law on June 2, 2005, 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*.

At the scheduled hearing scheduled for August 18, 2005, the parties entered into successful settlement negotiations. At that time, the parties executed an executed a Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

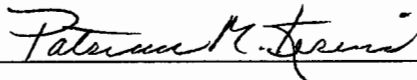
I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

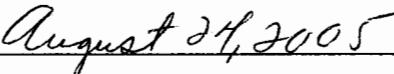
August 18, 2005

DATE



PATRICIA M. KERINS, ALJ

Receipt Acknowledged:



DATE



DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 2005

DATE

/lam



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

M.N. & D.N. 0/6/0
Minor children, P.B., R.B. III, & R.B.
Petitioners

v.
HAMILTON TOWNSHIP
BOARD OF EDUCATION
Respondent

OAL Picket No:

EDUOS-04208-2005 S
Agency Ref No. - 97-4/05

The parties agree as follows:

1. The children P.B., R.B. III & K.B. shall not be enrolled in the Hamilton Township School System as of Sept. 1, 2005, and none of the children shall attend the Hamilton Township schools.

2. The Hamilton Township Board of Education withdraws its counterclaim for tuition without prejudice, should the Petitioners allow the children P.B., R.B. III & K.B. to attend the Hamilton Township Schools when the Respondent may again file suit against the Petitioners for tuition from January 27, 2003, to the date of the children's return to the Hamilton Township School System pursuant to this matter.

Petitioners

Michael Newkirk
Michael Newkirk

Dennis Newkirk
Dennis Newkirk

Respondent
Hamilton Township Board
of Education

By: Dennis M. DeSantis
Dennis M. DeSantis

OAL DKT. NO. EDU 7320-00
AGENCY DKT. NO. 186-6/00

THERESA D'ELIA,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
THE STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF JERSEY	:	
CITY, UNION COUNTY,	:	
	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05

Date of Mailing: 9/9/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07320-00

AGENCY DKT. NO. 186-6/00

THERESA D'ELIA,

Petitioner,

v.

THE STATE-OPERATED SCHOOL DISTRICT OF

THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: July 8, 2005

Decided: July 21, 2005

BEFORE THOMAS E. CLANCY, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 8, 2000, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F1 to -13*.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**:
(a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1(d)* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings **BE** (and are hereby) **TERMINATED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

DATE

7/21/05

THOMAS E. CLANCY, ALAJ

Thomas E. Clancy

Receipt Acknowledged:

DATE

7-27-05

DEPARTMENT OF EDUCATION

M. Kathleen Duncan

Mailed to Parties:

DATE

JUL 29 2005

DEPUTY AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

David Sanders

da

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 JUL 11 P 1:43

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

THERESA D'ELIA,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF THE STATE
	:	OF NEW JERSEY
Petitioner,	:	
	:	OAL DKT NO. EDU-07320-00N
	:	Agency Ref. No. 186-5/00
vs.	:	
	:	
STATE-OPERATED SCHOOL	:	
DISTRICT OF THE CITY OF	:	STIPULATION OF SETTLEMENT
JERSEY CITY, COUNTY OF HUDSON	:	
	:	
Respondent.	:	
.....	:	

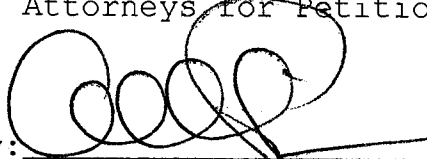
THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation ruling on the length of petitioner's temporary disability in Theresa D'Elia vs. Jersey City Board of Education, C.P. No. 2001-21666, and for good cause being shown,

IT IS HEREBY STIPULATED AND AGREED that Respondent shall restore all days which were deducted from Petitioner's sick leave bank on account of Petitioner's absence from work from February 18, 2000 through May 3, 2000, inclusive.

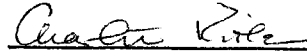
IT IS FURTHER STIPULATED AND AGREED that Respondent shall pay Petitioner her full wages and all other emoluments to which Petitioner would have been entitled for the period from February 18, 2000 through May 3, 2000, inclusive, had Respondent initially treated such absences as being related to a school accident.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: 

ALAN S. PORWICH
DATED: 7/8/05



CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: 3/15/05

OAL DKT. NO. EDU 4306-05
AGENCY DKT. NO. 138-6/05

J.L. on behalf of minor child, A.L.,

PETITIONER,

V.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, MERCER
COUNTY,

DECISION

RESPONDENT.

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

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

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/29/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4306-05

AGENCY DKT. NO. 138-6/05

J.L., ON BEHALF OF MINOR CHILD, A.L.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF EWING, MERCER COUNTY,**

Respondent.

Steve Hallett, Esq., for petitioner

Jeffrey F. Belz, Esq., for respondent

Record Closed: August 25, 2005

Decided: August 25, 2005

BEFORE STEPHANIE M. WAUTERS, ALJ:

This matter was transmitted to the Office of Administrative Law on June 14, 2005, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Dismissal indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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 25, 2005
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

8-29-05
DATE

M. Kathleen Duncan/ea
DEPARTMENT OF EDUCATION

Mailed to Parties:

John P. Pindus
**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

AUG 30 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

J.L. o/b/o
A.L.

Agency Pocket No.: 138-6/05
OAL Docket No.: EDUAS 04306-200

v.

Ennis Imp. Bd. of Ed.

Stipulation of Settlement and
Dismissal

This matter having been amicably resolved between the parties, it is hereby stipulated and agreed as follows:

1) Based upon presentation of a deed showing that the Ennis residence has been transferred to petitioner solely, A.L. shall be allowed to attend The Ennis schools free of tuition;

2) Both parties hereby dismiss ^{their} petition and counterclaim.

Steve Walcott Esq

Steve D. Walcott, Atty. for Petitioner

Jeffrey F. Balz
Jeffrey F. Balz, Atty. for
Respondent

JUDY A. MAZZEO, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

TOWNSHIP OF BARNEGAT, :

OCEAN COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner contends that the respondent failed to assign her the duties of a principal, as required by an earlier Commissioner's Decision ordering respondent to reinstate the petitioner to the position of principal to rectify an illegal reassignment in violation of her tenure rights. Respondent filed a Motion to Dismiss based on untimely submission of the petition.

The ALJ found that respondent's action in appointing petitioner as a principal — but failing to assign her to a school, failing to change her duties and causing her to report to the middle school principal as she had done during the earlier reassignment that violated her tenure rights — was adequate notice to trigger the 90-day limitations period for filing petitions, pursuant to *N.J.A.C. 6A:3-1.3(i)*. Petitioner's reassignment to a principal position without commensurate responsibilities occurred on August 23, 2004, following adjudication and an initial decision ordering her reinstatement as principal; the instant petition was filed on June 15, 2005. The ALJ, therefore, found that the petition was not filed in a timely manner, and concluded that the respondent is entitled to the granting of its Motion to Dismiss.

The Commissioner adopts the ALJ's decision with modification to the timeline for determining what constitutes an untimely filing in this matter, establishing the estimated date of receipt of the original Commissioner's decision as the accrual date. Additionally, the Commissioner notes that petitioner was advised that enforcement of agency orders may be sought in Superior Court pursuant to R. 4:67-6, and any petitioner choosing that avenue of remedy is not constrained by the 90-day rule if the case is later transferred by a Superior Court judge to the Commissioner for clarification of issues requiring administrative expertise. Because petitioner appealed directly to the Commissioner in this matter, she was bound by the procedural rules in *N.J.A.C. 6A:3-1.3*, including the 90-day rule. Accordingly, the Commissioner adopts the decision of the ALJ, and dismisses the petition for failure to timely file.

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 30, 2005

OAL DKT. NO. EDU 4561-05
 AGENCY DKT. NO. 151-6/05

JUDY A. MAZZEO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF BARNEGAT,	:	
OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions have been independently reviewed.

From 1994 to 2002, petitioner was employed by the respondent district in the dual assignment of Principal/Basic Skills Supervisor. In June, 2002, she was reassigned to the position of "Director of Special Projects." It is undisputed that the reassignment switched petitioner from a position in which she had tenure rights to a position in which she did not have tenure rights.

Petitioner appealed the reassignment to the Commissioner, and the matter was adjudicated in the OAL, under docket number EDU 8384-02, by means of stipulated facts and briefs in lieu of a hearing. On December 23, 2004 the Commissioner adopted the administrative law judge's (ALJ) initial decision dated May 27, 2004, ordering that respondent reinstate petitioner to the position of principal, with back pay, benefits and emoluments.

The parties agree that respondent “reassigned” petitioner back to the position of principal on August 26, 2004, and that petitioner was notified of the reassignment by letter dated September 7, 2004. This was before the Commissioner’s final decision was issued. However, the petitioner was not assigned to any school as a principal, but was rather kept in the same office she had been in as Director of Special Projects, performing the same duties and reporting to the same middle school principal. There is no record of petitioner taking any action to challenge respondent’s course of action (or inaction) until April 13, 2005.

On or about April 13, 2005, petitioner filed a motion with the Bureau of Controversies and Disputes (the Bureau) seeking substantive enforcement of the Commissioner’s December 23, 2004 order requiring her return to the position of principal, and alleging that respondent had complied only nominally with the Commissioner’s mandate. The Bureau advised petitioner, by letter dated April 21, 2005, that motions to enforce orders of the Commissioner are properly brought before the trial division of Superior Court. *R. 4:67-6*. In the alternative, the Bureau explained that if the issues raised by petitioner in the motion required determinations by the Commissioner, she would have to file a petition of appeal conforming to the requirements of *N.J.A.C. 6A:3-1.3* and *N.J.A.C. 6A:3-1.4*.

Petitioner apparently decided that the issues for which she sought a determination required the Commissioner’s expertise. Accordingly, she filed a petition, dated June 7, 2005, which was received by the Bureau on June 15, 2005. On June 23, 2005, respondent submitted a motion to dismiss the petition as untimely. More specifically, respondent asserted that petitioner had failed to file her petition within the ninety day period set forth in *N.J.A.C. 6A:3-1.3(i)*. The matter was transmitted to the OAL and assigned docket number EDU 4561-05.

In her response to the motion to dismiss, filed with the Bureau on June 30, 2005 and with the OAL on July 29, 2005, petitioner claimed -- citing no authority -- that the ninety day rule does not apply because she is challenging an attempt by respondent to circumvent the requirements of the Commissioner's decision and the rights involved therein. Petitioner stated: "At issue are not only the rights of the petitioner but the effectiveness of the decision making authority of the Commissioner." Petitioner's letter dated July 27, 2005, in response to respondent's motion.

No affidavits or certifications were submitted by the parties in connection with the motion to dismiss, but the ALJ found that "the essential facts in this matter may be gleaned from reviewing the petition and from the arguments of the parties, and are not disputed." Initial Decision at 2. His "factual discussion" included most of the facts set forth above, and was not challenged by the parties' exceptions.

In his legal analysis, the ALJ referred to *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 N.J. 572 (1993), in which the Court explained that the 90-day rule for filing petitions with the Commissioner of Education is within the broad delegation of power the Commissioner received from the legislature to prosecute controversies, *id.* at 582, and creates the repose necessary for the efficient administration of the school laws. *Ibid.* The *Kaprow* Court also approved of the regulatory focus on the date that petitioners receive written or actual notice of the board of education's wrongful act as the accrual date for a cause of action, as opposed to the date a petitioner feels the consequences of the wrongful act or receives formal notice of same. *Id.* at 588-89. See also, *Nissman v. Board of Educ. of Tp. Of Long Beach Island, Ocean County*, 272 N.J. Super. 373 (App. Div. 1994), *certif. den.* 137 N.J. 315 (1994).

Comparing the present case to *Kaprow*, the ALJ determined that respondent's failure to assign petitioner to a school, change her duties or eliminate her obligation to report to the same middle school principal, was adequate notice of respondent's adverse action and, thereby, petitioner's cause of action. Initial Decision at 5. Thus, he concluded that the 90-day rule was triggered on August 23, 2004. Initial Decision at 6. Consequently, he reasoned, the petition filed on June 15, 2005 was untimely. *Ibid.*

In her exceptions, petitioner continues to assert that the 90-day rule does not apply to the present case. She draws a distinction between contesting the Commissioner's decision of December 23, 2004, which she agrees would trigger the 90-day rule, and seeking compliance with same. Petitioner's exceptions at 2. In fact, petitioner maintains that her appeal does not rest upon an action of respondent, but rather upon an unfolding of every day assignments and duties during the course of the school year. *Ibid.*

The Commissioner is constrained to adopt, with some modifications, the ALJ's decision that petitioner did not meet the time requirements for pursuing her claim. *N.J.A.C.* 6A:3-1.3 (a) states, in pertinent part, that "[t]o initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall prepare a petition of appeal . . .," and *N.J.A.C.* 6A:3-1.3(i) directs petitioners to file their petitions "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." As stated above, the phrase "receipt of the notice of a final order, ruling or other action by the district board of education" has been interpreted in case law to mean even an informal awareness of adverse action by a board of education or other party.

The Commissioner agrees with the ALJ that petitioner would have been aware by early September 2004 that she was not given the principalship of an actual school, and that she was still reporting to the same middle school principal. These are adverse actions by respondent. However, it was not until the end of December 2004 that the Commissioner issued a decision ordering petitioner's reinstatement. Before that decision and order, any "appeal" by petitioner would have been premature and uncognizable. In other words, notwithstanding the fact that it appeared in September 2004 that respondent was not reinstating petitioner to full status as principal, respondent was not legally required to do so until it received the Commissioner's December 23, 2004 order. In light of the December holiday break, the likelihood that respondent would have seen the order before January 3, 2005 was small.

Thus, the 90-day limitations period should be deemed triggered on or about January 3, 2005. This is when respondent was obligated to reinstate petitioner to a principalship, and this is when petitioner should have paid heed to whether respondent assigned her a school and allowed her to perform the kind of duties she had performed previously as a principal. She had until April 4, 2005 to file a petition to bring before the Commissioner any disagreements she had concerning respondent's actions. The Commissioner does not agree with petitioner that respondent's failure to comply with the December 23, 2004 order could not be characterized as adverse action. Further, the Commissioner concludes that 90 days was enough time for petitioner to ascertain that the duties respondent assigned to her after January 3, 2005 were not compliant with the December 23, 2004 order, and that the assignment of those duties was an adverse action. Unfortunately, petitioner's first filing with the Bureau was on April 13, 2005, nine days past the deadline.

As mentioned *supra*, petitioner was advised by the Bureau in a letter dated April 21, 2005, that litigants may file motions for enforcement of agency orders in Superior Court, pursuant to R. 4:67-6. If a petitioner chooses that remedy, and his or her case is later transferred by a Superior Court judge to the Commissioner for clarification of issues which require administrative expertise, the 90-day rule does not apply. *Paul Metzger v. Board of Education of the Township of Willingboro*, 93 N.J.A.R. 2d 548, Initial Decision May 13, 1993, Final Agency Decision June 22, 1993, p.7. For instance, a Superior Court judge could, arguably, in a case such as the present one, have transferred the matter to the Commissioner for a determination as to whether petitioner's current duties are indeed not amenable to characterization as principal's duties. The arrival of the case at the Commissioner's office in such a scenario would not be subject to the 90-day rule.

Petitioner, however, appealed directly to the Commissioner for relief from an alleged wrong. She was consequently required to go forward in accordance with the procedural rules in N.J.A.C. 6A:3-1.3, including the rule concerning a limitations period, but did not. Accordingly, and for the reasons set forth above, the Commissioner adopts the decision of the ALJ and his order granting respondent's motion to dismiss the petition.

IT IS SO ORDERED*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/30/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION TO DISMISS

OAL DKT. NO. EDU 4561-05

AGENCY DKT. NO. 151-6/05

JUDY A. MAZZEO,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF BARNEGAT,

OCEAN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

James F. Schwerin, Esq., for respondent (Parker, McCay & Criscuolo, P.A., attorneys)

Record Closed: August 11, 2005

Decided: August 18, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is a teaching staff member at respondent's school district. She was appointed as a Principal by respondent Board of Education, but contends that she was not assigned to any school and was not assigned to perform the duties of a Principal. Petitioner contends that this action by respondent failed to comply with a December 23, 2004, final decision by the Commissioner in a matter entitled *Mazzeo v. Board of Education of the Township of Barnegat*,

OAL Dkt. No. EDU 8384-02, requiring that she be assigned to a Principal position. Petitioner filed a Petition of appeal with the Commissioner of Education on June 15, 2005, seeking to enforce the final decision of the Commissioner. Respondent filed a Motion to Dismiss in lieu of answer on the basis that the Petition was not filed in a timely manner pursuant to *N.J.A.C. 6A:3-1.3(i)*. The matter was then transmitted to the Office of Administrative Law (OAL) on June 27, 2005, for hearing as a contested case. On July 11, 2005, I entered a letter order as to submissions, following which I closed the record with respect to respondent's Motion to Dismiss on August 11, 2005.

FACTUAL DISCUSSION

Despite the fact that neither party submitted any affidavit or certification to establish a factual record, I **FIND** that the essential facts in this matter may be gleaned from reviewing the petition and from the arguments of the parties, and are not disputed.

Petitioner is a tenured Principal employed by respondent school district. She had previously achieved tenure in the position of Principal. On July 8, 2002, petitioner was transferred from the position of Principal and Supervisor of Basic Skills to the position of Director Special Projects, a position in which petitioner did not have tenure. Petitioner then filed a Petition with the Commissioner of Education, alleging that the foregoing transfer violated her tenure in seniority rights. On May 27, 2004, I entered an Order requiring that petitioner be reinstated to her former position as Principal together with any back pay, benefits and other emoluments. I further ordered that the matter be scheduled for additional proceedings with respect to petitioner's claim of entitlement to the position of Supervisor of Basic Skills. Thereafter, petitioner elected not to proceed with her claim to the position of Supervisor of Basic Skills, and attorney for petitioner requested that the matter be transmitted to the Commissioner. Accordingly, on November 23, 2004, I ordered that petitioner's withdrawal of her claim to the position of Supervisor of Basic Skills be accepted, and I adopted the May 27, 2004 Order Determining that Petitioner is Entitled to Reinstatement as Principal as the Initial Decision, thus concluding the matter. By a final decision of the Commissioner on December 23, 2004, the Initial Decision was affirmed.

On August 26, 2004, after the date of the May 27, 2004 Order Determining that Petitioner is Entitled to Reinstatement as Principal, but prior to the Commissioner's final decision on December 23, 2004, respondent reassigned petitioner from the position of Director of Special Projects to a Principal position. However, for purposes of deciding the within motion, it is undisputed that petitioner was never assigned to a school as a Principal, she remained in the same office and performed the same duties as when she was Director of Special Projects, and she continued to report to the same middle school principal as she had when she was Director of Special Projects. In her petition, petitioner alleges that respondent has failed to comply substantively with the order of the Commissioner by failing to change her assignment and failing to provide her with a school in which to serve as Principal.

On April 13, 2005, petitioner filed a Notice of Motion with the Commissioner of Education seeking to enforce the Commissioner's order of December 23, 2004. On April 21, 2005, the Bureau of Controversies and Disputes of the Department of Education informed petitioner that enforcement of the Commissioner's decision is a matter for the Superior Court of New Jersey, but also indicated that if the issues raised in the petitioner's motion seeking enforcement required adjudication before the Commissioner, petitioner was required to submit the request for relief in the form of a Petition of Appeal. Petitioner thereafter filed the within Petition on June 15, 2005.

LEGAL DISCUSSION

Respondent school district has filed a Motion to Dismiss the Petition on the basis that the Petition was not filed in a timely manner pursuant to *N.J.A.C. 6A:3-1.3(i)*. This section of the New Jersey Administrative Code states:

- (i) 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. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

In the present matter, petitioner alleges that respondent has failed to comply substantively with the order of the Commissioner by failing to change petitioner's assignment and failing to provide her with a school in which to serve as Principal. Petitioner acknowledges that on August 26, 2004, after the date of the May 27, 2004 Order Determining that Petitioner is Entitled to Reinstatement as Principal, but prior to the Commissioner's final decision, respondent reassigned petitioner from the position of Director of Special Projects to the position of Principal. However, petitioner further acknowledges that she was never assigned to a school and she remained in the same office and performed the same duties as when she was Director of Special Projects. She also continued to report to the same middle school Principal as she had when she was Director of Special Projects.

Despite these actions by respondent on and after August 26, 2004, petitioner took no action to challenge them until April 13, 2005, when she filed a Notice of Motion with the Commissioner of Education seeking to enforce the Commissioner's order of December 23, 2004. In fact, it was not until June 15, 2005, that petitioner filed a proper petition challenging the actions of the respondent.

N.J.S.A. 18A:6-26 delegates to the State Board and the Commissioner the "power to make rules governing the prosecution and hearing of controversies and disputes, under the school laws and the rules governing the particular prosecution or dispute when exercising original or appellate jurisdiction therein." *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 N.J. 572, 581-582 (1993). The Court in *Kaprow* went on to state:

The Legislature's broad delegation of power to the Commissioner and the State Board, particularly *N.J.S.A. 18A:6-26*, encompasses the authority to establish a time limitation for the resolution of disputes under the school laws. The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. 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.
[*Id.* at 582.]

In *Nissman v. Board of Educ. of the Township of Long Beach*, 272 N.J. Super. 373 (App. Div. 1994), petitioner claimed that she acquired tenure as a Principal by serving in the position for three calendar years as of August 31, 1990. This was notwithstanding the local board's resolution of April 23, 1990, that her employment contract expiring on August 31, 1990, would not be renewed. The Appellate Division held that the local board's resolution formulated a sufficient controversy to make it "the subject of [a] requested contested case hearing" within the meaning of *N.J.A.C. 6:24-1.2(c)* and is not contrary to legislative policy or existing law. *Id.* at 379-380. The Court noted that in *Kaprow v. Berkeley Tp. Bd. of Educ.*, 131 N.J. 572, 582 (1993), the Supreme Court stated that the limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days. The Court indicated that it is not necessary to decide whether the local board acted correctly when it passed its resolution. What is important is that the local board had the right to know within 90 days whether its action was going to be challenged. To allow a teaching staff member, such as petitioner, to file a claim after the commencement of a new academic year in these circumstances defeats the principle of "repose, an essential element in the proper and efficient administration of the school laws." Citing *Kaprow, supra*, 131 N.J. at 582.

In *Kaprow* the Court held that an agency regulation that focuses on the date of the employer's wrongful act as the accrual date for a cause of action, rather than the date on which the consequences of the act is directly felt by the employee, such as termination, is not inherently arbitrary or capricious. (Citations omitted) The action of respondent herein in appointing petitioner as a Principal but failing to assign her to a school, failing to change her duties and causing her to report to the middle school building principal as she had previously done as Director of Special Projects, was adequate notice of this action. When a prospective petitioner knows or has reason to know that he has a cause of action against an identifiable respondent and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. *Kaprow, supra* at 245, [citing *Farrell, v. Votatur Div.*, 62 N.J. 111, 115 (1973)]. Adequate notice under *N.J.A.C. 6:24-1.2* should effectuate concerns for individual justice by not triggering the limitations period until the effected individuals have been alerted to the existence of facts that may equate in law with a cause of action. 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." *Ibid.*

In this matter, similar to the facts in *Kaprow*, the final order, ruling, or other action by the respondent Board occurred when it appointed petitioner to the position of Principal on August 23, 2004, and had her report to the middle school building principal as she had previously done as Director of Special Projects, but did not assign her to a school and did not change her duties. It must be inferred that these actions and conduct continued from August 23, 2004, through April and June 2005. I **FIND** that these actions and this conduct, especially since they occurred over such an extended period of time, were sufficient to trigger the ninety-day limitations period on August 23, 2004. Therefore, I **FIND** that the Petition filed as it was on June 15, 2005, was not filed in a timely manner pursuant to *N.J.A.C. 6A:3-1.3(i)*. Accordingly, I **CONCLUDE** that respondent is entitled to the granting of its motion and that the Petition should be dismissed as untimely.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that respondent's Motion to Dismiss in lieu of answer on the basis that the Petition was not filed in a timely manner pursuant to *N.J.A.C. 6A:3-1.3(i)*, is hereby **GRANTED**, and the Petition is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 18, 2005

DATE


JOSEPH F. MARTONE, ALJ

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

Aug. 18, 2005
DATE

AUG 24 2005

DATE

Mailed to Parties:


**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

mph

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

PETITIONER,

V.

COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC
ATHLETIC ASSOCIATION,

DECISION

RESPONDENT.

SYNOPSIS

The Board of Education of the Township of Nutley (Nutley) filed a Petition of Appeal seeking reversal of the decision of the New Jersey Interscholastic Athletic Association Executive Committee (NJSIAA) affirming a determination of the Northern New Jersey Interscholastic League (NNJIL) and the NJSIAA Special Committee on Leagues and Conferences (Special Committee) denying Nutley's request to withdraw from the NNJIL and join the Northern Hills Conference (NHC).

Nutley avers that the decisions denying its application to withdraw from the NNJIL were arbitrary, capricious and unreasonable. Nutley claims that its application to join the NHC was made due to an imbalance in the current makeup of the NNJIL, resulting in negative impact to competitiveness which, in turn, occasions health and safety concerns for its student-athletes. Nutley charges that the record is replete with recognition by NJSIAA committees that a problem exists due to unbalanced competition in the NNJIL, and further contends that attempts to achieve balanced scheduling have "failed miserably", pointing out that the NNJIL has not implemented "cross over" scheduling nor addressed scheduling based on "strength of programs" in regard to contests with the strong parochial school members of the NNJIL, as required by action of the NJSIAA Executive Committee in 2000.

The NJSIAA advances that the emphasis in realigning leagues has always been "to assure full scheduling for schools, particularly those with heavy minority populations or parochial schools who would otherwise be denied entrance into local Leagues and Conferences," and a school's win/loss record is not a concern of the Association or the Commissioner. It is well established that in order to assure stability of the leagues, a school wishing to withdraw without the permission of both leagues must present substantial reasons for doing so, and satisfy seven alignment criteria to justify a league transfer. Nutley failed to satisfy four of the seven criteria, in that a transfer: was not justified based on size or geography; would increase financial expenses; and would have a severe negative impact on the NNJIL. The NJSIAA avers that Nutley's application to change leagues is predicated upon its desire to have a winning sports program, especially in football.

On appeal, the Commissioner upholds NJSIAA's determination to deny petitioning Board's request to withdraw from the NNJIL, finding that: Nutley was accorded the full measure of due process to which it is entitled; that the determination of NJSIAA was well-grounded in the record; and that Nutley has failed to establish that the denial of their withdrawal from the NNJIL was arbitrary, capricious or unreasonable, and therefore, under the established standard of review of NJSIAA matters, there is no basis upon which the Commissioner can overturn the NJSIAA's decision here. However, the Commissioner emphasizes that the NNJIL must immediately act to implement, as directed by the NJSIAA's Executive Committee, inter-division or "cross over" game scheduling based upon the relative strength of programs of the competing schools to help insure a healthy competitive balance for all schools in parochial-public school competition.

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.

AGENCY DKT. NO. 86-4/05

BOARD OF EDUCATION OF THE TOWNSHIP :	
OF NUTLEY, ESSEX COUNTY,	
	:
PETITIONER,	
	:
V.	COMMISSIONER OF EDUCATION
	:
NEW JERSEY STATE INTERSCHOLASTIC	DECISION
ATHLETIC ASSOCIATION,	
	:
RESPONDENT.	

For Petitioner, Robert J. Pansulla, Esq. (Gaccione, Pomaco & Malanga)

For Respondent, New Jersey State Interscholastic Athletic Association (NJSIAA),
Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

PROCEDURAL HISTORY

This matter has come before the Commissioner of Education by way of a Petition of Appeal filed on April 6, 2005 by the Board of Education of the Township of Nutley ("Nutley"), Essex County, seeking reversal of the decision of the New Jersey Interscholastic Athletic Association Executive Committee ("NJSIAA Executive Committee"), dated March 2, 2005, which affirmed the determination of the Northern New Jersey Interscholastic League ("NNJIL") and the NJSIAA Special Committee on Leagues and Conferences ("NJSIAA Special Committee") denying Nutley's request to withdraw from the NNJIL and join the Northern Hills Conference ("NHC").¹

¹ It is noted that subsequent to the NNJIL's denial of its request to withdraw from that Conference, Nutley went to Superior Court to attempt to secure a ruling allowing the change. That Court directed that Nutley first exhaust its administrative remedies.

On April 11, 2005, Nutley submitted copies of all exhibits filed with the NJSIAA Committees in support of its appeal, along with the transcripts of the hearing held on January 12, 2005 before the NJSIAA Special Committee and those of the March 2, 2005 hearing before the NJSIAA Executive Committee. Respondent NJSIAA filed its Answer to the Petition of Appeal, pursuant to *N.J.A.C.* 6A:3-7.2, on April 14, 2005. On May 3, 2005, Nutley submitted a brief in support of its position, and a reply brief was submitted by the NJSIAA on May 20, 2005, whereupon the record in this matter was closed.

BACKGROUND

The within record evidences the following:

- The NJSIAA is a voluntary association established pursuant to *N.J.S.A.* 18A:11-3, which organizes, oversees and governs high school athletics in the State of New Jersey.
- Nutley is a public school district in Essex County, and a member of the NJSIAA, and has adopted the Rules and Regulations of that body.
- Nutley is currently a member of the NNJIL and has been since 1982. (Nutley's Brief at 5)
- The NNJIL is currently comprised of 19 member schools. Nutley High School is one of the 13 Group III and Group IV public schools in Bergen, Essex and Passaic Counties included in that League. There are also six parochial school members, including two girls' schools (Holy Angels Academy and Immaculate Heart Academy), three boys' schools (Bergen Catholic, Don Bosco and St. Joseph's) and one co-ed school (Paramus Catholic). (NJSIAA Special Committee February 9, 2005 Decision at 1-2)
- Nutley applied, and was accepted for membership in the NHC. Such application was made, it avers, due to the imbalance that exists in the current makeup of the NNJIL,

resulting in negative impact to competitiveness which, in turn, occasions health and safety concerns for its students who participate in sports. (Petition of Appeal at 2-5)

The NNJIL, however, rejected Nutley's request to withdraw from that Conference, thus preventing Nutley from entering the NHC.

- Almost since the inception of the NNJIL, a number of public schools have attempted to leave that league because of the perceived domination of competition by the parochial schools as a result of their ability to draw an enrollment from a larger geographic area. (NJSIAA Answer to Petition of Appeal at 3; NJSIAA Special Committee February 9, 2005 Decision at 2)
- Historically, the schools in the NNJIL were arranged by population in two divisions. However, in an attempt to address the issue of unfair competition, while also maintaining the viability of the NNJIL, the NJSIAA conducted hearings in 1999 and ultimately issued a report on January 3, 2000, which allowed for the creation of two separate divisions of public schools based upon population, and one division made up solely of parochial schools. The NNJIL was directed to provide for competition with parochial schools on the basis of competitive power and strength so as to mitigate any unfair competitive imbalance.^{2 3} (*Ibid.*; NJSIAA Special Committee February 9, 2005 Decision at 2-3)

² Specifically, this Special Committee urged that future scheduling take into account the relative strength of a school's athletic program for each sport. This was to be accomplished by dividing the League into three sections, based on the strength of a school's athletic program for each sport over the previous five years. Inter-division or "crossover" games would then be scheduled between programs of similar strength. Scheduling in this manner, based on strength of program, should insure that the League will maintain "a competitive balance that is healthy for all schools. It also has the added benefit of allowing schools to play games against a wider variety of opponents. As the strength of a school's program rises or falls each year, the school's opponents will change accordingly." (Special Committee on League and Conferences Decision, February 9, 2005 citing to January 2000 Special Committee Report, Attachment A, pp. 4, 5)

³ This decision, on appeal by the parochial schools, was affirmed by the Commissioner of Education on June 23, 2000. *See In the Matter of the Divisional Realignment by the Northern New Jersey Interscholastic League*, Commissioner Decision No. 209-00.

- As a result of this realignment, the three divisions of the NNJIL are now configured thusly:

DIVISION A – (Smaller Public)

	<u>Enrollment</u>
Bloomfield	1,289
Hackensack	1,228
Ridgewood	1,164
Belleville	1,135
Teaneck	1,017
Nutley	1,008
Paramus	951

DIVISION B – (Larger Public)

	<u>Enrollment</u>
Clifton	2,435
Eastside	2,101
Passaic	1,948
J.F. Kennedy	1,628
Barringer	1,471
Montclair	1,316

DIVISION C – (Parochial)

	<u>Enrollment</u>
Immaculate Heart Academy	1,262
Bergen Catholic	1,236
Don Bosco Prep	1,136
Paramus Catholic	1,012
Academy of the Holy Angels	784
St. Josephs	664

(NJSIAA Special Committee February 9, 2005
Decision at 4-5)

- In contrast, the enrollment of the average school in the NHC is significantly smaller than the schools comprising the NNJIL:

	<u>Enrollment</u>
Passaic County Tech	1,464
West Orange	1,389
West Milford	1,088
Wayne Valley	1,055
West Side	976
Millburn	822
Passaic Valley	805
Montville	796
Lakeland	773
Orange	677
Delbarton	668
Caldwell	594
Pequannock	534
Mt. St. Dominic	492
Madison	480
DePaul	426
Butler	368
Academy of St. Elizabeth	338
Villa Walsh	294
Morris Catholic	270

(*Id.* at 5-6)

- For the years 2001-2003 Nutley maintained a strong baseball team and was competitive in soccer, wrestling and ice hockey. It also had strong girls' tennis and softball teams and was competitive in girls' soccer, cross country, volleyball and basketball. (Nutley's Application Athletic Results Exhibits)
- On January 12, 2005, Nutley appeared before the NJSIAA's Special Committee to appeal the NNJIL's denial of its application to leave that Conference. (Nutley's Brief in Support of Appeal, at 6).
- As has been its practice for over two decades, in considering requests for transfer of a school from one conference to another when one of the two conferences rejects the

transfer application, the NJSIAA Special Committee considered seven Realignment Criteria:

1. Size of schools involved;
 2. Geographic location of schools;
 3. Nature of total athletic program and facilities;
 4. The effect on other leagues and their existing relationships should the request to move from one league to another be granted;
 5. Administrative personnel for programs offered;
 6. Consideration must be given to the financial burden placed upon the school;
 7. Any negative effect that the transfer might have upon the present balance of minority and non-minority schools in a league or conference, at variance with the mandate of the Commissioner of Education in November 1979.
- By decision dated February 9, 2005, the NJSIAA Special Committee denied Nutley's application. In so concluding, the Committee made the following "Findings of Fact" and "Conclusions":

Findings of Fact

1. Nutley High School is one of 13 public schools in the NNJIL.
2. Nutley has the second smallest enrollment of any public school in the NNJIL but has been placed in a separate division where any enrollment disparity has been appreciably reduced.
3. With the exception of contests against parochial school members in the NNJIL, Nutley has had moderate success in its sports program, which the Committee finds is unrelated to its size.
4. If Nutley were to leave the NNJIL it would depart from a League division with schools of comparable size, in close geographic proximity and join a Conference with schools having widely diverse enrollments and geographic locations.
5. The departure of Nutley from the NNJIL would have a substantial adverse impact on that League. It would deprive several public schools, of comparable size in close geographic proximity, of a suitable opponent. It would also lead to applications being pursued by those very schools to leave the NNJIL since they have the same basic complaint as that articulated by Nutley High School. It would inevitably lead to further instability in the NNJIL.

6. The Committee further finds that if Nutley were to leave the NNJIL, it would disrupt the carefully designed divisional alignment which have (sic) received the approval of the NJSIAA and the Commissioner of Education.

Conclusions

1. The application of Nutley High School does not satisfy several of the criteria for realignment. Its size is more appropriate in the NNJIL, rather than the NHC, particularly in the context of its own division. It is surrounded by other member public schools in the NNJIL and its geographic location is much more appropriate within its existing Conference. Without question, there will be a further financial burden placed upon Nutley if it has to travel greater distances and there would be a comparable burden placed upon public schools in the NNJIL that now compete against Nutley within the framework of that League. More significantly, the transfer of Nutley from the NNJIL will have a severe adverse impact on that League.

2. The problems of competitive imbalance facing Nutley are indistinguishable from the problems facing comparably sized public schools in the "A" Division of the NNJIL. Indeed, the difficulties facing Nutley are shared by Paramus, Belleville, Bloomfield and Teaneck High Schools, all of which could present the same arguments as those advanced by Nutley to leave the NNJIL.

3. Since 1999, the NNJIL has attempted to address the competitive imbalance created by the presence of strong parochial schools as members. On January 12, 2000, the NJSIAA Executive Committee approved reports made by this Committee to maintain the three division structure, but to encourage the use of "strength of programs" in the scheduling of "cross over" contests with those parochial schools. On June 23, 2000, the Commissioner of Education approved those reports. Evidently, that aspect of the NJSIAA reports has not been followed by the NNJIL and the Committee encourages it to institute such a system so that Nutley and other schools can gain some degree of relief. Again, when arranging cross over contests, the NNJIL should consider scheduling public schools on the basis of competitive success or strength, on a program-by-program format.

4. There was no evidence there was any correlation between the size of Nutley High School and injuries that have occurred on the

playing field. Instead, particularly in football, there might have been lopsided defeats against parochial schools which hopefully can be remedied by a resort to the recommended strength factor in arranging for cross over contests.

- On March 2, 2005, Nutley appealed the NJSIAA's Special Committee's decision to the NJSIAA Executive Committee which, by a vote of 21 in favor, 5 opposed, with 3 recusals, adopted the decision of the Special Committee denying Nutley's application to leave the NNJIL and join the NHC. The Executive Committee, however, went on to specifically direct that the NNJIL implement the cross over scheduling based on strength of programs ordered in 2000. (March 14, 2005 letter from Boyd A. Sands to Joseph Zara, Superintendent of Schools, Nutley)

NUTLEY'S POSITION

Nutley contends that the decisions of the NJSIAA Special Committee and the NJSIAA Executive Committee denying its application to withdraw from the NNJIL were arbitrary, capricious and unreasonable. It charges that, although the record is replete with recognition by these Committees that a problem exists due to unbalanced competition in this League, and – notwithstanding that Nutley has satisfied the requisite applicable criteria warranting a change in leagues – the NJSIAA's sole rationale for denial of its application is that if Nutley changes leagues, all the other schools experiencing similar disparity in competitiveness with the private and larger schools will want to move as well. (Nutley's Brief at 2)

Nutley claims that its application to change leagues was motivated by "an embarrassing lack of competitive balance in [its] games"⁴ and increasing pressure from the parents of its students participating in sports who fear enhanced injuries as a result of this

⁴As an example, "football defeats by scores of 67-14, 55-0, and 42-13 against private or much larger schools."

competitive imbalance. (*Ibid.*) It seeks to correct this problem by competing in the NHC “where it is more suited as a Group 3 school.” (*Id.* at 5) Pointing to testimony presented at the Special Committee hearing – ironically by representatives of the league preventing its withdrawal – which acknowledged and confirmed the existing disparity, Nutley observes that a stated goal of the NJSIAA is to “foster competition,” and avers that for them to recognize the existence of a problem and ignore it “is arbitrary and unreasonable in and of itself.” (*Id.* at 3)

Next, to support its contention that its application to withdraw from the NNJIL fully satisfied each of the seven requisite Realignment Criteria, Nutley presents the following discourse:

1. Size of Schools Involved

Of the nineteen (19) teams currently listed in Nutley’s conference, only two (2) have a smaller enrollment and both of those are private institutions which can select [their] membership to improve [their] athletic programs from outside of [their] geographic region. As explained throughout, the imbalance of the member schools in the NNJIL has negatively impacted competition, which has been documented by Nutley in support of this appeal through injury reports, disparity in results and statistics. More importantly, Nutley has an obligation to respond to the concerns raised by the parents of its district, especially when the concern is prompted by the impact to health, safety and welfare of the participant students. Nutley has gone through the expense and effort of this process.

As a result of the aforementioned imbalance in number of the present enrollment of the schools in its current conference, and resulting negative impact to competitiveness, Nutley presented its concern for injuries and incidents which impact the health, safety and welfare of the students who participate in sports at Nutley to NJSIAA. Yet Nutley was told that NJSIAA cannot address this obvious problem due to statewide balance concerns. However, that conclusion unreasonably ignores the neat fit of Nutley into the Northern Hills Conference.

Nutley has already been accepted into the Northern Hills Conference because its addition would balance the competition for the conference and for Nutley. This is confirmed by the

enrollment numbers of the membership schools. The appropriateness of the size of schools in the Northern Hills Conference, as compared to Nutley, was confirmed through Mr. SanFillipo's testimony as Executive Director of the Northern Hills Conference, quoted in relevant part above, and found in its entirety in the transcript. [citation omitted] It is apparent that as a Group 3 school, Nutley is better suited in the Northern Hills Conference due to the comparable size of the schools involved. (emphasis in text)

2. Geographic Location of Schools

The geographic location of the schools is comparable as to each league. Nutley offered exact mileage calculations for each and every school of each conference in its submission, and the difference is negligible.

Important to note is both conferences are geographically diverse, and calls for Nutley to travel to urban and suburban areas. Nutley has a local county competition in each conference (i.e. Bloomfield, and Belleville currently, West Orange and Caldwell in the new conference). Each conference has a school within Newark. The geographical location of the schools involved justifies Nutley's attempt to change into the Northern Hills Conference.

3. Nature of Total Athletic Programs and Facilities, Administrative Personnel and Financial Burden

Grouping the next three items of the criteria, and as admitted at the hearings, Nutley would fit neatly into the Northern Hills Conference. In deliberations, an NJSIAA member went so far as to say that it should be Nutley, who considers its financial burden. The impact for the financial decisions are made locally. The point here is greater since it is the parents – the taxpayers of Nutley – that are pleading with Nutley to change leagues. Notwithstanding this analysis, there is no financial burden placed on Nutley for the change.

The nature of the total athletic programs is comparable in each league. The facilities and administrative personnel for these programs are all comparable among the leagues. This was also confirmed and admitted during the hearings, and justifies Nutley's entry into the Northern Hills Conference.

4. Impact on Other Leagues

Nutley submits that it can be stipulated through the record developed that a balance dealing with minority or urban scheduling is not an issue here. In fact, as discussed above when summarizing the geographic locations for the schools, it was confirmed that each conference has a school in Newark, and an even mix of other schools in urban and/or minority areas. Thus, the only actual item to address from the criteria is the effect on the other leagues. As to the Northern Hills Conference, it has accepted Nutley, and the impact deemed favorable. Mr. SanFillipo confirmed this as the league's Executive Director, and it is not refuted.

As to NNJIL, the member schools who appeared at the hearings below admitted that Nutley's request was legitimate and that a problem existed. But, they also confirmed that other schools were interested in joining NNJIL. Upon information and belief, Passaic County Tech was a school that had been voted out of its conference and, sought to enter NNJIL. There are other adjustments that can be made to balance the competitiveness without disrupting the continuation of NJSIAA's handling of the leagues. NJSIAA's goal of "fostering competition" would be enhanced by this change. (emphasis in text)

Here, not only do we have a school board, but we have concerns of parents disgusted with the competitive imbalance being experienced by their children. Moreover, Nutley has to answer to the parents, as taxpayers of Essex County, as to the protection being afforded to their children. The parents are disgruntled and concerned about the unlevel competitive scheduling in the athletic programs that their children compete in for Nutley. Nutley's participation in the Northern Hills Conference cures the problem. (Nutley's Brief at 9-13)

Notwithstanding Nutley's manifest satisfaction of the criteria, it contends, the decision of the NJSIAA's Special Committee, adopted by the NJSIAA's Executive Committee, stated in a conclusory manner that Nutley's injuries claim is not substantiated and questioned the integrity of Nutley's geographic data. However, the "real reason" for its denial of the application is blended into the opinion's conclusions, where it states "that Nutley's appealing of the competitive imbalance cannot succeed because other schools have the same complaint."

(*Id.* at 14) It cannot be determined that Nutley was accorded due process at the two NJSIAA hearings, it proffers, when such hearings resulted in “conclusory” findings. (*Id.* at 18)

Finally, Nutley advances that attempts to achieve balanced scheduling have “failed miserably,” as the NNJIL has neither successfully implemented cross over scheduling nor addressed scheduling based on strength of programs. (*Id.* at 15)

Nutley urges that it has gone through the effort and expense in support of its application and appeal, and has satisfied the necessary criteria. Therefore, it should be allowed to withdraw from the NNJIL to enter the NHC. (*Id.* at 19)

NJSIAA’S POSITION

The NJSIAA’s brief initially presents a comprehensive overview of the history of the League and Conference realignment process begun in 1982 in response to a previously expressed concern of the Commissioner of Education “that a number of inner city and parochial schools were not being allowed to have a full schedule of contests because they were denied membership in local Leagues and Conferences.” (NJSIAA Brief at 3) It stresses that the underlying focus of this and all subsequent realignment plans “has always been to assure full scheduling for schools, particularly those with heavy minority populations or parochial schools who would otherwise be denied entrance into local Leagues and Conferences.”⁵ (*Ibid.*) Although the NJSIAA has endeavored to have Conferences ordered by geography and size, it

⁵ Succeeding statewide realignments of Leagues and Conferences to insure fulfillment of the Commissioner’s directive took place in 1984, 1987 and 1998. In accomplishing such realignments the NJSIAA routinely applied seven criteria, *i.e.*, “size of school; geographic location; nature of the athletic programs and facilities; impact on existing relationship with leagues and conferences; administrative personnel; the financial impact; and any negative effect that a transfer might have on diversity concerns.” (NJSIAA Brief at 5)

emphasizes that assuring schools' competitive success is not now, nor has it ever been, a consideration or concern of either the Commissioner or the NJSIAA. (*Id.* at 4)

The NJSIAA points out that since the third statewide realignment, a number of schools have voluntarily transferred from one League to another as school population fluctuated. Where a school desires such a transfer over the objection of its current League, rather than conduct a statewide realignment, the NJSIAA considers *ad hoc* applications. However, in order to insure that general instability is not occasioned throughout the 21 Conferences in New Jersey, such a school must demonstrate "some substantial need" to transfer and satisfy the seven established realignment criteria. (NJSIAA Brief at 6)

With the underlying intent and purpose of the realignment process detailed, the NJSIAA proposes that it cannot be credibly disputed that Nutley was provided a full measure of due process in consideration of its transfer application. There were seven published realignment criteria; they were permitted to submit a detailed application addressing those criteria; they were accorded two separate hearings and were represented by counsel at both of these proceedings. At the Special Committee hearing on January 12, 2005, they were allowed to fully advance their arguments and to cross-examine NNJIL witnesses. On February 10, 2005, this Committee issued a detailed decision, which fully set forth a discussion of the evidence and testimony, findings of fact and conclusions of law. At the NJSIAA Executive Committee hearing on March 2, 2005, Nutley was again provided an opportunity to present its arguments and, after lengthy consideration and debate, the Executive Committee ultimately adopted the report of the NJSIAA Special Committee's report by a vote of 21 to 5. (NJSIAA Brief at 14-15)

The NJSIAA next submits that Nutley has not sustained its burden of providing substantial reasons for withdrawal from the NNJIL. Initially in this regard, contrary to Nutley's assertion that denial of its application was solely because other teams would seek to leave the conference as well, the instant record establishes that Nutley failed to satisfy four of the seven alignment criteria to justify a transfer. As found by the Special Committee in its conclusions:

1. Its size is more appropriate in the NNJIL, rather than the NHC, particularly in the context of its own division. It is surrounded by other member public schools in the NNJIL and its geographic location is much more appropriate within its existing Conference. Without question, there will be a further financial burden placed upon Nutley if it has to travel greater distances and there would be a comparable burden placed upon public schools in the NNJIL that now compete against Nutley within the framework of that League. More significantly, the transfer of Nutley from the NNJIL will have a severe adverse impact on that League. (Decision at 9, emphasis supplied.)

(NJSIAA's Brief at 15-16)

Furthermore, although Nutley proposed that district parents were increasingly concerned about "enhanced and significant injuries" brought about by the lack of competitive balance in the games, it "did not present any evidence to show that injuries in football were disproportionate or [that] there was any correlation between the perceived or actual competitive balance and injuries." (*Id.* at 16). The NJSIAA also points to a number of factual inaccuracies contained in Nutley's brief in this matter:

First, the school claims that it has the smallest enrollment of the public schools. In fact, Paramus High School has a smaller enrollment and Nutley's size is comparable to the other schools placed in the Division A of the NNJIL. Nutley states that the difference in mileage between the two conferences "was negligible." In fact, as the Special Committee found, as set forth in Chart C of its decision, that the traveling distances were

substantial.⁶ In addition, as also noted by the Special Committee, Nutley was surrounded by other NNJIL public high schools (Passaic, Belleville, Bloomfield and Montclair). Nutley claims that “on information and belief” Passaic County Tech had sought to enter the NNJIL. In fact, Passaic County Tech never applied to the NNJIL and was recently admitted to the NHC instead. Nutley states that the real reason for the transfer denial was that other schools had the same complaint about competitive imbalance. While it is correct that the Special Committee found that the problems facing Nutley were similar[ly] shared by Paramus, Belleville, Bloomfield and Teaneck High Schools, the Special Committee also acknowledged that these schools had been placed with Nutley in the smaller division in the hope that it would mitigate the “competitive imbalance” created by the parochial schools.

Nutley also contends that the NNJIL representatives testified that Nutley’s request was legitimate. Just the opposite is true. In fact, George Middleton, the NNJIL Secretary, testified at length against the transfer. He first noted that the injuries suffered by Nutley were not unusual, noting that “inherent in football is injury.” Mr. Middleton noted that on the subject of competitive balance that Nutley beat Clifton, the largest school in the NNJIL, in football the last two times that they played, demonstrating the lack of correlation between size and strength of program. He

⁶ For ease of comparison, Chart C is reproduced below:

NNJIL – Distance

Academy of the Holy Angels (Demarest) – 22 miles
 Barringer (Newark) – 5 miles
 Belleville – 1.5 miles
 Bergen Catholic (Oradell) – 15 miles
 Bloomfield – 2 miles
 Clifton – 2 miles
 Don Bosco Prep (Ramsey) – 23 miles
 Eastside (Paterson) – 6 miles
 Hackensack – 12 miles
 Immaculate Heart Academy (Westwood) – 20 miles
 J.F. Kennedy (Paterson) – 6 miles
 Montclair – 4 miles
 Paramus – 13 miles
 Paramus Catholic – 12 miles
 Passaic – 2.5 miles
 Ridgewood – 16 miles
 St. Joseph Regional (Montvale) – 24 miles
 Teaneck – 15 miles

NHC – Distance

Academy of St. Elizabeth (Covent Station) – 22 miles
 Butler – 19 miles
 Caldwell – 8 miles
 Delbarton (Morristown) – 27 miles
 DePaul Diocesan (Wayne) – 14 miles
 Lakeland Regional (Wanaque) – 20 miles
 Madison – 23 miles
 Millburn – 16 miles
 Montville Township – 17 miles
 Mount St. Dominic Academy – 7 miles
 Orange – 9 miles
 Passaic Co. Tech. (Wayne) – 12 miles
 Passaic Valley (Little Falls) – 7 miles
 Pequannock Twp. (Pompton Plains) – 15 miles
 Villa Walsh Academy (Morristown) – 25 miles
 Wayne Valley (Wayne) – 12 miles
 West Milford – 30 miles
 West Orange – 7 miles
 West Side (Newark) – 8 miles

(NJSIAA Special Committee Decision, February 9, 2005, at 6-7)

commented that “certainly Nutley is not the worse (sic) athletic program [in] the NNJIL.” He also noted that by being placed in Division A, Nutley would have to play most of its schedule against smaller schools. Mr. Middleton went on to note that Paramus, a small public school in the NNJIL, had its best football season in 20 years and made the football playoffs this year. Again this demonstrated the lack of any correlation between size and competitive success. (citations omitted) (NJSIAA Brief at 16-17)

In conclusion, the NJSIAA urges that Nutley’s application, in fact, is predicated on its desire to have a winning sports program, especially in football, which — pursuant to the realignment goals and objectives of the Association and the Commissioner — cannot be the basis for ordering a league transfer. Notwithstanding the considerable evidence supporting the Special Committee’s conclusion that a transfer was not justified based on size or geography, and would undoubtedly impose a greater financial burden on Nutley due to a significantly increased travel requirement, and would have a severe negative impact on the NNJIL — whose stability must be one of the NJSIAA’s prime objectives — Nutley is pursuing relief from the Commissioner because it wants to have a winning sports program. The NJSIAA submits, “[i]f that were the basis for schools transferring from one conference to another, then the process would be endless and conference structures would be eroded and scheduling of regular season contests would be chaotic.” This is precisely the reason why schools such as Nutley have the burden of providing substantial reasons why they should be permitted to leave their current conference, without any consideration whatsoever to their win/loss football record. (NJSIAA Brief at 17-18)

COMMISSIONER'S DETERMINATION

It is well-established that the Commissioner's scope of review in 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 (1992). That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules absent a finding that the NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. Nor may the Commissioner substitute her judgment for that of the NJSIAA, *even if she 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. Further, the burden of proof 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).

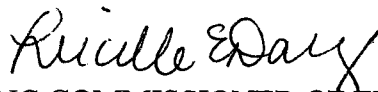
The arbitrary, capricious or unreasonable standard of review is extremely narrow in its scope and, consequently, imposes a heavy burden on those who challenge determinations of the NJSIAA. The standard, as defined by the New Jersey Courts provides:

In the law, "arbitrary" and "capricious" means having no rational basis. (citation omitted) ***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) 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. (citation omitted) (*Bayshore Sewerage Co. v. Dept. of Env't. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974))

Guided by these principles, having carefully reviewed and considered the record, including the transcripts of the Special Committee and Executive Committee hearings, all exhibits, and the parties' briefs on appeal, the Commissioner is persuaded that Nutley has been accorded the full measure of due process to which it is entitled, that the Special Committee's findings and conclusions are well-grounded in the record, and that Nutley, therefore, has failed to establish that the NJSIAA's determination upholding the denial of Nutley's withdrawal from the NNJIL was arbitrary, capricious or unreasonable. However, this said, the Commissioner is compelled to emphasize that the NNJIL must immediately act to implement, as directed by the NJSIAA's Executive Committee, inter-division or "cross over" game scheduling based upon the relative strength of programs of the competing schools to help insure a healthy competitive balance for all schools in parochial-public school competition.

Accordingly, having found that due process was granted Nutley and that there is sufficient credible evidence in the record to support the NJSIAA's denial of its request to leave the NNJIL, the Commissioner can find no basis under the established standard of review on which to overturn the NJSIAA's decision and, therefore, affirms its determination in this matter.

IT IS SO ORDERED.⁷


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/03/05

Date of Mailing: 10/03/05

⁷ 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.

#357-05ER

OAL DKT. NO. EDU 6962-05
AGENCY DKT. NO. 250-9/05

MARICE <u>GREENE</u> .	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION ON MOTION
CAMDEN, CAMDEN COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on September 30, 2005, along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order granting emergent relief in this matter as she concurs with the ALJ, for the reasons clearly stated in his decision, that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. The Board of Education of the City of Camden is directed to immediately enroll petitioner as a student in its district and shall determine his appropriate program and placement in accordance with the terms outlined by the ALJ on pages 6-7 of his Order. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/06/05
Date of Mailing: 10/06/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION

FOR EMERGENT RELIEF

OAL DKT. NO. EDU 6962-05

AGENCY DKT. NO. 250-0/05

M.G.,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF CAMDEN
CAMDEN COUNTY,**

Respondent.

Alan W. Lesso, Esq., for petitioner (South Jersey Legal Services, Inc.)

Harvey C. Johnson, Esq., for respondent

BEFORE RICHARD F. WELLS, ALJ:

STATEMENT OF THE CASE

Petitioner brings this action seeking emergency relief under *N.J.A.C. 1:6A-12.1(e)*. Petitioner, an eighteen-year-old student, alleges that respondent has improperly refused to permit him to enroll in school while he appeals respondent's residency determination.

PROCEDURAL HISTORY

On September 23, 2005, the Commissioner of Education received petitioner's application for emergent relief. On September 27, 2005, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a contested case. On September 30, 2005, oral argument was presented in the Trenton offices of the Office of Administrative Law.

STATEMENT OF THE ISSUES

Is petitioner entitled to immediate enrollment?

FACTUAL DISCUSSION

Petitioner is an eighteen-year-old individual who states that he currently resides in the City of Camden, New Jersey. Petitioner further states that it is his intention to permanently live in Camden. Petitioner claims that respondent refused to admit him to school.

Earlier, petitioner resided in the City of Philadelphia. At the time of his residence in Philadelphia, he became involved in legal matters that led to his involvement with the Juvenile Justice system. While in Philadelphia, he lived at the Youth Study Center in Philadelphia, as well as a residential program called the Devereaux Foundation, and the Glenn Mills School in Concordeville, Pennsylvania. On August 16, 2005, the judge in Pennsylvania released petitioner on probation. As part of the probation agreement, an Aftercare Supervision Plan through the First Judicial District of Pennsylvania, Juvenile Branch, was executed. A portion of the plan established that petitioner would reside with his aunt, who lives in Camden City. Additionally, supervision of his probation was transferred (or currently is in the process of being transferred) to New Jersey.

Petitioner has earlier been classified as a student with a disability who needs special education and related services. Petitioner represents that although he is eighteen years old and should enter twelfth grade, he currently exhibits significant deficits in his math and reading

skills. Additionally, petitioner has experienced emotional problems in the past involving depression and anxiety and currently receives medication for treatment of his physical and/or mental conditions. The Devereaux Foundation is an in-patient mental health facility and the Glenn Mills School is a residential therapeutic school.

Consistent with the Aftercare Supervision Plan, petitioner's aunt appeared at respondent's offices for purposes of arranging petitioner's enrollment. Respondent refused to enroll petitioner.

Respondent argues that enrollment was denied for several reasons. Respondent maintains that because petitioner's probation has not yet been formally or completely transferred to New Jersey, petitioner must still be considered a resident of the Commonwealth of Pennsylvania. Additionally, respondent asserts that insufficient school records have been submitted that would allow the Camden City Public School District to properly evaluate petitioner sufficient to permit a proper placement and program, even if admitted. Respondent further notes that petitioner never personally submitted an application for admission, but rather the effort was performed by his aunt. Respondent asserts that petitioner has failed to present any evidence that the aunt is a legal guardian or legal representative.

In addition to the above, respondent argues that petitioner has not made a voluntary decision to reside in the state, but rather was, according to the statements made in petitioner's emergent relief petition, ordered to reside in Camden. Consequently, respondent takes the position that Pennsylvania courts have no authority to order New Jersey school districts to bear the cost of educating special education students domiciled in Pennsylvania. Additionally, respondent observes that the Aftercare Supervision Plan envisions petitioner's participation in an adult education program so that he could receive a G.E.D. Parenthetically, respondent argues that if it is found that petitioner is still a citizen of Pennsylvania, the Camden City Public School District should receive remuneration from Pennsylvania for petitioner's education.

FACTUAL FINDINGS

I FIND:

- (1) Petitioner is an eighteen-year-old male classified as a student with a disability who needs special education and related services.
- (2) Chronologically, for the 2005/2006 school year, petitioner should be in the twelfth grade, although he exhibits significant deficits in grade level with regard to reading and math.
- (3) Petitioner's aunt resides in the City of Camden.
- (4) Petitioner asserts in his application for emergent relief that he currently resides with his aunt in the City of Camden and intends to do so for the foreseeable future.
- (5) Petitioner's Aftercare Supervision Plan envisions that petitioner will reside with his aunt and that his probation case will be transferred to Camden County, New Jersey.

CONCLUSIONS OF LAW

The standards for the granting of emergency relief are set forth in *N.J.A.C. 1:6A-12.1(e)*. It may be granted if the judge determines from the proofs that: (1) the petitioner will suffer irreparable harm if the requested relief is not granted; (2) the legal right underlying the petitioner's claim is settled; (3) the petitioner has a likelihood of prevailing on the merits of the underlying claim; and (4) when the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted. In the instant case, after hearing the arguments of counsel and any other documentation submitted, I am satisfied that petitioner is entitled to emergent relief. Specifically, I am persuaded that the applicable regulations require enrollment to take place immediately.

Under *N.J.A.C.* 6A:22-3.1(a)2, a student is domiciled in the school district when he has reached the age of eighteen and has established a permanent home within the district. A home is permanent when the student intends to return to it when absent and has no present intent of moving from it. Given the statements set forth in petitioner's Petition, specifically that he now resides in the City of Camden and intends to live there permanently, together with the agreement to reside with his aunt in Camden pursuant to the Aftercare Supervision Plan, I am satisfied that if petitioner's claims are taken as true, petitioner is currently domiciled in the City of Camden Public School District. Accordingly, based upon *N.J.A.C.* 6A:22-4.1(c)2, respondent must permit immediate enrollment. I **FIND** that the facts presented to this tribunal are far from the "clear, uncontested denials" that would support and justify an initial determination of ineligibility for enrollment. *See, e.g., N.J.A.C.* 6A:22-4.1(c).

Based upon the foregoing regulations, I am satisfied that the proofs have established the necessary elements to grant emergent relief under *N.J.A.C.* 1:6A-12.1(e). I **FIND** that petitioner would suffer irreparable harm if denied enrollment within the school district. Additionally, as discussed hereinabove, I **FIND** that the legal right underlying petitioner's claim is settled and that no clear, uncontested denial has been brought forth by respondent. Additionally, I **FIND** that if an evidentiary hearing was undertaken, I **FIND** that there is a good likelihood of petitioner prevailing on the merits in that it would be my reasonable expectation that petitioner would testify consistent with the statements made in his written Petition for Emergent Relief and that those statements of residency would be corroborated by petitioner's aunt and his New Jersey probation officer. Lastly, I agree with the statement of petitioner's counsel that when the equities and interests of the parties are balanced, the petitioner would suffer greater harm than the respondent would suffer if the requested relief was not granted. Specifically, I am satisfied that the marginal cost to the school district of taking on an additional student would be significantly less by comparison to the harm that would inure to petitioner if he was denied the opportunity to go to school and complete his high school education.

The conclusion that petitioner must be permitted enrollment in the Camden City Public School District should not be the end of this matter. Based upon the proofs submitted and arguments raised by both counsel, it is my conclusion that it would be unwise and inappropriate

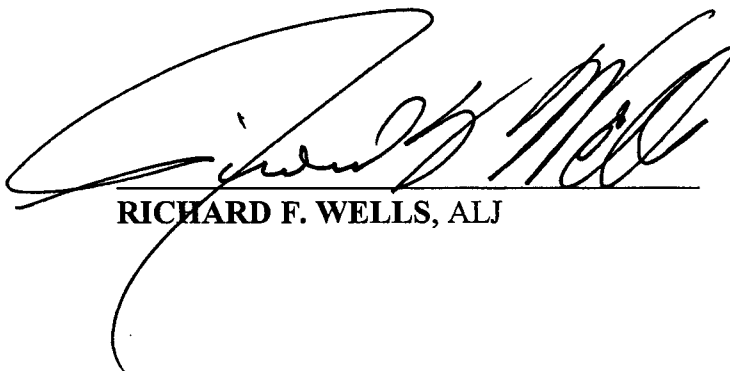
to simply order petitioner to enter twelfth grade in a mainstream setting. Although respondent has received some school record information from petitioner or petitioner's aunt, it is my conclusion that respondent should proceed with due diligence in determining the appropriate program and placement for petitioner, either within the school district or even potentially in an out-of-district setting. As the record currently stands, I am satisfied that respondent would be unable to make an appropriate determination as to a program and placement that would confer a meaningful educational benefit on petitioner. Accordingly, it is my conclusion that the school district should be afforded a reasonable amount of time in order to obtain prior school records, conduct a child study team meeting, prepare an interim IEP, and perform any evaluations deemed necessary. Therefore, it is my conclusion that although I **FIND** that petitioner should be granted immediate enrollment in the Camden City Public School District, such immediate enrollment should be on the following terms:

- (1) During the week of October 3, 2005, respondent will arrange for petitioner to complete all enrollment applications and other related paperwork;
- (2) During the week of October 3, 2005, respondent will schedule and arrange for the completion of a child study team meeting to be attended by petitioner at the child study team offices;
- (3) During the week of October 3, 2005, respondent will arrange for student intake and also the review and receipt of petitioner's prior school records;
- (4) With regard to the receipt of petitioner's prior school records, petitioner and petitioner's counsel will cooperate with respondent so that all necessary authorizations and record release documentation or permission slips are attended to so that all past records may be released;
- (5) Petitioner will initially begin his education program and placement in a home instruction setting. Starting October 11, 2005, petitioner will receive ten hours per week of home instruction in areas that respondent is able to determine would be appropriate based upon the records currently available;

- (6) During all home instruction sessions, petitioner's aunt, Sara Baldwin, shall be home, present and available;
- (7) During the week of October 11, 2005, respondent will develop an interim or temporary IEP to include ten hours of home instruction as aforesaid;
- (8) On or before October 31, 2005, respondent will determine whether any evaluations of petitioner are necessary and if any such evaluations are deemed necessary, will complete same within that time frame;
- (9) On or before November 15, 2005, and based upon the accomplishment of the above-delineated items, petitioner's home instruction will cease and respondent will advise petitioner of respondent's decision as to the appropriate program and placement for him; and
- (10) Respondent does not waive its ability to challenge the legitimacy of petitioner's residency within the school district by means of an evidentiary or plenary hearing.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If 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*.

10-3-05
DATE


RICHARD F. WELLS, ALJ

GLOUCESTER COUNTY INSTITUTE	:	
OF TECHNOLOGY, GLOUCESTER	:	
COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE	:	
LENAPE REGIONAL HIGH SCHOOL	:	
DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, Gloucester County Institute of Technology (GCIT), seeks to recover nonresident fees from respondent Board for Lenape Regional High School students attending the GCIT performing arts program, as well as prejudgment interest. Respondent has argued that GCIT improperly calculated the nonresident fee it charges for out-of-county students. This case stems from a long standing dispute between the parties regarding whether the GCIT performing arts programs met the definition of vocational education, and— if so— whether GCIT is entitled to reimbursement from the home districts of their students. This issue was determined in the affirmative by a companion case decided in the Appellate Division November 12, 2004 (certification denied by Supreme Court on January 28, 2005).

The ALJ found, *inter alia*, that the nonresident fee for out-of-county secondary students should be based on secondary students in attendance at GCIT, and that the Court's January 28, 2005 denial of certification established that GCIT was eligible for payment of the nonresident fee from respondent Board. The ALJ concluded that the GCIT nonresident fee calculation is appropriate and that prejudgment interest is warranted for "tuition and transportation costs" beginning on March 1, 2005.

The Commissioner concurs with the ALJ that: 1) GCIT did not err by omitting nonresident post-secondary students from its calculation of the nonresident fee authorized by *N.J.S.A.* 18A:54-20.1(c); and 2) there was no reason why respondent Board should not have paid at least the undisputed amount due to GCIT as of March 1, 2005. The Commissioner adopts the Initial Decision of the OAL as the final decision in this matter, clarifying that the amount referenced in the recommended order is the nonresident fee, not "tuition and transportation costs." Respondent Board is directed to remit payment forthwith to GCIT, including both the disputed nonresident fee balance and interest on the undisputed amount.

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.

OAL DKT. NO. EDU 4720-00
 (EDU 10120-98 ON REMAND)
 AGENCY DKT. NO. 444-9/98

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision on Remand¹ of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the respondent Board of Education (Lenape) in accordance with *N.J.A.C.* 1:1-18.4.²

In its exceptions, Lenape reiterates its arguments before the OAL with respect to statutory and regulatory construction, urging that Lenape's reading is the only one comporting with the plain language—as well as the history and intent—of the statutes and rules at issue. (Lenape's Exceptions at 3-11) Lenape also proposes findings of fact in addition to those reached by the Administrative Law Judge (ALJ), most notably with respect to events subsequent to March 1, 2005, when the Gloucester County Institute of Technology

¹ This matter was originally filed in 1998 and resulted in a Commissioner decision dated December 16, 1999, directing the respondent Board to pay tuition to petitioner. However, the State Board of Education, in its June 7, 2000 decision on appeal of the Commissioner's decision, remanded the matter to the Commissioner for determination consistent with the State Board's March 1, 2000 decision in the related matter of *K.B. v. Rancocas Valley, supra*. Accordingly, in June 2000, the Commissioner remanded the matter to the OAL for hearing consistent with the State Board's decision. (See Initial Decision at 1-2)

² The Gloucester County Institute of Technology's reply to Lenape's exceptions bore a face date of September 29, 2005 and was filed on October 3, 2005—well beyond the time frame permitted by *N.J.A.C.* 1:1-18.4(a). Since no extension was requested and granted pursuant to *N.J.A.C.* 1:1-18.8, the Institute's submission is not considered herein.

(GCIT) first presented its nonresident fee calculations. Lenape proffers that the amount due GCIT was not finally determined on that date—the date from which the ALJ ordered payment of prejudgment interest based on its being 30 days after resolution of the larger underlying dispute by the Supreme Court—and notes that the district is “currently processing a check for the undisputed amount of \$257,042.22,³ which will be promptly paid to GCIT without prejudice to Lenape.” (*Id.* at 2, Note 2)

With respect to the central question of this matter, the Commissioner concurs with the ALJ that GCIT did not err by omitting nonresident post-secondary students from its calculation of the nonresident fee authorized by *N.J.S.A.* 18A:54-20.1(c). Notwithstanding Lenape’s focus on the construction of particular words and phrases, it is clear from the overall statutory and regulatory scheme governing support of county vocational schools—as well as sound in terms of educational and fiscal policy—that the nonresident fee is intended to generate for out-of-county students the same level of support that the school’s county of location provides for resident students.

Post-secondary county vocational education for nonresidents—including charges to such students’ counties of residence where appropriate—is governed by its own separate statutory scheme, *N.J.S.A.* 18A:54-23.1 through 23.5 (*P.L.* 1973, c. 333), and indeed, was at the time *N.J.S.A.* 18A:54-20.1(c) was enacted and subsequently amended. Moreover, secondary and post-secondary students are generally funded in entirely different manners, with the result that, here, the school’s post-secondary costs are covered in full by State aid and the county contribution is used in its entirety to support the secondary program. (Petitioner’s Responsive Brief to Respondent’s Cross Motion for Summary Judgment, Exhibit B; Petitioner’s Cross Motion for Summary Decision, Exhibit B; Respondent’s Cross

³ Lenape contends that GCIT’s methodology “improperly inflates the total nonresident fee from \$257,042.22 to \$368,900.00, not including interest.” (Lenape’s Exceptions at 3, Note 4)

Motion for Summary Decision, Exhibit D) Under these circumstances, it was entirely consistent with statute and rule for GCIT to have reckoned the county's per pupil contribution toward secondary-level vocational education based on the county tax levy divided by the number of resident students enrolled in the secondary program, and then to assess the resulting amount to nonresident students' home districts.

With respect to the question of prejudgment interest, the Commissioner concurs that, as of March 1, 2005, there was no reason why Lenape should not have paid at least the undisputed amount due to GCIT, as it represents it now has; therefore, the Commissioner directs that prejudgment interest be paid on the amount of \$257,042.22⁴ from March 1, 2005 to the date such funds were—or are, if the above-referenced payment has not yet been fully processed—disbursed to GCIT.

Accordingly, as amplified above, the Initial Decision of the OAL is adopted as the final decision in this matter and the Board of Education of the Lenape Regional High School District is directed to remit payment forthwith to the Gloucester County Institute of Technology, including both the disputed nonresident fee balance and interest on the undisputed amount as set forth herein.

IT IS SO ORDERED.⁵


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/11/05

Date of Mailing: 10/12/05

⁴ Although the ALJ references "interest for tuition and transportation," the Commissioner clarifies that the amount at issue herein is solely the nonresident fee, since GCIT did not additionally charge Lenape for tuition, and transportation costs were not involved in the underlying dispute.

⁵ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4720-00

AGENCY DKT. NO. 444-9/98

**GLOUCESTER COUNTY
INSTITUTE OF TECHNOLOGY,**

Petitioner

v.

**BOARD OF EDUCATION OF
LENAPE REGIONAL HIGH
SCHOOL DISTRICT,**

Respondent

Louis Cappelli, Jr., Esq., for the petitioner

Trevor J. Cooney, Esq., for the respondent (Archer and Greiner, attorneys)

Record Closed: August 8, 2005

Decided: August 24, 2005

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of a petition filed by the Gloucester County Institute of Technology (GCIT) pursuant to *N.J.S.A.* 18A:6-9, seeking to recover tuition, transportation costs and non-resident fees from Lenape Regional School District, which is located in Burlington County. The file was transmitted to the Office of Administrative Law by the Commissioner of Education in June 2000, and has for much of the intervening time awaited resolution of a companion case, *K.B. v. Rancocas Valley Regional High School District*, Appellate Docket No: A-6814-02-T5.

That matter was decided in the Appellate Division on November 12, 2004 and certification was denied on January 28, 2005. Both parties here intervened in that matter. The Court determined that the GCIT performing arts programs met the definition of vocational education and that GCIT was therefore entitled to reimbursement from the home districts of their students.

That baseline question having been resolved the parties have now fallen into a new dispute. Lenape argues that GCIT has not properly calculated the non-resident fee it charges out-of-county students. GCIT counters that Lenape is acting in bad faith and should be responsible for prejudgment interest, pursuant to N.J.A.C. 6A:3-1.17(c) (1).

The facts are substantially undisputed. During the 1997/98 school year and in each succeeding school year students from the Lenape District have attended GCIT. The non-resident fee for each student is derived using a formula that divides GCIT students into the County contribution to arrive at a maximum per pupil charge. GCIT has not, however, included its post-secondary students in this calculation and Lenape believes that this omission inflates per pupil costs, increasing the allowable non-resident fee. The issue was submitted on cross-motions for summary decision pursuant to *N.J.A.C. 1:1-12.5*; *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995).

The question is one of statutory construction¹. *N.J.S.A. 18A:54-20.1(c)* authorizes County vocational schools to collect a fee in addition to tuition for out-of-county pupils. The legislature specifically limited tuition reimbursement from out-of-county districts to secondary school students. However, the formula for the non-resident fee does not address this secondary/post-secondary question. It simply sets an outer limit so that the fee cannot exceed the amount of the county's per pupil appropriation to the vocational education district. Neither does *N.J.A.C. 6A:23-3.3(d)(1)*, the regulatory adoption on the point, address the issue specifically.

Lenape argues that when the legislature forbade County vocational schools from collecting tuition for out-of-county post-secondary students, it did so clearly in the very statutory section at bar here. The silence regarding non-resident fees must therefore mean that post-secondary

¹ Each side submitted certifications of former DOE employees with expertise in school financing to opine on the meaning of the law. No fact dispute was created thereby and ultimately the matter remains a question of statutory construction.

students are to be counted by GCIT in formulating the fee. I do not agree. N.J.S.A. 18A:54-20.1(c) does not allow an institution like GCIT to collect tuition from a school district like Lenape for students that have graduated from high school and are no longer the responsibility of the home district. The question here, however, is whether GCIT must include in-county post-secondary students in attendance at its programs, when calculating the non-resident fee for out-of-county secondary students. The better rational, it seems, is that the regulatory scheme would choose to compare like categories. Thus, the non-resident fee for out-of-county secondary students would be based on secondary students in attendance at GCIT.

The GCIT analysis is further buttressed by the fact that the legislature and State Board used this same non-resident fee language for county special services districts, which have no post-secondary students, see N.J.S.A. 18A:46-31; N.J.A.C. 6A:23-4(d)(1). If post-secondary students were not contemplated in the special services district example and the same language was used in our vocational education example, then it follows that post-secondary students were not contemplated in the latter case. Although both parties argue that theirs is a plain reading and cite cases that urge plain reading where possible, see, eg., *Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102 (2004); *Nat'l Waste Recycling Inc., v. Middlesex County Improvement Auth.*, 150 N.J. 209 (1997), the subject is fairly arcane. The GCIT position is, however, a more logical fit for the language and for the circumstances.

Regarding prejudgment interest, eligibility for tuition and transportation reimbursement was finally resolved on January 28, 2005 with the denial of certification. Though a new debate surfaced regarding the non-resident fee calculation, payment for tuition/transportation should have been forthcoming shortly thereafter. Lenape has presented no good account for its failure to pay these sums timely and should not benefit from the delay. I would therefore impose interest for tuition and transportation commencing on March 1, 2005, which is 30 days from the date of the Supreme Court's order denying certification.

Based on the foregoing, I conclude that the GCIT non-resident fee calculation is appropriate and that prejudgment interest is warranted for tuition and transportation costs beginning on March 1, 2005. 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE 11/11/11

SOLOMON A. METZGER, ALJ

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

DATE _____

Mailed to Parties

AUG 26 2005

RECEIVED AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE _____

OFFICE OF ADMINISTRATIVE LAW

/cad

368-05

OAL DKT. NO. EDU 3307-05
AGENCY DKT. NO. 15-1/05

O.E. on behalf of minor child M.E.,

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

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

DECISION

RESPONDENT. :

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

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/13/05

Date of Mailing: 10/13/05



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03307-05

AGENCY REF. NO.15-1/05

O.E., ON BEHALF OF MINOR M.E.,

Petitioner,

v.

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

Respondent.

Irving Tobin, Esq., for petitioner (Gluck and Tobin, attorneys)

John P. Harrington, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy)

Record Closed: August 19, 2005

Decided: August 30, 2005

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

The matter was transmitted to the Office of Administrative Law (OAL) on March 22, 2004 for determination as a contested case. A hearing scheduled for April 15, 2005 was converted into an In Person Conference and the hearing was rescheduled for June 28, 2005.

On the date of the hearing, the parties were able to resolve the matter and submitted the attached Settlement. On August 19, 2005, respondent submitted the copy of the Board's Resolution approving the settlement agreement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

August 30, 2005
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

9-2-05
DATE

M. Kathleen Dunne
DEPARTMENT OF EDUCATION
Laure Sanders
Mailed to Parties: **DIRECTOR AND**
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 6 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

O.E. 0/6/0 M.E.
Petitioner

AGENCY REF 15-1/05
OAL Docket No. EDU-03307-05

✓
UNION TOWNSHIP BOARD
OF EDUCATION

Respondent

The above matter having been settled by Petitioner
agreeing to pay Respondent \$700.00 in full settlement of
the claim of Respondent

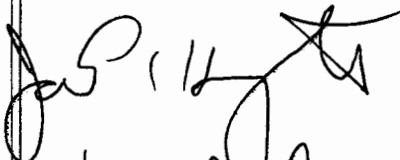
This settlement is not an admission on either party
as to the claim of the other.

Said \$700.00 to be paid within seven days by
bank check or attorney trust check

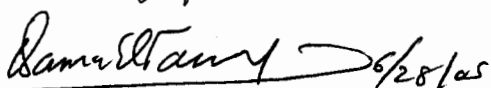
The parties hereby release each other from any claims
which were asserted in this action, except as set forth herein.

AGREED:

6/28/05


attorney for Respondent

Long J. L.
IRVING TOWNSHIP
attorney for Petitioner


6/28/05

PETITIONER

OSAMA K. ELTOUNY

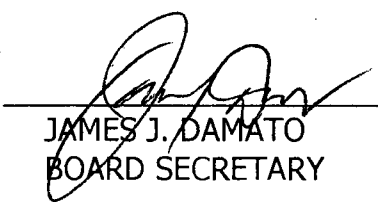
RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2005 AUG 19 A 11: 28

L-1. APPROVE SETTLEMENT – *O.E. O/B/O M.E. VS. UNION TOWNSHIP BOARD OF EDUCATION*

That the board approve settlement in connection with the matter of *O.E. o/b/o M.E. v. Union Township Board of Education* in connection with the information appended to 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 MEETING ON AUGUST 16, 2005.



JAMES J. DAMATO
BOARD SECRETARY

IN THE MATTER OF THE DENIAL :
 OF CERTIFICATION AFTER : COMMISSIONER OF EDUCATION
 REVOCATION OF OTTO KRUPP. : DECISION
 _____ :

SYNOPSIS

Petitioner -- former mathematics teacher convicted of first-degree murder in 1979 -- appealed, for the second time, denial by State Board of Examiners (SBE) of his application for re-issuance of a teaching certificate. A previous Commissioner's Decision, dated June 24, 2004 and affirmed by the State Board on October 6, 2004, sustained the SBE's denial of petitioner's first request for re-issuance of certificate, finding that the petitioner was statutorily disqualified from holding a New Jersey teaching certificate by virtue of his murder conviction, pursuant to *N.J.S.A. 18A:6-7.1*. Petitioner did not appeal to the Appellate Division, but instead submitted another application for certification to the SBE.

The SBE denied petitioner's application on January 20, 2005, finding that, as was previously determined by the Commissioner and affirmed by the State Board, petitioner is permanently disqualified from teaching in any institution or agency under the supervision of the Department of Education. The SBE further determined that it did not have the authority under its own regulations to issue petitioner a certificate since he was statutorily barred from teaching pursuant to *N.J.S.A. 18A:6-7.1*. Petitioner subsequently filed the within appeal to the State Board, which was remanded to the Commissioner.

Upon thorough review of the submissions by petitioner and the arguments presented by the SBE, the Commissioner finds that no new substantive issue has been raised by petitioner that was not argued and considered in the Commissioner's 2004 decision. In that the issues and facts presented in the instant matter, as well as the substantive merits of petitioner's arguments, have previously been litigated and decided in the prior case involving the same parties, therefore, the Commissioner finds that the fundamental principle of *res judicata* precludes further litigation of this matter. Accordingly, the petition in this matter is dismissed, with prejudice.

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

October 7, 2005

SBE #405-180
 AGENCY DKT. NO. 208-8/05

IN THE MATTER OF THE DENIAL :
 OF CERTIFICATION AFTER : COMMISSIONER OF EDUCATION
 REVOCATION OF OTTO KRUPP. : DECISION
 _____:

This matter was initiated by way of a Petition of Appeal, filed on August 24, 2005, following the State Board of Education's (State Board) August 3, 2005 remand of this matter to the Commissioner in accord with the Commissioner's jurisdiction to hear and issue determinations on appeals from decisions of the State Board of Examiners (SBE) denying issuance of certification.

On June 11, 1981, the SBE revoked petitioner's Teacher of Secondary School Mathematics certification following his May 21, 1979 conviction for first-degree murder. Upon petitioner's release after almost 23 years of incarceration, he applied for certification after revocation, claiming that he would waive any right to teach in the public school system and contending that he was solely requesting a conditional license restricting him to teach in correctional facilities operated by the Juvenile Justice System. On September 26, 2002, the SBE voted to deny petitioner's application for certification after revocation, finding that petitioner had not demonstrated rehabilitation sufficient to show that he could function effectively outside of confinement, and concluding that it had no authority to issue a limited or restricted certificate for the sole purpose of working within the correctional system.

Petitioner appealed the SBE's decision to the State Board. On May 7, 2003, the State Board remanded the matter to the Commissioner, finding that the jurisdiction to hear an

appeal of the SBE's denial of an application for a teaching certificate rests with the Commissioner. The State Board's remand required the Commissioner to resolve the issues relating to the application of *N.J.S.A. 18A:6-7.1*, noting that the SBE rendered its decision under the Rehabilitated Convicted Offenders Act (RCOA), *N.J.S.A. 2A:158A-1 et seq.*, and that it did not consider the effect of *N.J.S.A. 18A:6-7.1* on the issue of whether or not a certificate should be issued to petitioner. Upon receipt of the case, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. In an Initial Decision issued on May 10, 2004, the Administrative Law Judge (ALJ) concluded that petitioner had demonstrated sufficient rehabilitation to warrant certification after revocation. However, he also found that respondent was statutorily disqualified from holding a teaching certificate which would allow him to teach in the public schools or in correctional facilities in that, pursuant to *N.J.S.A. 18A:6-7.1*, petitioner was permanently disqualified from employment in New Jersey public schools and any other facility under the supervision of the Department of Education.

Upon review, the Commissioner disagreed with the ALJ's conclusion that petitioner had demonstrated sufficient rehabilitation to warrant certification after revocation, but agreed with the ALJ's conclusion that petitioner was statutorily disqualified from holding a teaching certificate. Like the ALJ, the Commissioner rejected petitioner's contention that he was entitled to certification because he had satisfied the criteria of the RCOA. Specifically, the Commissioner found that application for a teaching certificate is solely within the jurisdiction of the SBE, and that "the RCOA provides no independent authorization for the issuance of a teaching certificate, but, rather, operates to preclude licensing authorities from disqualifying or discriminating against an applicant for these credentials based *solely* on his or her conviction of a crime." *In the Matter of the Denial of the Issuance of a Teaching Certificate to Otto Krupp*, Commissioner's Decision June 24, 2004, slip op. at 19. The Commissioner further found no

conflict or tension between the RCOA, *N.J.S.A. 2A:168A-1 et seq.*, which was originally enacted by the Legislature in 1968, and *N.J.S.A. 18A:6-7.1*, noting that:

The intent of this Act is reflected in 2A:168A-1 **Legislative Findings**:

The Legislature finds and declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record.

Therefore, the Legislature finds and declares that notwithstanding the contrary provisions of any law or rule or regulation issued pursuant to law, a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless *N.J.S. 2C:51-2* is applicable *or unless the conviction relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought.* (emphasis supplied in Commissioner's decision))

As such, pursuant to this statutory provision, the relevant inquiry in judging the propriety of disqualification or discrimination against an applicant for licensure or certification based on conviction of a crime is whether the conviction at issue has a direct relation to the license or certificate being sought. *See Storcella v. State Dept. of Treasury*, 296 *N.J. Super.* 238 (App. Div. 1997).

Turning to the provisions of *N.J.S.A. 18A:6-7.1 et seq.*, as recognized by the ALJ, pursuant to amendments enacted by the Legislature in 1998, this provision

Disqualifies [an individual] from employment in "any facility, center, school or school system under the supervision of the Department of Education" if he had been convicted of certain crimes, including murder. Before the change in the law, subsection (e) of the statute allowed a person convicted of a disqualifying offense

the opportunity to demonstrate affirmatively his or her rehabilitation by clear and convincing evidence. As a result of the 1998 amendments, however, *N.J.S.A.* 18A:6-7.1 now provides that an individual convicted of a disqualifying offense “shall be permanently disqualified from employment or service.” Similarly, the Legislature expressly repealed the provision in the law that had previously granted such individual the opportunity to show rehabilitation. Instead, subsection (e) limits the individual to “an opportunity to challenge the accuracy of the disqualifying criminal record.” (citation omitted) Initial Decision at 8.

The Commissioner notes that the Legislature in enacting the 1998 amendments to *N.J.S.A.* 18A:6-7.1 proclaimed that a conviction for a first or second degree crime was inimical to employment in the public schools. When these amendments were drafted, the Legislature declared that the interest and safety of school children in the State of New Jersey must prevail. Indeed, one of the sponsors of the amendments declared, “We are entrusting these people with our children’s safety. The risk that these people have not been rehabilitated is a gamble that we are not willing to take.” Senator Norman M. Robertson, Senate and Assembly News Release, GovNet #30085. The other sponsor of the amendments stated, “There is no good reason why we should have a child abuser or flasher working with our children. This legislation keeps these people where they belong -- far away from our kids.” Senator Joseph A. Palaia, Senate and Assembly News Release, GovNet #30085.

Because the enactment of the 1998 amendments to *N.J.S.A.* 18A:6-7.1 is specifically predicated on the Legislature’s belief that an individual’s conviction for certain crimes, including murder, *relates adversely to employment in the public school system of New Jersey*, disqualification or discrimination against such an individual who has applied for a teaching certificate is specifically exempted from the dictates of the RCOA by that provision’s clear language as a consequence of the relationship between the offense and the certification being sought.

Id., slip op. at 19-21

Additionally, the Commissioner concluded that:

Most importantly, the award of a certificate by the Board of Examiners certifies that the holder has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey. As a consequence of *N.J.S.A.* 18A:6-7.1, petitioner is precluded from employment in any entity under the auspices of the Department of Education and the State Board of Education, rendering the award of certification to him a legal impossibility.

Id., slip op. at 22

Thus, the Commissioner found rehabilitation was not a consideration, as petitioner was statutorily disqualified from holding a New Jersey teaching certificate by virtue of his murder conviction, pursuant to *N.J.S.A.* 18A:6-7.1. Accordingly, the Commissioner adopted the Initial Decision of the OAL, as modified, sustaining the SBE's denial of petitioner's request for certification after revocation. On October 6, 2004, the State Board affirmed the Commissioner's determination "for the reasons expressed therein." Petitioner did not appeal to the Appellate Division. Instead, petitioner submitted another application for certification to the SBE. On January 20, 2005, the SBE denied petitioner's application for certification, finding that, as previously determined by the Commissioner and affirmed by the State Board, petitioner is permanently disqualified from teaching in any institution or agency under the supervision of the Department of Education. The SBE further determined that it did not have the authority under its own regulations to issue petitioner a certificate since he was statutorily barred from teaching, pursuant to *N.J.S.A.* 18A:6-7.1. Subsequently, petitioner filed the within appeal to the State Board, which was remanded to the Commissioner as noted above.

By letter of August 16, 2005, the Director of the Bureau of Controversies and Disputes requested that petitioner submit a petition of appeal, conforming to *N.J.A.C.* 6A:3-1.3 *et seq.*, and a legal memorandum or brief addressing why the issue raised in this matter has not already been decided by the Commissioner's June 24, 2004 determination, affirmed by the State Board on October 6, 2004, which found petitioner statutorily disqualified from holding a

New Jersey teaching certificate by virtue of his murder conviction. The SBE was directed to file its Answer and to respond to petitioner's legal memorandum upon its receipt.

Upon review, the arguments submitted by the petitioner¹ are essentially the same arguments presented in the previous matter, *i.e.*: 1) the legislative intent of *N.J.S.A. 18A:6-7.1* "was not to totally bar rehabilitated offenders, just bar entry into the public schools," thus, he should be allowed to use certification in any other forum from which he is not barred; 2) the RCOA states that an applicant cannot be disqualified or discriminated against based on a prior conviction -- yet, in the instant matter, petitioner is being discriminated against based on a prior conviction; 3) he is being discriminated against because, prior to the enactment of the 1998 amendment (*N.J.S.A. 18A:6-7.1*), two similarly situated individuals with homicide convictions were issued teaching certificates after promising that they would not teach in a public school; 4) the Department of Corrections and the Juvenile Justice System do not have a board of education, and, thus, do not fall under the criteria listed in *N.J.S.A. 18A:6-7.1*; and 5) petitioner is not barred from teaching in the adult correctional system because *N.J.S.A. 18A:6-7.1* would not apply as he would not be dealing with children under the age of 18. (Petitioner's Brief at 1-2 and Petitioner's Reply Brief at 2-3)

The SBE submits, *inter alia*, that petitioner is attempting to litigate again the issue of the effect of his disqualification from public school employment upon his eligibility for certification which was conclusively decided in the previous decision of the Commissioner (referenced above) regarding this same issue. (SBE Brief at 9) The SBE notes that petitioner did not appeal the State Board's affirmation of the Commissioner's finding to the Appellate Division, making the State Board's determination final. (*Id.* at 9-10) The SBE claims that petitioner is, therefore, barred from re-litigating the issue of the effect of his disqualification

¹ Although not requested to do so, petitioner additionally filed a reply to the SBE's brief.

from public school employment on his eligibility for certification and his petition should be dismissed. (*Id.* at 10)

Upon a thorough assessment of petitioner's submissions in this matter, as well as the arguments presented by the SBE, the Commissioner finds that no new substantive issue has been raised by petitioner that was not argued and considered in the Commissioner's June 24, 2004 decision, wherein it was determined that petitioner was statutorily disqualified from holding a New Jersey teaching certificate. In that the issues and facts presented in the instant matter, as well as the substantive merits of petitioner's arguments, have previously been litigated and decided in the prior case involving the same parties, therefore, the Commissioner finds that the fundamental principle of *res judicata* precludes further litigation of this matter. See *City of Hackensack v. Winner*, 82 N.J. 1, 31, 34 (1980) and *T.W. v. A.W.*, 224 N.J. Super. 675, 682 (App. Div. 1988).

Accordingly, for the reasons set forth above, the petition in this matter is dismissed, with prejudice.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/07/05

Date of Mailing: 10/07/05

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.*

353-05

³⁵³⁻⁰⁵
OAL DKT. NO. EDU 5654-05
(EDU 1164-05 ON REMAND)
AGENCY DKT. NO. 374-10/04

JACK CORTEZ, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION ON REMAND
OF GARFIELD, BERGEN COUNTY, :
RESPONDENT, :
AND :
IN THE MATTER OF THE TENURE :
HEARING OF JACK CORTEZ, :
SCHOOL DISTRICT OF THE CITY :
OF GARFIELD, BERGEN COUNTY. :
_____ :

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

Upon review, the Commissioner approves the settlement terms 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.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/05

Date of Mailing: 9/30/05

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



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05654-05

NO. EDU 01164-05 (**ON REMAND**)

AGENCY REF.NO.374-10/04

JACK CORTEZ,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF GARFIELD, BERGEN COUNTY and
IN THE MATTER OF THE TENURE HEARING OF
JACK CORTEZ, GARFIELD SCHOOL DISTRICT,
BERGEN COUNTY,**

Respondent.

Bruce D. Leder, Esq., for petitioner (Cohen, Leder, Montalbano & Grossman, attorneys)

Toni Belford Damiano, Esq., for respondent

Record Closed: August 19, 2005

Decided: August 19, 2005

BEFORE **CAROL I. COHEN, ALJ:**

The matter was transmitted to the Office of Administrative Law (OAL) on January 12, 2005 for determination as a contested case. A hearing was scheduled for February 1, 2005, which was adjourned because Ms. Damiano's father passed away. It was rescheduled to February 24, 2005.

On the date of the hearing the parties were able to resolve the matter. On March 1, 2005, the parties submitted the attached typewritten Settlement Agreement indicating the terms of the agreement. On March 10, 2005, the court received the original handwritten signed agreement. An Initial Decision Settlement was prepared on March 15, 2005 and mailed to the parties on March 24, 2005. On May 5, 2005 the Commissioner of Education filed a decision remanding the matter to the Office of Administrative Law (OAL) for further expansion and revision of the documents consistent with the Cardonick standards. The file was returned to the OAL on May 26, 2005. On August 19, 2005 the attorneys sent a revised Settlement Agreement consistent with the Cardonick standards. The attached Settlement Agreement indicates the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

8/19/05
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

August 23, 2005
DATE

Karen Linsley
DEPARTMENT OF EDUCATION

Laure Sanders
Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

AUG 23 2005
DATE

id

Damiano Law Offices

*51 East Main Street
Little Falls, New Jersey 07424*

*(973) 890-1199
Fax (973) 890-1966*

*TONI BELFORD DAMIANO
Also PA & D.C. Bars*

*STEVEN M. SEGALAS
Also NY Bar*

*ALAN G. TRESSER
JOSEPH V. MACERI
*NICOLE A. CASCIOLA
•Also PA Bar*

August 15, 2005

Via UPS Overnight

Honorable Carol Cohen
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: *Cortez v. Garfield Board of Education*
OAL Docket No(EDU1164-05- Remand)
EDU 05654-05

Dear Judge Cohen:

This letter is written with the authority and consent of Bruce Leder, attorney for Mr. Jack Cortez. Pursuant to N.J.A.C. 6A:3-5.6 - withdrawal, settlement or mooted tenure charges - the following information is submitted as required and established by the State Board of Education in the matter entitled *In re Cardonick, State Board Decision of April 6, 1983(1990 School Law Decisions(S.L.D.) 842, 846)*:

1. Enclosed is a copy of the filed tenure charges outlining the nature of the charges against Mr. Cortez; and,
2. In regard to the explanation of the circumstances justifying the settlement, please be advised that it is undisputed that Mr. Cortez suffers a physical disability that does not permit him to perform the duties required of him in the position he held with the Garfield Board of Education; and,
3. In regard to the consent of both the charged and charging parties, enclosed is a copy of the signed Stipulation of Settlement. Enclosed please also find a certified copy of the Garfield Board of Education Resolution No. 02-313-05 dated February 28, 2005, approving the settlement; and,
4. In regard to an indication that the charged party entered into the agreement with a full understanding of his rights, Mr. Cortez was extensively *voir dired* by Your Honor on the record, as well as having been asked questions

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2005 AUG 19 A 10:27

by counsel for the charged and charging party in addition to executing the Stipulation of Settlement; and,

5. It is clear that this agreement is in the public interest as the settlement financially benefits Mr. Cortez and does not detrimentally impact upon the District.

I trust the above is in full compliance with the Decision of the Commissioner of Education entered April 27, 2005, and acceptable as presented.

Very truly yours,

DAMIANO LAW OFFICES

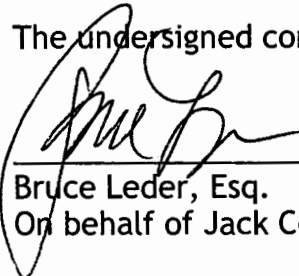


TONI BELFORD DAMIANO, ESQ.

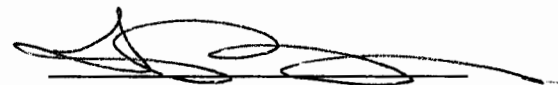
TBD:mr
Enclosures

cc: M. Kathleen Duncan, Director, Bureau Controversies & Disputes
Mr. Nicholas Perrapato, Superintendent w/o enclosures
Mr. Raymond Hryczyk, Assistant Superintendent w/o enclosures
Dr. Dennis Frohanpfel, Business Administrator w/o enclosures

The undersigned consent to the submission of the above.



Bruce Leder, Esq.
On behalf of Jack Cortez



Toni Belford Damiano, Esq.
On behalf of Garfield
Board of Education—
Duly Authorized Representative

GARFIELD BOARD OF EDUCATION - Regular Meeting - February 28, 2005

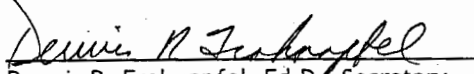
02-313-05 Whereas, the Garfield Board of Education and Jack Cortez are parties to a matter pending before the Office of Administrative Law, Docket No. EDU-01 164-05; and Whereas, both parties desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter, **It Is Hereby Agreed as follows:**

1. Jack Cortez will file a disability retirement application. Jack Cortez understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education. The Garfield Board of Education takes no position as to whether or not Jack Cortez is eligible for a disability retirement. The Garfield Board of Education agrees to provide reasonable assistance to Jack Cortez in the preparation of the disability pension application.
2. Jack Cortez shall receive from the Garfield Board of Education a lump sum settlement equivalent to five and one-half (5.5) months of his present salary (\$49,600) in return for the following release. Jack Cortez releases now and forever any and all claims, causes of action, petitions or demands against the Garfield Board of Education and its individual Board Members arising out of his employment, his termination, his tenure charges, his retirement and/or the end of his employment with the Garfield Board of Education. Notwithstanding this release, Jack Cortez has the right to pursue his workers' compensation claim.
3. Jack Cortez acknowledges that he has already received one and one-half (1.5) months of salary. This sum, in addition to the amount set forth in paragraph 2, shall be the total payable by the Garfield Board of Education to Jack Cortez for any claims. Upon receipt of the five and one-half (5/5) months as set forth in paragraph 2, Jack Cortez acknowledges that the Garfield Board of Education has completed its obligation to Jack Cortez and Jack Cortez agrees that the Garfield Board of Education will have satisfied its monetary obligations to him for any and all claims.
4. Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter.
5. The Garfield Board of Education will withdraw its Cross Petition in this matter.

Mrs. Aloia motioned to approve Resolution 02-313-05. Said motion was seconded by Mr. Hicks and carried by the following roll call vote: Mrs. Aloia, Ms. Visotcky, Dr. Conte, Mr. Hicks, Mr. DeMarco, Mr. Edward Puzio, and Mr. Wich voting YES.

I, Dennis R. Frohnapfel, Ed.D., Secretary of the Garfield Board of Education, hereby certify that the foregoing is a true copy of a motion duly adopted by said Board at a Regular Meeting held on February 28, 2005.

IN WITNESS WHEREOF, I have set my hand and the seal of the Garfield Board of Education, May 2, 2005.


Dennis R. Frohnapfel, Ed.D., Secretary
Garfield Board of Education

STATEMENT OF TENURE CHARGES

STATE OF NEW JERSEY :
 :
COUNTY OF BERGEN :

SS:

I, DR. DENNIS R. FROHNAPFEL, of full age, being duly sworn according to law and upon my oath, deposes and says:

1. I am the Board Secretary/School Business Administrator of the School District of the City of Garfield.

2. My appointment to the position of Board Secretary/School Business Administrator in the School District of the City of Garfield became effective on or about September 15, 2003, and I have held such position continuously from that time to the present.

3. As the Board Secretary/School Business Administrator, one of my duties is to oversee and supervise the conduct of non-certified employees in the District, and to insure that the conduct of the non-certified staff members is becoming to their positions within the district, and to overlook that non-certified staff members perform their assigned duties in an efficient, appropriate, and diligent manner.

4. Mr. Jack D. Cortez, Jr. is a custodian employed in the district. He was initially hired in the district on or about September 4, 1990. While he started as a custodian, he was later transferred to the Maintenance Department. However, at his request, he was returned to the custodian's position.

5. I am hereby seeking to prefer tenure charges against Mr. Cortez as follows:

- (a) Inability to adequately perform his duties as a custodian, due to incapacity, as set forth in the attached Statement of Evidence;
- (b) Inefficiency for excessive absenteeism; and
- (c) Other just cause.

6. With respect to the charges of inefficiency, Mr. Cortez has been afforded the opportunity to correct such inefficiency on February 9, 1999, January 14, 2000, January 2, 2001, and June 1, 2001, both verbally and in writing.

7. In view of the above charges, I have determined that Mr. Cortez's actions constitute incapacity in his job, and other just cause to warrant Mr. Cortez's termination from employment.

8. I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dennis R. Frohnappfel 6/23/04
DR. DENNIS R. FROHNAPFEL
Board Secretary/School Business Administrator

Sworn to and subscribed before me
this 23rd day of June, 2004.

Donna Nazzaro

DATED: June 23, 2004

DONNA NAZZARO
A Notary Public of New Jersey
My Commission Expires Nov. 4, 2004

STATEMENT OF EVIDENCE

STATE OF NEW JERSEY :
 : SS:
COUNTY OF BERGEN :

I, DR. DENNIS R. FROHNAPFEL, of full age, being duly sworn according to law and upon my oath, deposes and says:

1. I am the Board Secretary/School Business Administrator of the School District of the City of Garfield.

2. My appointment to the position of Board Secretary/School Business Administrator in the School District of the City of Garfield became effective on or about September 15, 2003, and I have held such position continuously from that time to the present.

3. As the Board Secretary/School Business Administrator, one of my duties is to oversee and supervise the conduct of non-certified employees in the District, and to insure that the conduct of the non-certified staff members is becoming to their positions within the district, and to overlook that non-certified staff members perform their assigned duties in an efficient, appropriate, and diligent manner.

4. Mr. Jack D. Cortez, Jr. is a custodian employed in the district. He was initially hired in the district on or about September 4, 1990. While he started as a custodian, he was later transferred to the Maintenance Department. However, at his request, he was returned to the custodian's position

5. A review of Mr. Cortez's personnel file reveals that, throughout his employment in the district, Mr. Cortez has had a history of excessive absenteeism, injury, and disability. In any event, some examples of his history are as follows:

(a) On August 4, 1994, during his normal work hours, Mr. Cortez was observed drinking beer at a local tavern.

(b) During the 1997-1998 school year, Mr. Cortez was absent a total of 33 days from work for illness, vacation, and personal days. As early as September 17, 1997, Mr. Cortez complained of experiencing chest pains while performing work duties.

(c) On November 25, 1997, Mr. Cortez allegedly injured his back and hips while performing his duties. He filed a Workers' Compensation claim as a result and was absent for a significant time from his work.

- (d) On July 28, 1998, Mr. Cortez asked to be transferred from the maintenance department to a custodial position as a result of medical problems. His request was accommodated. However, Mr. Cortez was excessively absent through 1998 and 1999, and, as such, his excessive absenteeism was discussed at a meeting of the Board's personnel committee on February 9, 1999.
- (e) Following that meeting, Mr. Cortez's excessive absenteeism continued. In March 1999, he filed a temporary disability claim. Then in August, while cleaning gutters at his home, he fell from a ladder. He then filed another temporary disability claim on September 6, 1999. In the 1999/2000 school year, Mr. Cortez was absent a total of 82 days.
- (f) After finally returning to work, on January 14, 2000, Mr. Cortez was reprimanded for his failure to adequately sweep the floor in a classroom. After this verbal reprimand, Mr. Cortez stated that he was ill, and he left work early.
- (g) On September 11, 2000, Mr. Cortez alleged that he had fallen while carrying a package up stairs and that he had hyper extended his knee. He was absent for a few days as a result, though he refused medical treatment at the time. His excessive absenteeism continued. As a result, on January 2, 2001, Mr. Cortez met with the principal in the school where he was assigned to work, as well as the Board Secretary at the time, Edward Izbicki. Following this meeting, Mr. Cortez continued to be excessively absent. His annual written performance report, dated June 1, 2001 indicates that he needed improvement in his punctuality and attendance, as well as his performance of his duties and his general attitude.
- (h) On or about June 29, 2001, Mr. Cortez filed another disability claim after he received treatment for a heart condition. He was absent for a significant time as a result. On July 6, 2001, the principal at the school where Mr. Cortez was assigned wrote a memorandum to the Superintendent indicating that Mr. Cortez's excessive absenteeism was negatively impacting upon his school's entire custodial staff. On or about July 9, 2001, Cortez was again absent. He continued to be absent for several days when the School Business Administrator at the time was advised that he had been admitted into the hospital for a coronary problem. He was absent for a significant time and he provided documentation indicating that he could return to work as of early September 2001. In early September, however, he called in

sick for work indicating that he could not get a doctor's appointment and he needed to see a doctor. On September 7, 2001, the school principal wrote another memo to the Superintendent expressing concerns about Mr. Cortez's physical well-being and his ability to perform custodial duties. Mr. Cortez continued to be absent for a significant period of time.

- (i) After Mr. Cortez eventually returned to work, his excessive absenteeism continued. In January, February and March 2002, Mr. Cortez was absent for a few days in each of those months as a result of upper respiratory infections. Through the 2002/2003 school year, Mr. Cortez was absent a total of 185 days. This resulted from various physical ailments, as well as mental ailments such as depression. Further, in August 2002, Mr. Cortez fell and suffered a head injury which resulted in a concussion, and numbness in his extremities. Also, in August 2002, Mr. Cortez underwent treatment for psychological problems and alcohol detoxification.
- (j) On September 17, 2002, Mr. Cortez fell while taking out garbage from the school cafeteria. He suffered contusions on his face, and a back injury. He filed a Workers' Compensation claim. He received benefits as a result of that claim until on or about September 15, 2003, at which time he was supposed to return to work. However, he did not do so. He has not returned to work since that time.

6. In view of the above-listed events, I have determined that Mr. Cortez's actions constitute inefficiency in his job, incapacity and other just cause to warrant Mr. Cortez's termination from employment.

7. I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Sworn to and subscribed before me
this 23rd day of June, 2004.

Dennis R. Frohnapp 6/23/04
DR. DENNIS R. FROHNAPFEL
Board Secretary/School Business Administrator

Donna Nazzaro

DATED: June 23, 2004

DONNA NAZZARO
A Notary Public of New Jersey
My Commission Expires Nov. 4, 2004

COHEN, LEDER, MONTALBANO & GROSSMAN

A LIMITED LIABILITY COMPANY
COUNSELLORS AT LAW
1700 GALLOPING HILL ROAD
(AT GARDEN STATE PARKWAY, EXIT 138)
KENILWORTH, N.J. 07033

(908) 298-8800

Firm E-MAIL
laborlaw@coopmail.net

FAX
(908) 298-9333



DIRECT E-MAIL

COHEN: edcohensq@yahoo.com
LEDER: UNIONLEDER@YAHOO.COM
MONTALBANO: MONTALBANOEMAIL@YAHOO.COM
GROSSMAN: davegrossmansq@yahoo.com
MCLAUGHLIN: mclaughlinsq@yahoo.com

EDWARD A. COHEN
BRUCE D. LEDER¹
PAUL A. MONTALBANO
DAVID GROSSMAN¹

DONALD RAYMAR
MICHAEL A. McLAUGHLIN¹

¹ALSO N.Y. BAR

MAR 1 2005

February 28, 2005

Honorable Carol I. Cohen
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102-3011

Re: Jack Cortez v. City of Garfield Board of Education
Docket No. EDUOA 01164-2005N

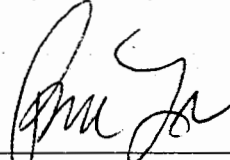
Dear Judge Cohen:

Enclosed please find typewritten Settlement Agreement in this matter.

Should you have any questions, please feel free to contact.

Very truly yours,

COHEN, LEDER, MONTALBANO & GROSSMAN

By: 

BRUCE D. LEDER

BDL:cs

encl.

cc Toni Damiano, Esq.
Jack Cortez
Ken Bohan (L. 560)

SETTLEMENT AGREEMENT

In the matter of Jack Cortez v. Garfield Board of Education
OAL Docket No. EDU01164-05

WHEREAS, the Garfield Board of Education and Jack Cortez are parties to a matter pending before the Office of Administrative Law, Docket No. EDU-01164-05; and

WHEREAS, both parties desire to resolve this matter voluntarily and without further expense of time and money and the uncertainty of the results of this matter;

IT IS HEREBY AGREED AS FOLLOWS:

1. Jack Cortez will file a disability retirement application. Jack Cortez understands that the decision on that application is within the jurisdiction of the Pension Board and not the Garfield Board of Education. The Garfield Board of Education takes no position as to whether or not Jack Cortez is eligible for a disability retirement. The Garfield Board of Education agrees to provide reasonable assistance to Jack Cortez in the preparation of the disability pension application.

2. Jack Cortez shall receive from the Garfield Board of Education a lump sum settlement equivalent to five and one-half (5.5) months of his present salary (\$49,600.00) in return for the following release. Jack Cortez releases now and forever any and all claims, causes of action, petitions or demands against the Garfield Board of Education and its individual Board members arising out of his employment, his termination, his tenure charges, his retirement and/or the end of his employment with the Garfield Board of Education. Notwithstanding this release, Jack Cortez has the right to pursue his workers compensation claim.

3. Jack Cortez acknowledges that he has already received one and one-half (1.5) months of salary. This sum, in addition to the amount set forth in paragraph 2, shall be the total amount payable by the Garfield Board of Education to Jack Cortez for any claims. Upon receipt of the five

and one-half (5.5) months as set forth in paragraph 2, Jack Cortez acknowledges that the Garfield Board of Education has completed its obligation to Jack Cortez and Jack Cortez agrees that the Garfield Board of Education will have satisfied its monetary obligations to him for any and all claims.

4. Jack Cortez directs that all necessary steps be taken to withdraw his Petition pending in this matter.

5. The Garfield Board of Education will withdraw its cross petition in this matter.

Garfield Board of Education

/s/ Jack Cortez
Jack Cortez

/s/ Dennis R. Frohnapfel

Dated: February 24, 2005

Dated: February 24, 2005

Whereas the Garfield Board of Education
and Jack Carter are parties
to a matter pending before the
Office of Administrative Law, Docket
EDU - 01164-05 and

Whereas both parties ~~are desirous~~ desire
to resolve this matter voluntarily
and without further expense of
time and money and the uncertainty
of the results of this matter

It is hereby agreed as follows:

(1) Jack Carter will file a disability
retirement application. Jack Carter understands

that the decision on that application is

within the jurisdiction of the Pension

Board and not the Garfield Board of Education

no position as to whether or not Jack Carter is eligible for a disability retirement. The GBE agrees to provide reasonable assistance to Jack Carter in the preparation of the disability pension application.

② Jack Carter shall receive from the GBE a lump sum settlement equivalent to five and $\frac{1}{2}$ (5.5) months of his present salary (\$49,600) in return for the following release. Jack Carter releases now and forever any and all claims, causes of action, petitions or demands against the GBE and its individual Board members arising out of his employment,

his retirement and/or
~~his obligation~~ the end of his employment
with the GBE. Notwithstanding this
release, Jack Corbin has the right to
pursue his worker compensation claim

③ Jack Corbin acknowledges that
he has already received one and ^{one} half
(1.5) months of salary. This sum
in addition to the amount set forth
in paragraph 2 shall be the total
amount payable by the GBE to Jack Corbin
for any claims. Upon receipt of
the five and one half (5.5) months as set
forth in paragraph 2, Jack Corbin
acknowledges that the GBE has
completed ~~its~~ its obligation to Jack Corbin

will have satisfied its monetary obligations
to him for any and all claims

(4) Jack Cortez directs that
all necessary steps be taken to withdraw
his Petition pending in this matter

(5) GBE will withdraw its
cross petition in this matter

(6)

Jack Cortez
Jack Cortez

Dennis R. Zerkowich
Garfield Board of Education

Feb 24, 05

Date

Damiano Law Offices

*51 East Main Street
Little Falls, New Jersey 07424*

*-----
(973) 890-1199
Fax (973) 890-1966*

*TONI BELFORD DAMIANO
Also PA & D.C. Bars*

*STEVEN M. SEGALAS
Also NY Bar*

**ALAN G. TRESSER
*MICHAEL E. CANNATARO
JOSEPH V. MACERI*

June 23, 2004

**Also Fla Bar*

VIA HAND DELIVERY

Mr. Jack D. Cortez
27 Commerce Street
Garfield, New Jersey 07026

Re: Tenure Charges

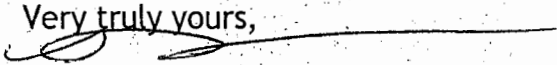
Dear Mr. Cortez:

Enclosed please find a Statement of Tenure Charges and Statement of Evidence, in accordance with N.J.S.A. 18A:6-11, which have been executed by Dr. Dennis R. Frohnappfel, the Board Secretary/School Business Administrator of the Garfield Board of Education.

Dr. Frohnappfel is seeking to prefer tenure charges against you for your inefficiency in your duties as a custodian/bus driver with the school district, and for other just cause.

N.J.S.A. 18A:6-11 provides that you may submit to the Board a written statement of position and a written statement of evidence, under oath, to the Board prior to the Board taking any action with respect to the charges being preferred by Dr. Frohnappfel. N.J.A.C. 6:24-5.1 provides that you may provide said written response to the Board within fifteen (15) days of receipt of these Tenure Charges and Statement of Evidence. It is the Board's intention to address this matter in executive session at the Board meeting scheduled for Monday, July 19, 2004 at 7:00 pm. Accordingly, if you so desire to refute the allegations as set forth in the enclosed Statement of Evidence, kindly do so in a writing, under oath, submitted to the Board Offices, within fifteen (15) days of receipt of this letter.

Very truly yours,


TONI BELFORD DAMIANO, ESQ.

cc: Mr. Nicholas Perrapato, Superintendent of Schools
Mr. Raymond Hryczyk, Assistant Superintendent of Schools
Dr. Dennis R. Frohnappfel, Board Secretary/School Business Administrator
Mr. Gerald Wich, Board President
Mr. Edward Puzio, Board Vice President

S.S. AND W.S., ON BEHALF OF	:	
MINOR CHILD, J.S.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	
	:	DECISION
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF HASBROUCK	:	
HEIGHTS, BERGEN COUNTY, ET AL.	:	
	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioners seek to have a one-day suspension expunged from their son's record; suspension was imposed for violation of the Board's written policy against harassment, intimidation and bullying after J.S. added a yarmulke and curls to a portrait of another student while in art class. Petitioners contend that the penalty imposed was excessive, and a verbal or written warning would be a sufficient disciplinary action. Respondent Board maintains that the penalty is appropriate, and the Commissioner cannot set aside its determination unless she finds that the action was "arbitrary, capricious and unreasonable."

The ALJ found that: the target of J.S.'s hazing was a special education student with multiple disabilities; the intent of his action was to belittle and ridicule a classmate; the fact that J.S. shares a Jewish identity with the targeted student does not excuse his behavior or lessen its severity; educators and administrators in the school district took the incident very seriously, and determined that it violated the district policy against "defamation of a cultural, racial or religious group"; and both the building principal and the superintendent of schools agreed that a one-day suspension was a fitting penalty under district guidelines. The ALJ concluded that the nature of the offense, its foreseeable effect on the victim and the failure of petitioner to apologize for his actions are more than sufficient to warrant imposition of the one-day suspension. Therefore, the school administration did not act arbitrarily, capriciously or unreasonably by following its own guidelines and imposing a one-day suspension.

The Commissioner fully concurs with the ALJ that, under the circumstances, the respondent Board's imposition of a one-day suspension upon J.S. is properly upheld. The Initial Decision of the OAL dismissing the petition is adopted as the final decision in this matter.

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

October 13, 2005

OAL DKT. NO. EDU 3683-04
AGENCY DKT. NO. 70-2/04

S.S. AND W.S., ON BEHALF OF	:	
MINOR CHILD, J.S.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	
	:	DECISION
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF HASBROUCK	:	
HEIGHTS, BERGEN COUNTY, ET AL.	:	
	:	
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.

Upon careful and independent review, the Commissioner fully concurs with the Administrative Law Judge that, under the circumstances here present, the Board of Education's imposition of a one-day suspension upon J.S. is properly upheld.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/13/05

Date of Mailing: 10/13/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3683-04

AGENCY DKT. NO. 70-2/04

**S.S. and W.S., on behalf of their
minor child J.S.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF HASBROUCK HEIGHTS,**

Respondent.

S.S. and W.S., *pro se*

Alan P. Dzwilewski, Esq., for respondent

(Schartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: June 3, 2005

Decided: September 6, 2005

BEFORE **KEN R. SPRINGER, ALJ:**

Statement of the Case

This is an appeal on behalf of an eighth-grade student seeking to expunge a one-day suspension from his pupil record. Hasbrouck Heights Board of Education

("Board") has imposed a one-day suspension on a thirteen-year old student (identified here as "J.S.") for violation of its written policy against "harassment, intimidation and bullying." School officials allege that, while in art class, J.S. added a yarmulke and curls to a portrait of another student.¹ The Board contends that such conduct violates a school policy prohibiting harassment "motivated by any actual or perceived characteristic, such as ...religion." Both students directly involved are Jewish. J.S.'s parents urge that no anti-Semitism was intended and that the Jewish symbols added to the portrait are not inherently defamatory. The victim, a special education student with distinctive facial characteristics and noticeable speech impairment, had been the brunt of prior teasing by a group of boys to which J.S. belongs.

While acknowledging that some disciplinary action is warranted, petitioner contends that the penalty is excessive and that a verbal or written warning would be sufficient. Respondent maintains that the penalty was appropriate and that Commissioner of Education ("Commissioner") cannot set aside its determination unless he finds that the action was "arbitrary, capricious and unreasonable."

Procedural History

By notice dated December 9, 2003, the middle school principal notified J.S.'s parents that their child will receive a one day out of school suspension for having "depicted a defamatory picture of another student." Petitioner's parents sought a review of decision and were afforded the opportunity to make a presentation to the Board at its regularly scheduled meeting on January 29, 2004. Meanwhile, on December 10, 2003, J.S. had already served the one-day suspension. On February 3, 2004, the Board notified the parents in writing that it had voted to uphold and affirm the action taken by the middle school principal.

¹ A yarmulke (Yiddish) or kipa (Hebrew) is "a skullcap worn esp. by Orthodox and Conservative Jewish males in the synagogue and the home." WEBSTER'S NEW COLLEGIATE DICTIONARY 1366 (9th ed. 1988).

Petitioner's parents filed an appeal to the Commissioner on February 13, 2004 and the Board filed its answer on March 3, 2004. Subsequently, on April 21, 2004, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on May 18, 2005. Witnesses and exhibits are listed in the appendix. Upon receipt of post-hearing briefs, the record closed on June 3, 2005.

Findings of Fact

Most of the relevant facts are undisputed. **I FIND** the following facts:

On December 8, 2003, J.S., thirteen years old, was an eighth grade student enrolled in the Hasbrouck Heights public school system. During the second period on that day, J.S. was attending art class. Barbara Kritzer, the art teacher, had assigned a project in which pairs of students, seated at tables, were asked to draw portraits of each other. There were roughly twenty students in the class, described by their teacher as "a pretty wild group." One of the students in the class, identified as T.D., was a special education student, who took "cycle classes," such as art, in the mainstream. Ms. Kritzer testified that T.D. is small in stature, and that he walks differently, that his face is "a little deformed" and that he has a speech problem. Harriet Eisenberg, director of special services in the district, noted that T.D. is classified as "multiply-disabled," and that he exhibits "learning disabilities, physical deformities, facial distortion and speech impairment." T.D.'s physical characteristics "make him look different" from other children.

Art teacher Kritzer stated that T.D. was "out of the group" and seemed to get teased a lot, either because he was different or because of the way he reacted to teasing. However, Ms. Kritzer was unaware of anything unusual having happened in her class until a day or two after December 8, 2003 when the building principal, Edward Bolcar Jr. approached her about a complaint he had received from T.D.'s parents.

Mr. Bolcar, a school administrator with thirty years of experience, met with T.D. and his mother on December 9, 2003. According to Mr. Bolcar, the mother objected to certain alterations that J.S. had made to a portrait of T.D. in art class the day before, which she believed were intended to demean and embarrass her son. Mr. Bolcar questioned T.D., and he stated that he felt "insulted and humiliated." Characterizing T.D.'s demeanor, Mr. Bolcar said that T.D.'s "head was down," that his "eyes were downcast" and that he appeared "genuinely upset." Mr. Bolcar did not think he was merely repeating what his mother had told him to say.

In a letter to the Board dated December 17, 2003, the mother eloquently summarized her anguish at the ridicule to which her son had been subjected:

The drawing depicting my son with a yarmulke and curls may seem to some as a classmate "joking around" but it was meant to be offensive. My son believes it was to point out that he has another issue that makes him different. He was upset to learn that someone would "make fun" of him because of his Jewish heritage.

My son receives cruel insults on a daily basis and I encourage him to shrug off many of these harsh comments but this was different. I could see he was truly offended . . . victimized because of his religious values.

Ms. Kritzer was able to retrieve the drawing. The portrait portrays a male figure with long sideburns, similar to peyos typically worn by Orthodox Jewish men, to which someone has added curls covering the ears and a yarmulke on top of the head.

Testifying in his own defense, J.S., now age fourteen, admitted that he had drawn the curls and the yarmulke, although the sideburns had been part of the original drawing. J.S. explained that several other students had previously drawn on the portrait, but their markings had been erased and he was the last one who "drew over it." When J.S. completed making his alterations on the portrait, "everyone was just laughing" and "joking around." Explaining that he belonged to a Reform Temple and had just had his bar mitzvah two months before the incident, J.S. denied any intent to

make fun of Jewish culture because, "I'm Jewish myself." On cross-examination, J.S. acknowledged that he was aware of the prohibition in the student handbook against hazing and bullying.

In further support for their position, the parents submitted a letter from Rabbi David Rosenberg of Temple Shuvah Yisrael in Westbury, New York. Rabbi Rosenberg explained that "'hazing' or 'making fun' of others is never acceptable in Jewish thought" and that J.S. "openly admits he participated in such an event." Instead of punishment, the Rabbi recommended that J.S. "should sincerely ask [T.D.] to forgive him for what he did." Curiously, J.S. never saw fit to follow the Rabbi's well-meaning advice, conceding that he had never apologized to T.D. for offending him. Indeed, J.S. seemed as much concerned about himself as his victim, saying that he now regrets the incident "because of what it caused both to me and to him."

Experienced educators in charge of running the Hasbrouck Heights school system took the incident very seriously. Director Eisenberg, who herself is Jewish, thought the act was designed to mock another child. She regarded the Jewish connotations as "even more offensive if the child who did it is Jewish." Building Principal Bolcar determined that singling out a particular child for his religious faith violated the district policy against "defamation of a cultural, racial or religious group." Petitioner's parents make much of the technical definition of "defamation," but Mr. Bolcar was clearly using the word in its generic sense as making disparaging or unfavorable statements about another person. Superintendent of Schools Joseph Luongo commented that the appropriate use of a symbol depends on its context and that even a religious icon can be offensive if used to show disrespect for a particular group or tradition. Given the circumstances, both Mr. Luongo and Mr. Bolcar agreed that a one-day suspension is a fitting penalty under district guidelines.

J.S.'s conduct had the foreseeable effect of isolating T.D. from the rest of the class and emphasizing his differences from everyone else. Clearly, J.S. understood that what he was doing would hurt T.D.'s feelings and would incite other children to laugh at the outsider. He intended to belittle and ridicule his classmate and to rally the

other children in the class against him. Certainly the fact that J.S. happens to share a Jewish identity with his victim does not excuse his behavior or lessen its severity.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's imposition of a one-day suspension for J.S.'s violation of its policy against harassment, intimidation or bullying should be upheld.

Establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment conducive to learning. *R.R. v. Board of Educ.*, 109 N.J. Super. 337 (Ch. Div. 1970). Recently, the New Jersey Legislature recognized that harassment, intimidation or bullying disrupts a student's ability to learn and hampers the school's ability to educate its students in a safe environment. N.J.S.A. 18A:37-13. In order to achieve a safe and secure school environment, the Legislature mandated that every public school district in New Jersey adopt a policy prohibiting harassment, intimidation or bullying on school property or at school-sponsored functions. N.J.S.A. 18A:37-15(a). Among other features, such policy must specify a description of the type of behavior expected from every student, the consequences and appropriate remedial action for anyone who fails to conform to such expectations, and the range of ways in which a school will respond once an incident has been reported. N.J.S.A. 18A:37-15(b).

Courts and administrative agencies have demonstrated an increased willingness to protect victims of bullying behavior and to require school districts to carry out their obligation to stop such abuse. Most notably, in *Shore Regional High School Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194 (3rd Cir. 2004), the Third Circuit held that a school district violated the Individuals With Disabilities Education Act because of its inability to protect a student from a pattern of bullying and harassment. Similarly, in *L.W. v. Toms River Reg. Sch. Dist. Bd. of Educ.*, OAL Dkt. No. CRT 8431-01, <http://lawlibrary.rutgers.edu/oal/final/crt8535-01.pdf> , the Director of the New Jersey

Division on Civil Rights held a school district liable for civil damages and penalties under the Law Against Discrimination for tolerating a hostile educational environment of intimidation and bullying based on sexual orientation.

Under federal and state law, therefore, the Board has a duty to implement strong measures to prevent bullying of students under its care. To carry out its responsibilities, the Board enacted Policy #5131.2, prohibiting hazing, bullying, harassment, and intimidation activities of any type inconsistent with the educational process. "Harassment, intimidation or bullying" is broadly defined to encompass any gesture or written, verbal or physical act "motivated by any actual or perceived characteristic," including religion, ancestry or mental or physical disability. It extends to any conduct that "has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school."

J.S. had received a copy of the student handbook and was familiar with its contents. The handbook put him on notice that he was expected to "behave in a manner that does not interfere with the education of others" and to "conduct [himself] in a manner that supports the physical and emotional well-being of others." Under the heading of "Bullying," the handbook states that students must "respect the rights and privacy of fellow students" and that "no student should be subject to bullying or unwarranted harassment." Once a report of suspected bullying is made, the school staff member must take appropriate action to remedy the situation "based on the severity of the problem." Disciplinary guidelines in the handbook set forth a wide range of potential consequences, from verbal warning to police intervention. The suggested penalty for "defamation of a cultural, racial or religious group" by an eighth grade student is an out-of-school suspension. School administrators, however, "reserve the prerogative to adjust the disciplinary process" to fit the nature of the offense.

Undoubtedly this incident has overtones of religious bigotry on J.S.'s part. Use of orthodox religious symbolism to taunt a Jewish student in his class suggests J.S.'s eagerness to dissociate himself from an unpopular child in the class whom others might

otherwise view as connected with him through common religious ties. Even if the religious aspect were purely incidental and J.S. picked on this particular target because of his handicap or just because he was “different,” the conduct would be equally reprehensible and violative of the school policy against bullying. J.S.’s parents argue hollowly that the class was never disrupted because the teacher was unaware of the incident when it occurred. One has only to read the heartbreaking letter from the victim’s mother to appreciate the adverse impact on T.D.’s educational opportunities and interference with the safety and security of the classroom.

Brief comment must be made about the scope of review of a school board’s action on appeal to the Commissioner. *N.J.S.A. 18A:6-9* confers extensive authority on the Commissioner to hear and determine “all controversies and disputes arising under the school law.” Numerous reported opinions by New Jersey’s highest court have broadly construed this unfettered legislative grant to allow the Commissioner to exercise independent judgment in finding facts and making legal conclusions. See, e.g., *Jenkins v. Township of Morris Sch. Dist.*, 58 N.J. 483, 494 (1971) (crossing school district lines to remedy segregation); *Board of Educ. of East Brunswick v. Township Council*, 48 N.J. 94,106 (1966) (ensuring that school district has adequate funds to deliver thorough and efficient education); *In re Masiello*, 25 N.J. 590, 606 (1958) (review of denial of administrator’s certificate).

Nonetheless, the Board urges that the Commissioner’s jurisdiction should be limited to determining whether it acted arbitrarily, capriciously and unreasonably. If it did not, then the Board insists that the Commissioner cannot substitute his own judgment for that of local authorities. Respondent cites a long line of administrative decisions, exemplified by *J.D. & E.D. ex rel. B.D. v. Bd. of Educ. of Toms River Reg. Sch. Dist.*, OAL Dkt. No. EDU 6009-97, 1997 N.J. AGEN LEXIS 521 (Nov. 19, 1997), adopted (Comm. July 1, 1998) <http://lawlibrary.rutgers.edu/oal/final/edu6009-97.pdf> , in which the Commissioner appears to have confined himself to such narrow scope of review. *But cf.*, *Henry v. Rahway State Prison*, 81 N.J. 571 (1980), where the New Jersey Supreme Court rejected a similar “abuse of discretion” standard and directed the

Civil Service Commission [now Merit System Board] to conduct a *de novo* review in a public employee's appeal of a disciplinary action.

Here it is unnecessary to resolve these competing views of the breadth of the Commissioner's review powers. The result would be the same no matter which standard is applied. Under a *de novo* review standard, the nature of the offense, its foreseeable effect on the victim and the failure of petitioner to apologize for his actions are more than sufficient to warrant imposition of the one-day suspension. That being the case, the school administration did not act arbitrarily, capriciously or unreasonably by following its own guidelines and imposing a one-day suspension.

Order

It is **ORDERED** that the relief requested by petitioner is denied.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 6, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

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

DATE

Mailed to Laura Sanders
**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

SEP 8 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

Appendix

List of Witnesses

1. Barbara Kritzer, art teacher, Hasbrouck Heights public school district
2. Harriet Eisenberg, director of special services, Hasbrouck Heights public school district
3. Edward J. Bolcar Jr., middle school principal, Hasbrouck Heights public school district
4. J.S.
5. Joseph Luongo, chief school administrator, Hasbrouck Heights public school district
6. W.S., mother of J.S.

List of Exhibits

No.	Description
J-1	Copy of policy No. 5131.2 of the Hasbrouck Heights Board of Education, entitled "Hazing/Bullying, Harassment & Intimidation," revised February 27, 2003
J-2	Copy of excerpt from the Hasbrouck Heights student handbook for the 2003-04 academic year, entitled "Student Behavior"

- J-3 Copy of redacted report on bullying/harassment incident prepared by Edward J. Bolcar Jr., dated December 8, 2003
- J-4 Copy of letter to Mr. and Mrs. S.S. from Edward J. Bolcar Jr., dated December 9, 2003
- J-5 Copy of memorandum to Board of Education members from Joseph C. Luongo, dated December 12, 2003
- J-6 Copy of letter to Board of Education members from T.D.'s parent, dated December 17, 2003
- J-7 Copy of memorandum to board of education members from Joseph C. Luongo, dated January 23, 2004
- J-8 Copy of letter to S.S. from Joseph C. Luongo, dated December 10, 2003
- J-9 Copy of letter to Mr. and Mrs. S.S. from Joseph T. Bellino, dated February 3, 2004
- P-1 Copy of various dictionary definitions of "defamation"
- P-2 Id. Copy of legal argument submitted by S.S., undated
- P-3 Copy of letter to Judge Ken Springer from Rabbi David Rosenberg, dated March 29, 2005
- P-4 Copy of visual database of extremist symbols, logos and tattoos from the Anti-Defamation League website, dated December 22, 2003

OAL DKT. NO. EDU 6599-05
 AGENCY DKT. NO. 206-8/05

L.A., on behalf of minor children, <u>T.J.A.</u>	:	
and P.M.A.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY	:	DECISION ON MOTION
OF PORT REPUBLIC, ATLANTIC COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on September 2, 2005, along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order granting emergent relief in this matter as he concurs with the ALJ, for the reasons clearly stated in his decision, that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter shall proceed to plenary hearing on its merits, scheduled for November 2, 2005, as directed by the ALJ.

IT IS SO ORDERED.*


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05

Date of Mailing: 9/12/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER – EMERGENT RELIEF

OAL DKT. NO. EDU 6599-05

AGENCY DKT. NO. 206-8/05

**L.A. ON BEHALF OF MINOR
CHILDREN, T.J.A. AND P.M.A.,**

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF PORT REPUBLIC,
ATLANTIC COUNTY,**

Respondent.

Duane T. Phillips, Esq., for petitioner

Clement F. Lisitski, Esq., for respondent

BEFORE BRUCE M. GORMAN, ALJ:

The New Jersey Department of Education (DOE) Bureau of Controversies received a request for emergent relief on August 25, 2005. Petitioner contends the Board of Education's refusal to promote her two children to the next grade for the 2005-2006 school year on the basis of their having too many absences was arbitrary and capricious. The matter was transmitted to the Office of Administrative Law (OAL) on September 1, 2005. *N.J.S.A.* 18A:38-1. 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 oral argument for September 2, 2005, at the OAL office in Atlantic City, New Jersey.

Petitioner brings this matter on an emergent basis seeking an Order requiring the respondent to start her children in the next grade (8th grade for T.J.A. and 2nd grade for P.A.). Respondent has determined to retain the children in their prior grades.

Petitioner offered the children's report cards. T.J.A.'s report card (P-1) reflects 5 final grades of A, four final grades of A+, and 2 final grades of A-. Because he is in a lower grade, P.A. was graded on a different system. His report card (P-2) reflects 8 final grades of O (the equivalent of A), four final grades of G+ (the equivalent of B+), one final grade of G (the equivalent of B), and one final grade of U (the equivalent of F). The U was in the subject of Health.

Rosemary Fiore, Superintendent, offered brief testimony. She attributed the decision to retain the children in their prior grades to their attendance records. The children's attendance records, in turn, are tied to an ongoing residency dispute between petitioner and respondent. That matter was originally before me in the matter of *L.A. v. Board of Education of the City of Port Republic*, Docket # EDU 34-05. Based upon the representations of both counsel, the residency dispute has apparently overflowed into the Superior Court.

The children's attendance records appear on the second pages of their respective report cards (P-1, P-2). T.J.A.'s record reflects 27 absences. However, nine days absence occurred in September 2004 when he attended no school because petitioner declined to enroll him in the Galloway Township school system. Two additional days absence occurred for the same reason in October. Four additional absences occurred in January when respondent barred T.J.A. and P.A. from attending its school because of the residency dispute. That situation was corrected when EDU 34-05, *supra*, was settled.

P.A.'s record is more complicated. His record reflects 41 absences. Those absences include the same 17 days described above for T.A. Additionally, his record reflects eight absences on Thursdays. Ms. Fiore testified petitioner removed P.A. from the school on

Thursdays at the time his Health class was scheduled. She would come to the school and sign him out to insure he could not attend that class. If she did not bring him back for his other classes, P.A. was marked absent for the day.

Petitioner's explanation for this conduct was that she had a conflict with the Health teacher that caused said teacher to be mean to P.A. Therefore, petitioner removed him from the school when he was scheduled for that class.

Ms. Fiore cited Board policy regarding promotion and attendance (R-1) in defense of the administration's decision to retain the children. That policy states in pertinent part:

Excessive Absence

Parents of students who miss 20 or more days of school, either excused or unexcused, will be notified by the Chief School Administrator that the student's attendance has placed him or her in danger of being retained in the same grade level for the next school year.

The parents will be invited to attend a conference with the administrative principal, teacher and other appropriate school personnel to discuss the child(ren)'s attendance situation.

Should the administrative principal feel it appropriate to do so, parents will be presented with a copy of *N.J.S.A. 18A-29* detailing the parents' obligation to comply with the attendance regulations. *N.J.S.A. 18A:38-29* provisions regarding the penalties for not complying with the law could also be addressed.

Each student's case shall be evaluated on its own merits and documentation.

The administrative principal shall initiate the appropriate legal proceedings, if necessary, to bring out parent compliance with attendance regulations.

Should retention due to poor attendance be decided upon, parents of the child(ren) affected must be formally notified of such intent by June 1 and an opportunity provided for the parents to meet with school personnel regarding the decision.

Respondent alleged that it provided petitioner with the required notice (see R-3). Petitioner denied receiving the notice. At this early stage of the matter, I have no need to resolve this conflict in testimony.

I note that nothing contained in this policy *requires* retention of a student who exceeds the 20 day absence limitation. Breach of that standard merely triggers a parent conference, a conference geared toward advising the parent of his/her obligation to send the child to school. The policy does not define how the “danger” of retention is to be resolved.

Ms. Fiore stated that the children should not be promoted because they had missed more than 20 days each. She objected to petitioner’s removal of P.A. from Health class. She complained that petitioner was uncooperative and disruptive. She would not follow school rules. Ms. Fiore was deeply concerned that promoting T.J.A. and P.A. would send a message to other parents that their children could flout the attendance rules and still be promoted.

However, Ms. Fiore could not explain why the children’s academic achievements as reflected on their report cards did not warrant their promotion to the next grade level. When asked this question, she retreated into a dissertation about attendance rules and the uncooperativeness of petitioner. She also noted that the policy (R-1) allowed for an appeal to the Board of Education, and petitioner never perfected such an appeal.

I note that if the 15 absences resulting from the residency dispute are eliminated, T.J.A. missed only 12 days of school. Similarly, if those 15 days plus the 8 days when he attended school until his mother removed him from Health class are eliminated, P.A. missed only 18 days of school. Both of those figures fall below the 20 day benchmark contained in the policy (R-1).

The requirements for granting emergent relief are well settled. Petitioner carries the burden in seeking emergent relief. The standard is set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982), necessary for the awarding of this relief. See also, *Princeton Ins. Co. v. 349 Associates, L.L.C.* 147 N.J. 337, 340(1997). *Crowe* requires a showing of **each** of the four specific criteria:

Jersey State Constitution. *N.J. Const. art. VIII, Section 4.* That right entitles the children to promotion if their respective academic records warrant it.

Petitioner argues that the children's superior academic records as reflected in their report cards renders success reasonably probable in this case. Respondent argues that the school administration has the expertise to make the decision regarding promotion, and that discretion should not be disturbed by a non-professional educator such as myself. That argument might have some validity had Ms. Fiore been able to explain why children with either all A's (T.J.A.) or O's and G's (P.A.) would benefit educationally from repeating grades they had already successfully completed. She could not. Accordingly, I **FIND** that petitioner has demonstrated a reasonable probability of success.

Finally, petitioner argues that retaining the children in their prior grades will retard them academically by compelling them to repeat work already successfully completed, humiliate them, and damage them socially by separating them from their peers. Respondent retorts that promoting these children will send a message to other parents that school rules need not be followed. I **FIND** that the relative hardship will fall heavily upon these children if emergent relief is not granted. I further **FIND** that no real hardship will come to respondent if the children are promoted.

Therefore, I **FIND** and **CONCLUDE** that petitioner has met its burden and shown each of the factors necessary for the granting of emergent relief. Consequently, emergent relief should be **GRANTED**.

ORDER

I **ORDER** that petitioner's application for emergent relief by **GRANTED**.

I **ORDER** that T.J.A. be enrolled in Grade 8 pending final disposition of this matter.

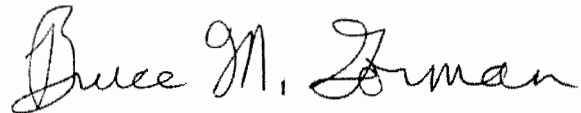
I **ORDER** that P.A. be enrolled in Grade 2 pending final disposition of this matter.

A plenary hearing is scheduled for November 2, 2005, at 9:00 a.m. at the OAL office located at 1601 Atlantic Avenue, Atlantic City, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A. 52:14B-10*.

September 6, 2005

DATE

A handwritten signature in black ink, reading "Bruce M. Gorman". The signature is written in a cursive, flowing style.

BRUCE M. GORMAN, ALJ

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

L.A.

For Respondent:

Rosemary Fiore, Superintendent

EXHIBITS

For Petitioner:

- P-1 Port Republic City School District Report Card for T.J.A.
- P-2 Port Republic City School District Report Card for P.A.

For Respondent:

- R-1 Port Republic School District School Attendance Policy
- R-2 Letter to L.A. from Rose Anne Fiore, Superintendent, May 13, 2005
- R-3 Letter to Mr. and Mrs. A. from Rose Anne Fiore, Superintendent, May 27, 2005
- R-4 Handwritten notes, May 31, 2005, with 10 pages attached)
- R-5 Letter to L.A. from Rose Anne Fiore, Superintendent, June 29, 2005 (2 pages)
with 4 pages attached)



State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

RICHARD ROSENBERG
Acting Commissioner

September 9, 2005

Michael S. Green, Esq.
86 Washington Avenue
Milltown, NJ 08850

Martin R. Pachman, P.C.
60 East Main Street
Freehold, NJ 07728

Dear Parties:

D.M.G, INDIVIDUALLY and on behalf of minor child, J.G. V. BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY, AGENCY DKT. NO. 226-8/05, OAL DKT. NO. EDU 6600-05

We are enclosing a copy of the decision of the Commissioner of Education dated September 9, 2005 in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1 et seq.*

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C. 6A:4-1.4(a)*, the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

A handwritten signature in cursive script, appearing to read "M. Kathleen Duncan".

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr/DMGandJG

Enclosure

c: Clair Applegate, OAL Library
Jones Addo, State Library

www.nj.gov/education

New Jersey Is An Equal Opportunity Employer • Printed on Recycled and Recyclable Paper

OAL DKT. NO. EDU 6600-05
 AGENCY DKT. NO. 226-8/05

D.M.G., individually and on behalf of minor
 child, J.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
 TOWNSHIP OF EAST BRUNSWICK,
 MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law on September 2, 2005, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as he concurs with the ALJ's determination that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982): specifically, the existence of irreparable harm, that petitioner's claim is based upon a settled right, or that petitioner is likely to prevail on the merits of this matter.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits, scheduled for April 27 and 28, 2006, as directed by the ALJ.

IT IS SO ORDERED.*


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05

Date of Mailing: 9/12/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
Mercerville, New Jersey 08625
(609) 588-6542

Joseph F. Martone
Administrative Law Judge

VIA FAX TRANSMISSION

September 6, 2005

Honorable William L. Librera, Ed.D. (609) 777-4099
Commissioner
Department of Education
100 Riverview Plaza-4th Floor
P.O. Box 500
Trenton, NJ 08625-0500

**RE: D.M.G., INDIVIDUALLY AND ON BEHALF OF J.G. V. BOARD
OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK
MIDDLESEX COUNTY**
OAL DKT. NO. EDU 6600-05; AGENCY DKT. 226-8/05

Dear Commissioner Librera:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to *N.J.A.C. 1:1-12.6(j)*, this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown, under *N.J.A.C. 1:1-18.8(e)*, the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

A handwritten signature in cursive script, reading "Joseph F. Martone".

Joseph F. Martone
Administrative Law Judge

mph
c: Michael S. Green, Esq. (via fax transmission)
Martin Pachman, Esq. (via fax transmission)
Clerk, OAL Scheduling



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 6600-05

AGENCY DKT. NO. 226-8/05

**D.M.G., INDIVIDUALLY AND ON
BEHALF OF J.G.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF EAST BRUNSWICK,
MIDDLESEX COUNTY,**

Respondent.

Michael S. Green, Esq., for petitioners

Martin Pachman, Esq. for respondent

BEFORE JOSEPH F. MARTONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner seeks emergent relief to stay the transfer of her son, J.G. from Warnsdorfer Elementary School, which he attended for first and second grades, to Memorial School for third grade. The matter was transmitted to the Office of Administrative Law (OAL)

for hearing as a contested case on September 1, 2005, on petitioners' application for emergency relief. The matter was scheduled oral argument on September 2, 2005. On that date, oral argument was held and concluded. At the conclusion of the hearing, the record closed with respect to the application for emergent relief.

FACTUAL DISCUSSION

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

J.G., who is presently seven years of age, was placed by respondent board of education in Warnsdorfer Elementary School in September 2003, at the age of five. He was placed there at that time because of overcrowding in Memorial Elementary School which is within his district of residence. At the time of J.G.'s placement at Warnsdorfer, his older brother was attending Memorial in fifth grade. At the time of J.G.'s placement at Warnsdorfer, his parents were given no notice of any "unscheduled school transfer" and were not placed on notice that J.G. could be subsequently transferred to another school.

On or about June 3, 2005, respondent determined to transfer J.G. to Memorial Elementary School for attendance at third grade commencing on September 7, 2005. Petitioner requested a hearing on this transfer before the respondent board of education based on due process claims, but this request was denied.

LEGAL DISCUSSION AND ANALYSIS

Petitioners claim that respondent's actions in this matter are arbitrary and capricious, violate petitioners' due process rights because of the failure in refusal to provide to petitioner a notice and opportunity for hearing before effectuating the transfer. Petitioners also claim that this action violates the *No Child Left Behind Act*, the *Civil Rights Act*, U.S.C.A. §1983, negligently inflicts emotional distress on J.G., and violates due process rights accorded under respondent's own policies and the New Jersey Administrative Code.

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

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

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.
2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.
3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.
4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

Irreparable harm

As to the first requirement for a showing of irreparable harm, the petitioners, assert that respondent owes a duty of reasonable care to its students, and that by electing to transfer J.G. from Warnsdorfer School to Memorial School without notice and without having an appropriate transitional plan or school-based counseling will result in J.G.'s suffering emotional distress. Petitioner points out that school transitions are difficult for all children and are a major life event that can result in stress and dysfunction if transitional services are not provided. Specifically, petitioners contend that based on his social history, J.G. will be extraordinarily susceptible to adjustment problems resulting from this unscheduled transfer and that this transfer is not in his best interest.

While this may be the case, I am unable to determine the validity of this claim without conducting a full and complete hearing. The petitioner's contention is in the form of an opinion submitted by an expert. I have no expertise in this area and will require a full hearing in order to make the factual determination that J.G. will suffer emotional distress and that such distress will be irreparable. In the absence of such a factual determination, I **FIND** that petitioner has failed to establish the requirement of irreparable harm in this matter.

Right to underlying claim must be settled

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. *N.J. Const.* (1947), Art. VIII, ¶1, *N.J.S.A.* 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at *N.J.S.A.* 18A:11-1c. and d. to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

In the present matter, counsel for respondent has represented that respondent has a duly adopted plan for the allocation of children to the various schools within the school district. The parents acknowledge that Memorial School is J.G.'s home school, and that for first and second

grade J.G. was transferred from his home school to a school outside of his neighborhood because of overcrowding at his home school. Because the overcrowding of his home school no longer exists, respondent has determined that J.G. will be returned to his home school. Such a determination is entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable. *Thomas v. Bd. of Educ. of Morris Twp.*, 89 N.J. Super. 327, 332 (App. Div. 1965), *affirmed*, 46 N.J. 581 (1966). In assessing this, the local school board's factual determinations must be accepted if supported by substantial credible evidence. *Quinlan v. Bd. of Educ. of North Bergen Twp.*, 73 N.J. Super. 40 (App. Div. 1962). Such an assessment is only possible after a full hearing.

In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. *Schuster v. Ed. of Educ. Montgomery Twp.*, 96 N.J.A.R. 2d (EDU) 670, 676 (citing *Schnick v. Westwood Ed. of Educ.*, 60 N.J. Super. 448 (App. Div. 1960), and *Quinlan v. Bd. of Educ. of North Bergen Twp.*, 73 N.J. Super. 40 (App. Div. 1962)).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as follows:

In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.

[*Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District*, OAL DKT. EDU 1839-98 (January 22, 1999) (citing *Bayshore Sewage Co. v. Dent. of Envir. Protection*, 122 N.J.

Super. 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).]

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. *Massaro v. Bd. of Educ. of the Boro. of Bergenfield*, 1965 *S.L.D.* 84, 85. In *Kopera v. Bd. of Educ. of West Orange*, 60 *N.J. Super.* 288, 294 (App. Div. 1960), the Appellate Division stated, "the well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives." See also *G.M. v. Roselle Park Boro. Bd. of Educ.*, 95 *N.J.A.R.* 2d (EDU) 107, 109 (where the Commissioner adopted the decision of the ALJ when in a challenge to board action, the ALJ stated, "it is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis."). As long as the record reflects a rational basis for the action, as well as an absence of bad faith, a board's action shall be upheld. In the *G.M.* case, *supra*, the ALJ, after a full hearing, found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority.

Based upon the foregoing, I **FIND** that the right underlying petitioners' claim is settled against the petitioners' position. Therefore, I **FIND** that petitioners have failed to establish the right to relief in the absence of a full evidentiary hearing showing that the action of respondent is arbitrary, capricious and unreasonable.

Requirement to show reasonable probability of prevailing on the merits

The most difficult requirement for the moving party to establish in order to show entitlement to emergency relief is the third factor. In order to prevail on their application for emergency relief, the party requesting the relief, the parent in this matter, must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition of the final decision as when this matter began, it must be established by the moving party that she will

probably win on the merits. It is with respect to this that petitioner has the greatest difficulty. Petitioners must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. However, petitioners' claim can only be established after a full hearing because of the presumption that respondent's actions are correct. Petitioners must show that respondent's actions violated petitioners' due process rights because of the failure in refusal to provide to petitioners a notice and opportunity for hearing before effectuating the transfer. However, petitioners have not shown a settled right to such a due process hearing before a local board of education in the present circumstances. While there is clearly a right to challenge the reasonableness of a school redistricting plan after its adoption, see, *Fullen v. Bd. of Educ. of Twp. of Middletown*, 1986 S.L.D. 603, there is no case of which I have been made aware that establishes a right to such a hearing to individual parents. Petitioners also claim that this action violates the *No Child Left Behind Act*, and the *Civil Rights Act*, U.S.C.A. §1983. While I question whether there is a personal right to pursue a claim for an alleged violation of *No Child Left Behind*, I **FIND** that the only way to determine if such claims exist is by conducting a full factual hearing on petitioners' assertions. Petitioners also claim that respondent's action negligently inflicts emotional distress on J.G. As I previously made clear, I cannot make such a determination without conducting a full hearing as to this issue. Therefore, I **FIND** that petitioner has failed to show the likelihood of prevailing on the merits.

Relative hardship to the parties.

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief in order to preserve the status quo pending a full hearing on the merits. While neither party specifically addressed this factor, it appears clear that any hardship which may result will fall upon petitioner and J.G. rather than upon respondent school district, and I so **FIND**.

Conclusion

Based upon the foregoing, I have found that for purposes of deciding this application for emergency relief, petitioners have failed to establish the existence of irreparable harm, that petitioners' claim is based upon a settled right, or that petitioners are likely to prevail on the

merits. In view of the fact that petitioners have failed to establish three of the four requirements for emergency relief, I **CONCLUDE** that petitioners' request should be **DENIED**.

As I have stated hereinabove, many of the claims made by petitioners require factual determinations made after a full hearing. Accordingly, I have scheduled this matter for hearing on my earliest available dates. I intend to contact the parties within the next 30 days in order to conduct a prehearing conference and deal with discovery and other issues in preparation for a full hearing in this matter.

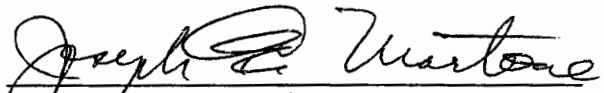
ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioners' request for emergency relief seeking to stay the transfer of her son, J.G. from Warnsdorfer Elementary School, which he attended for first and second grades, to Memorial School for third grade is hereby **DENIED**. It is further **ORDERED** that the matter is hereby scheduled for a full hearing to be held on **April 27 and 28, 2006**, commencing at 9:00 am at the OAL, 9 Quakerbridge Plaza, Trenton, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who 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*.

September 6, 2005

DATE


JOSEPH F. MARTONE, ALJ

mph

LYNDHURST EDUCATION
ASSOCIATION, ET AL.,

PETITIONERS,

V.

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

RESPONDENT,

AND

TMC SERVICES, INC.,

INTERVENOR-RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Education Association and 21 former Board of Education employees alleged that the process used by the Board in subcontracting out custodial, maintenance and bus transportation services to TMC Services Inc. for the 2002-2005 school years violated the public school bidding laws, and, as a consequence, the legal rights of the 21 individual petitioners whose employment was terminated upon implementation of the contract. Petitioners asked that the Commissioner order the Board to cease and desist from continuing with the contract; declare the contract null and void; order petitioners' reinstatement to their previous positions; and order that petitioners be made whole with respect to back pay, benefits, and emoluments.

The ALJ concluded that petitioners did not have standing to pursue allegations of violation of bidding laws, particularly where the remedy sought was primarily private monetary compensation. The ALJ further concluded that even if the contract in question had been found defective, that would not in itself constitute illegal dismissal of the employees terminated as the result of a lawful decision to subcontract so as to entitle them to reinstatement and back pay. Finally, the ALJ noted that the contract was due to expire and was not expected to be renewed, so that the matter had additionally become moot. The ALJ noted that his decision should not be construed as a willingness to condone or ignore material procedural defects in the public bidding process, but, rather, as recognition that these must be challenged in the appropriate manner.

The Commissioner adopted the Initial Decision as the final decision in this matter.

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

OAL DKT. NO. EDU 1408-03
AGENCY DKT. NO. 345-10/02

LYNDHURST EDUCATION	:	
ASSOCIATION ET AL.,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF LYNDHURST,	:	
BERGEN COUNTY,	:	
	:	
RESPONDENT,	:	
	:	
AND	:	
	:	
TMC SERVICES, INC.,	:	
	:	
INTERVENOR-RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioners' exceptions and the reply thereto filed by the Board of Education (Board) in accordance with *N.J.A.C. 1:1-18.4*. Neither exceptions nor replies were filed by Intervenor-Respondent TMC Services, Inc. (TMC).

On exception, petitioners urge rejection of the Initial Decision, which, they object, focuses on issues of standing, jurisdiction and appropriateness of individual remedy without ever reaching the merits of petitioners' claims. Petitioners contend that, contrary to the findings of the Administrative Law Judge (ALJ): 1) There is no conclusive proof of cancellation of the TMC contract by the Board so as to moot the appeal; 2) the contract between the Board and TMC is patently illegal under the public

public school contracts law, nor could any monetary relief be awarded them if they did. Similarly, the Commissioner concurs that violation of the bidding laws, even if proven by a party with standing, would not result in a finding that petitioners were “illegally dismissed” within the meaning of *N.J.S.A. 18A:6-30*. Therefore, even if the ALJ had not concluded that this matter was moot by virtue of termination of TMC’s contract with the Board, there would be no basis on which to order the requested relief or direct further proceedings.³

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.⁴


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05

Date of Mailing: 9/12/05

³ The Commissioner echoes the ALJ’s statement, in the Initial Decision at 7 (Note 1), that: “This view should not be construed as a willingness by the undersigned to condone or ignore material procedural defects in the public bidding process,” but that where challenges to such actions are to occur, they must be made in the appropriate manner and by appropriate parties.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1408-03

AGENCY DKT. NO. 345-10/02

LYNDHURST EDUCATION ASSOCIATION, *et al*,

Petitioners,

v.

LYNDHURST BOARD OF EDUCATION,

Respondent,

TMC SERVICES, INC.,

Third Party Intervenor-Respondent.

Louis P. Bucciari, Esq., for petitioners

(Bucciari and Pincus, attorneys)

Vincent M. Giblin, Esq., for respondent

(Kroll Heineman Giblin, attorneys)

Keith A. Krauss, Esq., for Third Party Intervenor-Respondent

Record Closed: June 16, 2005

Decided: July 29, 2005

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 in February 2003. In it, the Lyndhurst Education Association ("LEA"), together with 21 former Lyndhurst Board of Education

(Board) employees, alleged that the process used by the respondent in subcontracting out custodial, maintenance and bus transportation services to TMC Services Inc., ("TMC") for the 2002-2003, 2003-2004 and 2004-2005 school years violated various provisions of the public education bidding statutes. See, e.g., *N.J.S.A.* 18A:18A-42; *N.J.A.C.* 6A:27-9, 27-9.3, 27-9.9, 27-9.19. Thus, it was alleged the legal rights of the 21 individual petitioners (who are LEA members) were violated by the Board when it entered into the contract without first complying with the law. Petitioners contend that their terminations as Board employees (although many then were rehired by TMC) therefore violated their statutory rights (both tenured and non-tenured) and requested that the Commissioner: (1) order the Board to cease and desist from continuing with the contract; (2) declare the contract null and void; (3) order their reinstatement to their previous positions; and (4) be "made whole" *vis-à-vis* back pay, benefits, etc.

In its Verified Answer, the Board claimed that none of its actions were in violation of law or contrary to any of the petitioners' rights. By way of separate defense the Board argued that in any event the claims were barred, *inter alia*, since the Commissioner lacks subject matter jurisdiction in the circumstances of the case.

Following transmittal to the Office of Administrative Law, petitioners moved for partial summary judgment on the question of "liability", *i.e.*, the alleged statutory and regulatory violations. The "damages" issue was not addressed at that time. Thereafter, the Board responded and cross-moved for summary judgment on the jurisdiction issue. Some delay then was occasioned by the need to provide TMC an opportunity to enter the case as an intervenor. Since then, further delays resulted from a variety of other events, including on-going efforts to settle the case, especially since the Board-TMC contract was due to expire on June 30, 2005 and presumably would not be renewed for 2005-2006. Also, there were various discovery difficulties.

DISCUSSION

The following are the essential background facts pertinent to the cross-motions for summary decision as to the issue of "lack of jurisdiction" raised by the Board.

The LEA is the chosen majority representative for collective bargaining of the non-supervisory certified and support staff employed by the Board and the 21 individually named petitioners all were employed at the start of the 2002-2003 school year as custodial, maintenance and/or school bus transportation employees. Their employment ended on November 18, 2002 which they were terminated due to the following events.

On August 10, 2002, the Board published a notice in local newspapers soliciting bids for the subcontracting of its "facility management" services. Apparently, no prior public resolution was adopted to authorize the solicitation of such bids. Copies of the Board's bid specifications were sent to interested potential subcontractors, although the bid specifications were not adopted by public resolution of the Board either.

The specifications provided that the bidder was to provide all staff needed to perform described administrative/managerial, mechanical maintenance/operation, grounds maintenance, busing and cleaning tasks/functions. It further specified minimum staffing levels for the various positions including the custodians, mechanics and bus drivers. The specifications for bus services did not include route descriptions and were not submitted to the Bergen County Superintendent of Schools. On August 20, 2002, the Board adopted a resolution approving TMC's bid (the lowest of three) and in a resolution adopted on September 17, 2002, voted to abolish all of its custodial, maintenance and bus driver employee positions, effective November 18, 2002, including the positions of the individually name petitioners. Sometime in October 2002 a contract with TMC was signed by Lyndhurst's Superintendent of Schools, although no formal Board resolution approving the terms of that contract was adopted either. Those are the undisputed facts.

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any of the substantive issues in a case. *N.J.A.C. 1:1-12.5(a)*. The motion may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. *N.J.A.C. 1:1-12.5(b)*. Thus, a motion for summary decision before OAL is almost identical to the standard used for

summary judgment under the New Jersey Rules of Court, R.4:46-2(c), which provides that summary judgment should be granted if:

The pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

In its cross-motion the Board argues that its decision to subcontract or “outsource” its custodial and bus transportation activities (which led to the termination of the 21 individual petitioners’ employment) was a perfectly legitimate exercise of its inherent managerial prerogatives and the petitioners’ efforts under the guise of a “school law controversy” to interdict that managerial decision is wholly improper. The proper forum for seeking relief, if any, it argues was either to the Public Employment Relations Commission (PERC) or in a civil “taxpayer” suit in the judicial forum. To put it another way, the petitioners are attempting to pursue a purely “private right of action” for money and other compensatory damages and according to the Board, that action constitutes a collateral attack on an inherent management decision reviewable, if at all, in some other forum. Implicit in this argument is the Board’s view that in all likelihood the petitioners concluded they could not prevail before PERC (subcontracting is a non-negotiable issue), or in a taxpayer suit (where the LEA would have no standing and where the 21 individuals faced a very serious “out-of-time” argument).

Another argument explicitly raised by the Board is that the circumstances surrounding the termination potentially are subject to the arbitration provisions of the Board-LEA collective negotiations agreement, yet another available forum for dealing with the dispute. Thus, as the Board puts it, the “strategic decision” by petitioner not to grieve the terminations, but rather to submit their private claims under the “guise” of a taxpayer challenge should not be allowed.

Following my receipt of the cross-motions I determined that oral argument would be appropriate and that argument took place in mid-May 2004. In addition, steps were

taken to include TMC as a party. Efforts also were stepped-up to obtain information to permit the damages issue (if reached) to be decided on affidavits rather than require in-person hearings on each of 21 individual claims. Although, at first, I contemplated ruling on the "liability" issue; subsequently, I determined to reserve on that issue given the voluminous nature of the pertinent payroll records and the need for additional discovery. In addition, I continued to encourage counsel to pursue the possibility of settlement.

Following oral argument on "liability" and jurisdiction the undersigned conducted additional, independent research and asked counsel to supplement their previous submissions. In response to my letter request, supplemental memoranda were submitted. In my request I asked counsel to comment upon certain administrative and court decisions which I believed might be pertinent to the standing issue and which had not previously been addressed. They included:

- (a) *Yacenda Food Management Corp. v. New Jersey Highway Authority*, 203 N.J. Super. 264 (App. Div. 1985);
- (b) *Angel v. Bd. of Ed. Of Englewood*, 94 N.J.A.R. 2d, (EDU) 423;
- (c) *Comm. Workers of America, AFL-CIO v. Clymer*, 292 N.J. Super. 138 (Law Div. 1996); and
- (d) *Bd. of Ed. Of Twp. of Middle v. N.J. State Department of Education*, OAL Docket No. EDU 10755-96 (April 20, 1996)

Major support for the Board's argument that the 21 individual petitioners do not have standing can be found in the State Board of Education decision in *Angel, supra*, which rejected the ALJ's and Commissioner of Education's determinations that both the individual petitioners, who were custodial-maintenance employees, and the Englewood Teachers' Association had standing. In *Angel*, the petitioners had challenged the validity of actions taken by the Englewood Board to subcontract out custodial services and terminate employment. Petitioners alleged that the decision to subcontract was made in bad faith, failed to satisfy bid specifications and violated their tenure rights. The Board replied that the petitioners had no standing to challenge the contract award as demonstrated, *inter alia*, by their sole claim for relief – private monetary damages for loss of employment.

In the initial decision the ALJ determined that the individual petitioners had standing to challenge the award because the issue concerned them as Englewood taxpayers and they were likely to suffer financial harm. The ALJ also determined that the Englewood Teachers' Association had standing to challenge the Board's action because of the effect on its members.

Although the Commissioner adopted the ALJ findings, the State Board reversed and rejected the conclusion that the petitioners had standing. In its decision the State Board said:

We reject the ALJ's determination that petitioners had standing to challenge whether the bidder who was awarded the contract met the bid specifications. As the Board argues, the interest of the individual petitioners involved here was clearly in saving their jobs rather than in correcting public misdoing or compelling performance of a public duty. Consequently, they cannot be considered as taxpayers for purposes of this litigation.

Furthermore, neither the individual petitioners nor the Association were potential bidders on the contract and their challenge to the qualifications of the successful bidder could not provide them with any remedy. Hence, under the bidding laws, they did not have standing to make this challenge. In essence, it was the Board's decision to subcontract, not its determination of which bidder would be awarded the contract, that had affected petitioners. [*Angel v. Bd. of Educ. of the City of Englewood*, 94 N.J.A.R. 2d (EDU) 423 (emphasis added) (citations omitted).]

Arguably, the reasoning in *Angel* can be applied to this matter. Here, too, the petitioners essentially seek reinstatement and monetary compensation based on the Board's alleged failure to comply with public bidding statutes and regulations. There was no request that the contract be rebid or awarded to another bidder. In other words, petitioners clearly were more interested in reinstatement and collecting compensation than in correcting any alleged misdoing and their status as "taxpayers", under these circumstances, as in the *Angel* case, basically is irrelevant since realistically no public right is sought to be vindicated.

I agree with the decision in the *Angel* case. Neither the *Yacenda* nor *Clymer* decisions have as much force as might first appear on the surface even though both cases commented that merely having a private interest in the outcome of such litigation

is not, *ipso facto*, a bar to pursuing a challenge to a bid award. See *Yacenda, supra* at 271; *Clymer, supra* at 146.

In *Yacenda*, the petitioner sought to enjoin performance of a no-bid contract between the Highway Authority and the Marriott Corporation and to compel the project to be publicly advertised for the receipt of bids. No compensatory damages were sought, except that the individual plaintiff (Hellman) was a principal in *Yacenda Corporation* – a potential bidder. The court found that although this status did give him a “technical” private interest in the outcome, he still had standing to sue as a taxpayer to “raise the important question of the need for public bidding of NJHA contracts.” *Yacenda, Id.* Such is not the case here. The 21 individuals in this case likely care less about a rebid – they want to be rehired as Board employees! No overriding issue of public concern appears to me to be present in this context.

So too, in *Clymer*, when the individual plaintiffs (psychologists employed by the Department of Corrections) were added to the complaint the State challenged their inclusion arguing they were mere “nominees”, stand-ins for the union. The court rejected the argument and held they did have independent standing to challenge the bid award. However, as in *Yacenda*, the court was persuaded by the existence of an overriding issue primarily of public concern; the potential indirect benefit to the individual plaintiffs clearly was secondary to that major interest. See *Clymer, Id.*

Accordingly, based upon my reading of the applicable law, given the essentially private nature of their claims and the relief sought, neither the LEA nor the 21 individual former employees have the requisite standing to challenge the Board’s award to TMC in this forum.¹

Even if I am in error in reaching this conclusion, I do not believe there is any appropriate relief. First, no case, not even *Yacenda* or *Clymer*, countenance the award of compensatory damages where, as here, the private parties claim they were harmed

¹ This view should not be construed as a willingness by the undersigned to condone or ignore material procedural defects in the public bidding process. Where those occur they should be challenged – but in the appropriate forum and for valid reasons.

by non-intentional bid violations. If, in fact, any individual petitioner suffered any monetary loss it is due solely to the fact that the low bidder was awarded a contract. In their verified petition, petitioners ask that I set aside the Board's contract with TMC because of the violations of the public bidding laws, and to reinstate them in their jobs with back-pay plus interest. Again, New Jersey case law does not support such a remedy - private parties are not entitled to recover money damages as a result of a public body's violation of the bidding statutes. For example, in *Feriozzi Co., Inc. v. Atlantic City*, 268 N.J.Super. 310 (Law Div. 1993) the award of money damages to a private individual or enterprise was held not to be in the public interest:

The reason why an unsuccessful bidder may not receive money damages, even if the challenge to the award of the contract succeeds, is to prevent the public from paying twice. It is the public interest, not the private interest of the bidder, which is paramount. The purpose of competitive bidding is "to secure competition and to guard against favoritism, improvidence, extravagance and corruption."
[*Id.* at 316 (citation omitted)(emphasis added).]

In *M.A. Stephen Const. Co., Inc. v. Borough of Rumson*, 125 N.J.Super. 67 (App.Div. 1973), *certif. denied*, 64 N.J. 315 (1973), the Court held that the purpose of the public bidding statutes was not to create a private right of action for damages against a public entity as follows:

It is true that . . . a bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him . . . But such standing was granted simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust. It was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder.

Therefore, the 21 individual petitioners in this case have no legal claim to monetary damages because of the Board's violation of the public bidding laws. Challenges to the bidding process are meant to protect the public's interest, not to award the other bidder or, as in this case, the terminated employees, any money.

Arguably, awarding monetary damages would serve to punish the taxpayers of Lyndhurst – not the Lyndhurst Board – whose tax dollars would subsidize the award.²

In addition, petitioners are not entitled to compensation under *N.J.S.A. 18A:6-30* because they simply were not “illegally” discharged. The statute states:

Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefore with the board or body by who he was employed, within 30 days after such determination.

[*Ibid*, (emphasis added).]

Also, even although some of the workers had acquired tenure, the Board’s contract with TMC did not violate their tenure rights since the tenure statute for janitorial employees provides that they can be terminated as a result of a reduction in force:³

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 as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

[*N.J.S.A. 18A:17-3*]

Furthermore, *N.J.S.A. 18A:17-4* permits the reduction in the work force of janitors except “by reason of residence, age, sex, race, religion or political affiliation.” As the State Board observed in *Hunterdon Central High School Educ. Assoc. v.*

² I am not relying, either, upon the Board’s essentially editorializing comments related to the “cost-savings” to the taxpayers of Lyndhurst – that is not a reason to condone material defects in a proper case.

³ There is no comparable tenure statute for bus drivers, so it seems that they can only receive tenure if it is provided for in their employment contract with the school district. See *Albert v. Bd. of Educ. of the Freehold Reg’l High School Dist.*, 1977 S.L.D. 598. Tenured bus drivers can be dismissed as a result of a reduction in force pursuant to *N.J.S.A. 18A:6-10*, which provides that “persons” under tenure in a public school system can be dismissed as a result of a reduction in force.

Hunterdon Central Reg'l High School Bd. of Educ., 1988 S.L.D. 2468, because there is no statutory authority prohibiting the dismissal of tenured custodians due to a Board's decision to subcontract, a reduction in force resulting from subcontracting does not violate tenure rights:

In contrast to reductions affecting tenured teaching staff members . . . reduction in the number of custodians employed is permitted by the statute unless taken for one of the prohibited reasons. Thus, the terms of N.J.S.A. 18A:17-4 do not prohibit the dismissal of tenured custodians resulting from a decision to subcontract for custodial services. In the absence of statutory or regulatory prohibition of subcontracting for such services, we conclude that a reduction resulting from subcontracting does not in itself violate custodial tenure rights
[*Id.* at 2475—2476]

In *In re IFPTE Local 195 v. State*, 88 N.J. 393 (1982), the Supreme Court held that a decision to subcontract must be related to a legitimate governmental purpose and not be made in bad faith. *Id.* at 411. The State cannot subcontract in "bad faith" for the sole purpose of laying off public employees or substituting private workers for public workers. Accordingly, where subcontracting results in the termination of tenured custodians (or bus drivers) the Board's actions must be examined to ensure it was undertaken in good faith. *Hunterdon Central High School Educ. Assoc. v. Hunterdon Central Reg'l High School Bd. of Educ.*, *supra*, 1988 S.L.D. at 2476. Here, petitioners offered no evidence that their termination was due to anything other than the Board's desire to save the district \$250,000 per year. Even if the Board violated public bidding laws, in the way it chose to subcontract out the janitorial, maintenance and/or transportation services, this is not evidence of a bad faith motive to deprive any tenured workers of their tenure rights. Indeed, if the Board did not (or had not) violated the subcontracting laws, the tenured workers would still have lost their jobs. The Board's failure to comply with the bidding laws even if proved, is not evidence of a deliberate laying off of public employees or substituting private workers for public workers.

In reaching the conclusion to dismiss the Verified Petition, I am not unmindful of the respectable arguments advanced by petitioners and the cases cited by them. Nonetheless, even if I am wrong and petitioners do have standing to challenge the

award despite their primary private interest, and even if statutory and/or regulatory requirements were not met, the three school year contract term is now over and I understand there is no successor agreement with TMC or any other private vendor. There is nothing to bid upon; there is nothing to enjoin – there simply is no practical reason to continue the litigation at further expense to the parties. In short, there is no Board liability, and even there is there is no cognizable damages claim. Accordingly, the Verified Petition is **ORDERED** to 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 2005
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

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

DATE

AUG 1 2005
DATE
/mvh

Mailed to Parties:

James A. Anderson
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

Z.G., ON BEHALF OF MINOR CHILD,	:	
<u>E.G.,</u>	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
	:	
NEW JERSEY STATE DEPARTMENT	:	
OF EDUCATION,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioner challenged the New Jersey Department of Education's assignment to his son, E.G., of a "V2" score on the March 2004 High School Proficiency Assessment (HSPA), and sought alteration of the Department's records reflecting such designation. "V2" indicates that the student "cheated or was disruptive on the exam" and was assigned to E.G. because he refused to take the math portion of the HSPA test. Petitioner maintained that E.G. was unable to take this section of the exam because he is physically handicapped and was not allowed an appropriate accommodation for his disability; specifically, E.G. was not allowed to use a Palm Pilot in place of the graphing calculator necessary to complete the math portion of the test, and was instead instructed to use a TI-83 emulator, on which he maintained he had not been adequately trained.

The ALJ recommended dismissal of the petition, finding that petitioner demonstrated no basis, either in law or fact, on which the Department could be compelled to set aside its policy—for which the Department had demonstrated a sound basis—of not permitting changes to the final report generated by the Department for any given administration of the HSPA test. The ALJ found petitioner's allegations of harm speculative at best, given that access to Department HSPA records is strictly controlled, and noted that the local school district is free to handle the designation in E.G.'s individual pupil record as it sees fit.

The Commissioner adopted the Initial Decision as his own for the reasons expressed therein, further noting that the "V2" score was appropriately assigned because E.G. began the math portion of the exam, but then refused to continue taking it—thus producing, for purposes of Department record-keeping, an answer book that needed to be voided for scoring purposes due to disruption of the standard testing procedure by the test-taking student.

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.

OAL DKT. NO. EDU 11503-04
 AGENCY DKT. NO. 343-9/04

Z.G., ON BEHALF OF MINOR CHILD,	:	
E.G.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
	:	
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, as have petitioner's exceptions and the reply thereto filed by the Department of Education (Department) in accordance with *N.J.A.C. 1:1-18.4*.

On exception, petitioner reiterates his previously expressed contention that a Department policy rooted in "administrative convenience" should not be allowed to take precedence over the civil rights of a handicapped minor, either E.G. or any future student who may find himself in a similar situation. Petitioner further contends that the Administrative Law Judge (ALJ) erred in failing to consider—as she was required to do in a matter decided on a summary basis—the potential for outside access to E.G.'s "V2" designation in the light most favorable to E.G., who has additionally suffered emotional damage by being falsely labeled a "cheater." (Petitioner's Exceptions at 1-2)

In reply, the Department reiterates that petitioner has identified no basis in law that would compel the Department to alter procedures which have been specifically

developed to address the unique requirements of the State testing program and are enforced without exception so as to ensure the integrity of the score reporting and data compilation process for each test cycle; certainly, petitioner has not established that the Department in any way violated E.G.'s civil rights or caused him actionable harm. The Department further urges that the ALJ was correct in her assessment of petitioner's proffered concerns about possible release of E.G.'s "V2" Department test report, not only because such concerns were unsupported by any facts brought to the record, but also because—even if release were theoretically possible—there would still be no harm to E.G. since the "V2" designation is nothing more than an administrative code reflecting the fact that an irregularity occurred subsequent to the student's commencing the test such that the answer book for that particular test administration could not be scored. (Department's Reply at 1-4)

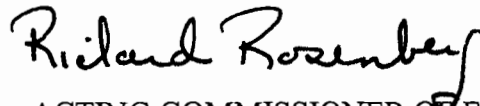
Upon his own independent review and consideration, the Commissioner determines to adopt the Initial Decision of the ALJ. It is clear from the record that there are sound reasons for the Department's policies and practices with respect to alteration of test reports, particularly given the nature and purpose of the final (Cycle II) report issued at the conclusion of any given test administration. (See Certification of Timothy A. Peters, appended to Brief in Opposition to Petitioner's Motion for Summary Decision and in Support of Respondent's Cross-Motion for Summary Decision) It is equally clear that, even assuming *arguendo* that such alteration could be compelled under appropriate circumstances, no change would be warranted in this case because E.G.'s actions did, in fact, fall within the purview of the "V2" administrative designation, which encompasses student-initiated disruption of testing procedures as well as cheating;

whatever issues E.G. may have had with the accommodation provided by the district, and, regardless of whether he was justified in his decision, E.G. undisputedly began taking the test and then refused to continue it, thus producing—for purposes of the Department’s record-keeping—an answer book that needed to be voided for scoring purposes due to disruption of the standard testing procedure by the test-taking student. In this regard, the Commissioner concurs with the Department that: 1) allowing changes to test reports “without a cognizable legal basis or actionable harm alleged as the justification for doing so,” would set a precedent allowing any unhappy test taker to seek alteration of reported results; 2) the Department should not be compelled to create new administrative classification categories every time a particular situation is perceived by an involved party as not “fitting comfortably into [the established] reporting and scoring scheme,” and 3) to prevail in a claim of the type made herein, a petitioner must at the very least make some demonstration of an interest that outweighs the Department’s demonstrated interest in “uniformity, efficiency, and security” with respect to administration of the Statewide testing program. (Reply in Opposition to Petitioner’s Motion for Summary Decision and in Support of Respondent’s Cross-Motion for Summary Decision at 3)¹

¹ To the extent that petitioner remains concerned about disclosure of the “V2” designation on E.G.’s *local district* pupil record because petitioner and the district Board of Education entered—in the due process proceeding referenced in the Initial Decision at 2—into a settlement agreement providing that the district will enter into its pupil record for E.G. whatever test score designation is found appropriate in the instant matter (Exhibit E), the Commissioner concurs that the outcome of petitioner’s dispute with the Department cannot be dictated by a settlement agreement reached between petitioner and the local district Board in a separate proceeding to which the Department was not a party. The Department correctly notes that nothing, save their own settlement agreement, prevents petitioner and the district from reaching independent accord on how the test score in question will be handled with respect to clarification or release of E.G.’s local district pupil record. (Reply in Opposition to Petitioner’s Motion for Summary Decision and in Support of Respondent’s Cross-Motion for Summary Decision at 6)

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.²

A handwritten signature in black ink, reading "Richard Rosenberg". The signature is written in a cursive style with a large, stylized "R" and "B".

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/9/05

Date of Mailing: 9/12/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11503-04

AGENCY DKT. NO. 343-9/04

Z.G. o/b/o MINOR CHILD E.G.,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT

OF EDUCATION,

Respondent.

Arthur L. Raynes, Esq., appearing for Petitioner
(Wiley, Malehorn & Sirotta, attorneys)

Melanie M. Brookes, Deputy Attorney General, appearing for Respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 17, 2005

Decided: July 29, 2005

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

Petitioner challenges Respondent's, New Jersey Department of Education (DOE), assignment of a "V2" score to E.G. for the High School Proficiency Assessment (HSPA) he took in March 2004. On November 10, 2004, 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*.

Petitioner had also filed a due process petition against the Livingston Board of Education. That petition bore agency docket number 2005-9355; Petitioner withdrew the due process petition when the parties thereto reached a settlement agreement.

In this matter, the parties filed cross applications for summary decision and a briefing schedule was established. The record closed on June 17, 2005.

FINDINGS OF FACT

The following findings of fact are based on the record before me which consists of the verified petition, exhibits attached to the certification of Kristin V. Hayes, and the certification of Timothy A. Peters and are essentially undisputed.

1. E.G. is the natural child of Petitioner, Z.G., and resides with him in the Livingston School District, in the Township of Livingston, Essex County, State of New Jersey. E.G. has attended school under the jurisdiction of the Township of Livingston Board of Education from kindergarten through the present.
2. Respondent, the State of New Jersey Department of Education, has mandated each public school student pass the HSPA before being permitted to graduate.
3. E.G. was, at the time the petition was filed, seventeen years old, a junior in high school and eligible for accommodations, pursuant to §504 of the Rehabilitation Act, from the Livingston Township Board of Education, due to his physical handicap which substantially limits the use of his arms and hands.

4. During his tenth and eleventh grades, E.G. was enrolled in classes which required the use of a graphing calculator.
5. Due to the nature of E.G.'s disability, he was unable to use a graphing calculator. The District provided E.G. with a Palm Pilot containing a graphing calculator; however, at the time the petition was filed, E.G. had not been provided with training on the Palm Pilot.
6. The District also provided E.G. with a TI-83 emulator as an alternative accommodation to the Palm Pilot, the training for which was provided in April 2004.
7. Although he had not been provided with training on the Palm Pilot, E.G. chose to continue to use it because it was the accommodation with which he was most comfortable.
8. In March 2004, E.G. sat for the HSPA. Upon his arrival to take the math portion of the exam, he was informed he was unable to use the Palm Pilot; he was required to use the TI-83 emulator.
9. A scribe was assigned as a personal aide to E.G. as an accommodation; the aide acted as proctor for the HSPA; there were no other Board representatives or students present in E.G.'s testing room.
10. E.G. did not take the math portion of the test.¹
11. Because he did not take the test, E.G. was assigned a "V2" score.²
12. Subsequently, E.G. took and passed the HSPA.

¹ There is some dispute in the record with respect to the circumstances of E.G.'s failure to take the math portion of the test. The District indicated, in its report to DOE, that E.G. refused to take that portion. In papers filed by Petitioner, there is a statement that E.G. reviewed the examination and determined he could not use it without the use of graphing calculator as well as a statement that E.G. attempted to take the exam. The resolution of this disparity is not material to the determination herein. The only material fact to be derived from these specific circumstances, with which no one disagrees, is E.G. did not take the exam in March 2004.

² The meanings of the "V" scores are discussed more fully below.

13. Respondent establishes guidelines for administering and scoring the HSPA as well as the guidelines regarding accommodations for the HSPA.
14. The HSPA is administered to first time eleventh-grade students each March and to retesters, defined as those who fail to demonstrate proficiency in each content area, the following October.
15. Approximately five weeks before each administration of the HSPA, Respondent DOE provides in-depth training to staff in the high schools of the state. Parents and students also receive advance information about the purpose and format of the HSPA.³
16. The Department responds to a host of queries during the testing period on a wide range of topics, including unanticipated accommodations needs.
17. Students are allowed to use calculators for the mathematics section of the HSPA and the districts are required to provide them. Students are expressly prohibited from using such items as computers, including laptops and palmtops, pocket organizers and calculators with typewriter keyboards during the administration of the HSPA. This is explained in the HSPA District/School Test Coordinator Manual published by the Department.
18. The gathering, scoring and reporting of HSPA results is a massive project. Multiple choice items are scored by optical scanners; open-ended items are scored by trained readers. Computers combine these open ended scores with the multiple-choice scores for each student. Students receive a score for each section of the HSPA; however, if an irregularity occurs during testing making it impossible for a student to complete a test that can be scored, the district must apply one of three void codes specified in the HSPA District/School Test Coordinator Manual.

³ There is nothing in the record to indicate E.G. did not receive the materials or that he was unaware of the prohibition against the use of the Palm Pilot; the issue in this matter, however, is not to determine fault or make a character judgment; no such determination or judgment is intended in this decision. The only relevant issue is, as Respondent asserts, whether DOE is required to change the record and delete the V2 score.

19. The void codes are V1, to be applied when a student becomes ill during the test; V2 is applied when a student is disruptive or cheats during testing; V3 is applied when the student should not have taken the HSPA.
20. There are two other void codes which are only employed during the scoring process; they are not applicable in the situation giving rise to this application.
21. When a void code is employed, the answer folder is voided and the student may not resume the test section in which the situation giving rise to the void code occurred.
22. When the scoring is completed and approved by DOE, HSPA scores are reported to the districts in two cycles. In Cycle I, two copies of each student's individual report, a hard copy score report, are produced. One copy is sent to the parents and one is kept by the district.
23. Cycle II produces a revised and expanded set of summaries that reflect corrections requested by the districts. These reports are generated from "read-only" electronic files that are essentially frozen after the districts have been given time to confirm or correct demographic data.
24. DOE does not release individual student scores or student information of any kind to the media, colleges or employers, even by request of a student. No paper file copies of student score reports are maintained by the Department.
25. Once the Cycle II reports have been produced, the "read-only" electronic files are considered "frozen" and no file can be amended. Errors can only be submitted for correction on future test administrations, if a student were to be retested.

ANALYSIS AND CONCLUSIONS

The rules of this forum provide a party may move for summary decision at any time after a case is determined to be contested. A motion for summary decision shall be rendered if the submissions, including discovery and affidavits, if any, show there is no genuine issue as to a material fact challenged and that the moving party is entitled to prevail as a matter of law. In order to prevail, an adverse party must respond by setting forth specific facts showing there is a genuine issue which can only be determined in an evidentiary proceeding. *N.J.A.C. 1:1-12.5(a)*.

In this case, the parties have filed cross applications for summary decision and essentially undisputed facts have been set forth above. For the reasons which follow, summary decision is granted in favor of Respondent.

Petitioner asserts the record is clear: E.G. did not cheat on or disrupt the administration of the HSPA; he was unable to take the exam because he lacked an appropriate accommodation; when he had a meaningful accommodation he was able to use, he successfully passed the examination.

On the other hand, Respondent claims it does not, as a practice, change records for two reasons. The first is to reduce file tampering; the second is to ease the Department's burden in processing, analyzing and disseminating the massive amount of information yielded by each administration of the HSPA. According to Respondent, errors are not corrected after the "read only" electronic files are created; to do so in this case would create a dangerous precedent.

Neither party cites legal authority to support the respective positions; Respondent, however, relies on public policy to support its position that the legal issue to be resolved in this matter is whether the Department is required, as a matter of law, to delete any reference to E.G.'s V2 score in its files, citing the need to preserve the integrity of the data yielded from the results of the HSPA, because the HSPA is used to evaluate the quality of education statewide.

To maintain the integrity of not only the results of the examination but the procedures used to compile and maintain the evaluative data as well, the risk that data will be corrupted must be minimized. For this reason, according to Respondent, the Department's electronic data files are made permanent at the conclusion of the scoring and reporting process which is accomplished by compiling data into "read-only" electronic files which are not altered, even if errors are subsequently discovered. It is a well established goal of public education in this state to continually evaluate and improve the quality of education.

Based on the foregoing, I **FIND** the Department has demonstrated the need to preserve the integrity of the procedures used in evaluating the data produced by the HSPA as well as the integrity of data itself to accurately and adequately evaluate the quality of education statewide.

On the other hand, although Petitioner alleges E.G. may be harmed by the V2 score, those allegations are speculative at best. In fact, Respondent clearly states that it does not release the scores to colleges or employers; moreover, in its brief, Respondent also notes the District is free to delete the score from its own records of E.G.'s individual HSPA performance. Accordingly, I further **FIND** Petitioner has failed to demonstrate E.G. has or will suffer actionable harm.

I **CONCLUDE**, therefore, Respondent is entitled to summary decision as a matter of law.

ORDER

Therefore, I hereby **ORDER** summary decision be and hereby is entered in favor of Respondent Department of Education; I further **ORDER** the petition in this matter 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 2005
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

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

July 29, 2005
DATE

AUG 1 2005
DATE

Mailed to Parties:
[Signature]
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

#332-05

OAL DKT. NO. EDU 4243-02
 AGENCY DKT. NO. 126-4/02

A.J. on behalf of minor child <u>P.B.</u> ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE BOARD OF EDUCATION	:	DECISION
OF THE TOWNSHIP OF	:	
DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed stipulation of settlement and the Initial Decision issued by the Office of Administrative Law (OAL) have been independently reviewed.

Petitioner appealed respondent's denial to his granddaughter, P.B., of access to Delran High School in March 2002. Apparently, P.B. was allowed back in school on April 15, 2002, pending resolution of the controversy.

Although respondent, in its answer, agreed that it had told petitioner that three years of tuition were owed for P.B., respondent did not file a counterclaim for the tuition with its answer.

On July 19, 2005, petitioner's attorney forwarded to the OAL a stipulation of settlement, executed by counsel for both parties, in which they withdrew "all claims and counterclaims." There are no other facts or terms set forth in the stipulation of settlement which, by way of Initial Decision, the ALJ approved.

Because the only terms included in the "settlement" are the withdrawal of claims, the Commissioner regards the parties' action as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. The Commissioner also notes that disposition of this case is particularly appropriate at this time, insofar as a student who was in high school in the Spring of 2002 has most likely completed high school by now.

Accordingly, the Initial Decision is approved with the modification that it be deemed a withdrawal.

IT IS SO ORDERED

A handwritten signature in black ink, reading "Lucille E. Dargatzidis". The signature is fluid and cursive, with the first name "Lucille" and last name "Dargatzidis" clearly legible.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/05

Date of Mailing: 9/14/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT

OAL DKT. NO. EDU 4243-02

AGENCY DKT. NO. 126-4/02

A.J., O/B/O MINOR, P.B.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF DELRAN,
BURLINGTON COUNTY**

Respondent.

Richard A. Isolda, Esq., appearing for petitioner

John T. Barbour, Esq., appearing for respondent

Record Closed—July 21, 2005

Decided—July 28, 2005

BEFORE **JOHN R. FUTEY, ALJ:**

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on June 17, 2002, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The matter was heard for a pre-hearing at the OAL, Mercerville, N.J. on October 9, 2002.

The scheduled plenary hearing date of April 9 and 11, 2003, were adjourned in advance at the mutual request of the parties, who both needed more time to prepare. The next scheduled date of January 21, 2004, was adjourned to allow for the anticipated filing of cross motions for

summary decision. The next date of November 22, 2004, was adjourned at Mr. Isolda's request due to vacation plans. The next date of May 16, 2005, was adjourned due to an anticipated settlement. The matter was re-scheduled for July 25, 2005. Prior thereto, however, on July 21, 2005, the parties submitted a fully executed settlement agreement.

The parties have agreed to a settlement and have submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

July 28, 2005
DATE

John R. Futey
JOHN R. FUTEY, ALJ

Receipt Acknowledged:

8-1-05
DATE

M. R. Rottman
DEPARTMENT OF EDUCATION

AUG 2 2005

DATE
mamf

Mailed to Parties: [Signature]
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

John T. Barbour, Esquire
Staff Attorney, Delran Board of Education
11 Jewel Road
Millville, New Jersey 08332
Voice: 856-327-4374
Facsimile: 856-825-7508
e-mail: jtbarbour@comcast.net
Attorney for Respondent

RECEIVED
2005 JUL 21 A 10:17
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

In the matter of: :
 :
 :
A.J. O/B/O Minor Child P.B., :
 :
Petitioners, :
 :
 :
-and- :
 :
 :
Twp of Delran BOE, et als :
 :
BURLINGTON COUNTY :
 :
Respondent. :

STIPULATION OF SETTLEMENT

The parties having mutually agreed to the withdrawal of all claims and counterclaims as a complete and final settlement of all claims and allegations that were or could have been brought by or against one another, HEREBY Settle and Resolve all issues involved herein.

Dated:

7.18.05

For Albert Jimenez as Legal Guardian
For PATRICIA BUCKLEY, a minor


Richard A. Isolda, Esquire

June 6, 2005

For Delran Board of Education


John T. Barbour, Esquire

THOMAS <u>DERBY</u> ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY :		
OF CAMDEN, CAMDEN COUNTY,		DECISION
	:	
RESPONDENT;	:	
	:	
AND	:	
	:	
IN THE MATTER OF THE CAMDEN	:	
BOARD OF EDUCATION,	:	
RESPONDENT, AND THOMAS	:	
DERBY, CHARGING PARTY.	:	
_____	:	

SYNOPSIS

In this consolidated matter, petitioner claimed the Board of Education violated his tenure and seniority rights by not appointing him—following abolition of a teaching staff position he claims to have held under the Reading Specialist endorsement on his Educational Services Certificate—to a newly created Educational Program Specialist position requiring the same endorsement. In his related unfair practice charge before the Public Employment Relations Commission (PERC), petitioner contended he was denied the position he sought in retaliation for engaging in protected activity. Petitioner sought retroactive reappointment to the position in question as his primary relief.

The ALJ found that petitioner acquired tenure as a teacher, and that his lawful reassignment to another position within the scope of his instructional certificate did not constitute a reduction in force so as to implicate his tenure or seniority rights; thus, petitioner had no claim under the school laws. The ALJ further dismissed the entire matter as moot, having found that—since the Educational Program Specialist title was not used in the district after 2001-02 and will not be used again in light of its rejection by the County Superintendent—no purpose would be served by continued proceedings since no relief is available to petitioner even if he prevails in his unfair practice charge.

The Commissioner adopted the ALJ's decision with respect to petitioner's tenure and seniority claims, but declined to rule on the mootness of petitioner's unfair practice charge. Consistent with the Joint Order of Consolidation, the Commissioner forwarded the matter to PERC for final decision on all remaining issues, including the question of mootness of the unfair practice charge.

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

OAL DKT. NO. EDU 8516-01
AGENCY DKT. NO. 437-10/01;
OAL DKT. NO. PRC 2201-03
PERC DKT. NO. CI-2002-43
(CONSOLIDATED)

THOMAS DERBY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	
	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY :		
OF CAMDEN, CAMDEN COUNTY,		DECISION
	:	
RESPONDENT;	:	
	:	
AND	:	
	:	
IN THE MATTER OF THE CAMDEN	:	
BOARD OF EDUCATION,	:	
RESPONDENT, AND THOMAS	:	
DERBY, CHARGING PARTY.	:	
_____	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, which did not comply with the time requirements of *N.J.A.C.* 1:1-18.4(a),¹ are not considered herein, and no reply to them was filed by the respondent Board of Education (Board).

Upon review and consideration of the school law claims before the Commissioner, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner's tenure was achieved under his instructional certificate, not under the reading specialist endorsement on his educational services certificate, so that petitioner has no

¹ Petitioner's exceptions bore a face date of August 16, 2005, and were filed via fax on August 17, 2005 (hard copy August 18, 2005). The Initial Decision was mailed to the parties on August 2, 2005, so that any exceptions to be filed in the absence of an extension requested and granted pursuant to *N.J.A.C.* 1:1-18.8 would have been due on or before August 15, 2005.

possible tenure claim to any position other than that of teacher. The Commissioner further concurs that petitioner was not subjected to a reduction in force (RIF), but was instead lawfully transferred to another teaching position within the scope of his instructional certificate, so that neither his tenure nor his seniority rights are implicated in this matter. Consequently, the Commissioner concludes, as did the ALJ, that petitioner has not demonstrated entitlement to relief under the school laws, as sought in his petition before the Commissioner.²

The Commissioner expressly declines, however, to reach the ALJ's recommendation—based on an undisputed finding that the title assigned to the position sought by petitioner in his pleadings is no longer in use and was not approved by the County Superintendent of Schools—that this matter is moot in its entirety. Instead, having ruled on the merits of petitioner's school law claims as set forth above, the Commissioner finds that the final decision on dismissal of petitioner's unfair practice claims is more properly made by the Public Employment Relations Commission (PERC), since, notwithstanding that petitioner has no entitlement by tenure or seniority to the position or back pay he seeks, PERC may not concur that the issues within its jurisdiction are mooted by the fact that the position sought by petitioner no longer exists under the title(s) it had during the period at issue.³

Accordingly, the Initial Decision of the OAL dismissing petitioner's tenure and seniority claims is adopted as the final decision in this matter with respect to

² Finding of Fact No. 2 is corrected to indicate that petitioner was hired by the Board on September 1, 1988, and Finding of Fact No. 18 is corrected to reference R-3, Exhibit 19.

³ The Commissioner recognizes that, should PERC determine that this matter is not moot, and should it subsequently find that petitioner is entitled to relief in the form of appointment to a position that he sought and should have received, but did not because the Board violated employment law, further proceedings before the Commissioner may be necessary to determine the existence of such position(s), regardless of the title(s) assigned to them.

those claims, and—consistent the Joint Order of the Commissioner and the Chair of the Public Employment Relations Commission (PERC)—the Commissioner’s decision herein, together with the full record of this matter, shall now be forwarded to PERC for final decision on all remaining issues, including the mootness of petitioner’s unfair practice charge.⁴

IT IS SO ORDERED.⁵



ACTING COMMISSIONER OF EDUCATION

Date of Decision:	<u>9/14/05</u>
Date of Mailing:	<u>9/14/05</u>

⁴ An extension has been requested pursuant to *N.J.A.C.* 1:1-17.8(c) to permit the rendering of a final decision by PERC.

⁵ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

**GRANTING SUMMARY DECISION
REGARDING EDUCATION ISSUES
AND RECOMMENDING DISMISSAL
OF UNFAIR PRACTICE CHARGE**

OAL DKT. NO. EDU 8516-01

AGENCY DKT. NO. 437-10/01

OAL DKT. NO. PRC 2201-03

PERC DKT. NO. CI-H-2002-43

(CONSOLIDATED)

THOMAS DERBY,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF CAMDEN, CAMDEN COUNTY,**

Respondent;

and

**IN THE MATTER OF THE CAMDEN
BOARD OF EDUCATION, RESPONDENT,
AND THOMAS DERBY, CHARGING
PARTY**

Michael Barrett, Esq., for petitioner-charging party (Bergman & Barrett, attorneys)

Harold W. George, Esq., for respondent-respondent (Sumners George, attorneys)

Record Closed: July 1, 2005

Decided: July 29, 2005

BEFORE JOSEPH F. MARTONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the matter before the Commissioner of Education, petitioner filed a petition challenging the actions of respondent Board of Education of the City of Camden, abolishing a teaching staff position which he alleges he previously held under a Reading Specialist endorsement on an Educational Services Certificate and creating new positions with the title Educational Program Specialist that require a Reading Specialist endorsement. Petitioner asserts that he acquired tenure under his Reading Specialist endorsement and, therefore, he was and is entitled to the new position; however respondent has placed and continues to place non-tenured or less senior individuals to fill these positions in violation of petitioner's tenure and seniority rights.

This matter was transmitted to the Office of Administrative Law (OAL) on November 20, 2001, for hearing as a contested case. This matter was then assigned to me on December 17, 2001, and a telephone prehearing conference was scheduled for January 31, 2002. This was adjourned at the request of attorney for petitioner who was unavailable. Because the attorneys were of the opinion that a settlement was possible, I scheduled a number of telephone conferences which were held on March 7, April 11, April 29, May 29 (adjourned), June 19, and July 2, 2002. When it was determined that the matter could not be settled during the conference on July 2, 2002, the matter was scheduled for hearing on December 18, 2002. Additional conferences were held on October 17, 2002 and November 19, 2002. On November 19, 2002, it was determined that two hearing days would be required and the attorneys requested that the hearing scheduled for December 18, 2002, be adjourned and the matter be rescheduled for two days. This request was granted and the matter was rescheduled for hearing on January 30 and 31, 2003.

On January 9, 2003, attorney for respondent filed a motion to consolidate the within matter with a Charge filed by petitioner as the charging party with the Public Employees' Relations Commission (PERC) on February 21, 2002, entitled *In the Matter of Camden Board of Education, Respondent and Thomas Derby, Charging Party*, PERC Docket No. CI-H-2002-43.

In the Charge before PERC, petitioner alleged that he engaged in certain activities protected by the PERC Act of which respondent was aware. After respondent abolished petitioner's teaching staff position, it created new Educational Program Specialist positions for which petitioner contends he is uniquely qualified, and it placed less-qualified individuals in these positions. Petitioner contends that he was denied the opportunity to interview for and was denied placement in the new positions, and that those actions by respondent were retaliatory because of petitioner's engagement in the protected activity. Petitioner seeks a determination that the actions and conduct of respondent amounted to retaliatory action against petitioner for his engaging in protected activities and are unfair practices under the PERC Act, and he requests that PERC direct respondent to cease such conduct and retroactively appoint petitioner to one of the new positions.

By an Order entered on January 22, 2003, I ordered the consolidation of these two matters and provided for a procedure by which the Commissioner of Education and the Public Employment Relations Commission would decide those issues over which they each have the predominant interest. By a Joint Order on Consolidation and Predominant Interest entered by the Commissioner of Education on March 5, 2003, and the Chair of the Public Employment Relations Commission on February 24, 2003, the Commissioner of Education and the Public Employment Relations Commission ordered the consolidation of these matters and established the procedure for issuing the final administrative decision.

The PERC matter was then transmitted to the OAL on April 9, 2003. The Consolidated matter was then scheduled for hearing on October 15 and 17, 2003. These hearing dates were adjourned at the request of attorney for petitioner on October 14, 2003 because he had been newly retained, and the hearing was rescheduled for May 13 and 25, 2004.

The hearing commenced on May 13, 2004, and attorney for respondent submitted a motion for summary decision. The hearing was continued to May 25, 2004. On May 25, 2004, Karen Murray, Esq., but here it before me an advise that her services had been terminated by responding by correspondence faxed to her office. When she attempted to determine the name of substitute counsel, She could not confirm who this. However, she stated that she could not represent the interests of respondent because she had been terminated as its attorney.

In view of this, I released Ms. Murray and Mr. Barrett and instructed Ms. Murray to advise her former client that I required an explanation for the failure of any substitute counsel to appear on its behalf in order to decide whether to reschedule a matter. I also gave to Mr. Barrett the opportunity to respond to the respondent's motion for summary decision, and he did so.

In January 2005, substitute counsel entered an appearance in this matter. I was then advised that because of changed circumstances, the matter may be resolved, and I withheld any further action in the matter. Because of this, and through inadvertence, I did not close the record with respect to the respondent's motion until July 1, 2005.

ISSUES TO BE DECIDED

This matter is a consolidated case and involves two issues: an education issue and a PERC issue. The education issue as I see it and as set forth in the Order of Consolidation is whether the petitioner was and is entitled to the position entitled Educational Program Specialist (Literacy) and whether respondent's placement of non-tenured or less senior individuals to fill these positions violates petitioner's tenure and seniority rights? See the January 24, 2003, Order of Consolidation, page 5. The Commissioner of Education has the predominant issue on the educational issue dealing with petitioner's tenure and seniority rights. PERC has the predominant interest on the allegation of retaliation issue. *Id.* Thus, the respondent school district's summary decision motion is properly before me on the issues reserved for the Commissioner's jurisdiction in the Order of Consolidation. The issue of alleged retaliation is reserved for PERC and must be addressed by PERC if I grant the respondent's motion for summary decision and this decision is affirmed by the Commissioner of Education.

FACTUAL DISCUSSION

A review of petitioner's petition and his Certification (P-1) and respondent's answer and Certifications of Counsel (R-2 and R-5) with annexed exhibits reveals that most of the essential relevant facts are not in dispute. I **FIND** that following to be the relevant facts in this matter:

1. Petitioner holds an Instructional Certificate with a Teacher of English endorsement, and an Educational Services Certificate with a Reading Specialist Endorsement, both issued

in March 1988.

2. Petitioner was hired by respondent on September 1, 1999.
3. From September 1, 1988 through June 2001, the petitioner was employed as a Teacher of Reading.
4. At all pertinent times, petitioner held the proper certificate and endorsement for his assignment and was employed on a full-time basis.
5. During this time, because petitioner was employed as a teacher, he served under his Instructional Certificate and was assigned to a Teacher of Reading position resulting in his acquiring tenure with respondent.
6. On April 30, 2001, Reading, as a separate subject, was eliminated from the Camden School District's curriculum. The Official Board Minutes of April 30, 2001, shows that the Board voted on April 30, 2001, to eliminate reading. (R-2, Exhibit 6, Official Board Minutes of April 30, 2001 with vote page.) This action was not taken by resolution.
7. The petitioner was never employed as a Reading Specialist.
8. The petitioner applied for an Educational Program Specialist position in July 2001.
9. The job description for Educational Program Specialist was never approved by the County Superintendent. (R-2, para. 6)
10. The petitioner was not dismissed, laid off, or reduced in salary as a result of the elimination of Reading as a separate curriculum subject in the school district. (R-2, para. 9)
11. No teaching staff member was dismissed, laid off or reduced in salary as a result of the elimination of reading as a separate curriculum subject in the school district. (R-2, para. 10)
12. The position or title of Educational Program Specialist was unrecognized and was never approved as a tenurable position by the County Superintendent. (R-2, Exhibit 15)
13. The Educational Program Specialist position was officially abolished by the Board on May 24, 2004, as it had not been used for two years. (R-3, Exhibit 18).
14. The former position of Teacher of Reading worked directly with students. (R-2., para. 12)
15. The position of Educational Program Specialist for Literacy, prior to its abolition, was developed to work primarily with staff rather than students. (R-2, para. 12)
16. The position of Teacher (Sylvan Reading Lab) works directly with students and is the position to which petitioner was assigned. (R-2. para. 8 and 12)
17. The position of Literacy Teacher Coach has been developed to work primarily with staff,

rather than students.

18. The job descriptions for the following positions are not the same: Educational Program Specialist (R-2, Exhibit 9); Teacher (Sylvan Reading Lab) (R-2, Exhibit 10); Literacy Teacher Coach (R-3, Exhibit 18).
19. The petitioner is a member of the Camden Education Association, a bargaining unit representing all of the teachers. The Association has never filed any grievance or initiated any litigation relative to any of the changes in re-assignments of teachers of reading. (R-2, para. 19)
20. In 2001, the board of education appointed 10 individuals to the position of Educational Program Specialist Literacy. (R-2, Exhibit 16)
21. The title of Educational Program Specialist for Literacy was abandoned by the board and was not used in either the 2002-2003 or 2003-2004 school years (R-2 para. 16). No one has been assigned to the position or title of Educational Program Teacher Specialist for the 2002-2003 and 2003- 2004 school years.
22. The Board subsequently changed the title to Educational Program Specialist. On June 24, 2003, in response to the school district's request for approval by the County Superintendent of Schools to use a number of unrecognized titles, including the title of "Educational Program Specialist" the school district was advised by the County Superintendent of Schools, that he was concerned how appointees would accumulate tenure and seniority. He suggested that the school district use the title "Educational Program Teacher Specialist." (R-2, Exhibit 15).
23. On July 28, 2003, the school board abolished the title of Educational Program Specialist and created the title of Educational Program Teacher Specialist in order to comply with the County Superintendent's direction (R-2, Exhibit 17).
24. The County Superintendent recently advised the school district that he will not be approving any Educational Program Specialist title going forward beginning with the 2004-2005 school year.
25. Petitioner, through his counsel, was advised of the County Superintendent's rejection of the position in question in July 2003 and again in October 2003. However, petitioner has not yet amended his petition, and the petition claims entitlement to a position that does not exist.

LEGAL DISCUSSION AND ANALYSIS

Whether the petition should be dismissed as moot

In his petition, the petitioner claims entitlement to and seeks immediate and retroactive appointment to the position of Educational Program Specialist. Respondent school district argues that petitioner's claim is moot because he seeking the remedy of appointment to a position that no longer exists.

As stated above, from 1988 through 2001, the petitioner was assigned as a Teacher of Reading in one of respondent's high schools. (P-1, R-2, Exhibits 1, 2 and 3) Based upon petitioner's Certification (P-1) and the fact that his assignment from 1988 through 2001 was as a Teacher of Reading, I **FIND** that petitioner acquired tenure under his Instructional Certificate since the Teacher of Reading assignment was an instructional position.

Because the State does not offer Reading as a credit-bearing subject, the respondent board eliminated Reading from its middle and high school course curricula in April 2001, beginning with the 2001-2002 academic year. (R-2, Exhibit 6) All reading, writing and vocabulary development is taught within Language Arts at the middle school level, and English at the high school level.

Upon adoption by the board of education of a new curriculum and reading program, the Teacher of Reading positions in the school district were eliminated, and the positions of "Educational Program Specialist for Literacy" and "Teacher (Sylvan Reading Lab)" were open to all reading teachers in the district. (R-2, Exhibits 7 and 8) All reading teachers were reassigned as either a Sylvan Reading Lab Teacher or an Educational Program Specialist for Literacy. (R-2, Exhibit 12) Both positions were teaching positions paid on the teachers' salary guide.

The petitioner was reassigned as a Sylvan Reading Lab Teacher, effective September 1, 2001. (R-2, Exhibit 11) There was no change in petitioner's salary or benefits as a result of this reassignment. All teachers, regardless of assignments are paid on the same salary guide.

Petitioner contends that his tenure and seniority rights were violated because he was not reassigned as an Educational Program Specialist. It is noted that the Camden Education Association, a bargaining unit representing all of the teachers, including petitioner, never filed any grievance or initiated any litigation relative to any of the changes and reassignments of Teachers of Reading. (R-2, para. 19)

Respondent contends that since the petitioner seeks retroactive appointment as an Educational Program Specialist, a position that has been abolished, petitioner's claim is moot, and there is no reason to proceed regarding a position that cannot lawfully exist and has been abolished. Respondent also argues that since the Educational Program Specialist position was abolished in May 2004, and since petitioner has failed to amend his petition, he cannot claim entitlement to the new title of Educational Program Teacher Specialist established in July 2003. Further, respondent contends that based upon the County Superintendent's recent advice that he will not be approving any Educational Program Specialist title going forward beginning with the 2004-2005 school year, there is currently no such actual position in the school district.

In response to the foregoing, petitioner contends that whatever the new positions are called, the essence of these new positions from a content standpoint is "reading specialist" focused. Thus, the petitioner contends that by virtue of his education, certifications, endorsements, and actual experience, he was more legally qualified for appointment to the new positions than other individuals within the school district. He contends that despite this, he was denied one of these positions, and even denied an interview for one of them, because of personal and professional antipathy towards him.

I agree that the Commissioner of Education does not render decisions on cases that have become moot since a development or event renders a controversy moot where it precludes a court from granting effective relief. *Farmer v. Camden Bd. of Educ.*, EDU 6789-01 (Initial Decision (November 2003) Commissioner's Decision, No. 684-03 (December 2003) <<http://lawlibrary.rutgers.edu/oal/search>>; citing *J.B. v. Asbury Park Bd. of Ed.*, 1988 S.L.D. 2303; *Weehawken Educ. Assn., v. Weehawken Bd. of Ed.*, 1978 S.L.D. 924; *Nichols v. Jersey City Bd. of Educ.*, 65 N.J. Super. 45 (App. Div. 1961). An action is moot when it no longer presents a justiciable controversy because the question has become academic, or when a decision

on the controversy will have no practical effect. *Victoria v. Woodbridge Bd. of Educ.*, 1982 S.L.D. 1.

In *Farmer*, the ALJ dismissed as moot a petition which challenged an appointment to a position that was subsequently abolished and the board had created a restructured position. The Commissioner affirmed the ALJ's summary decision. In *Nichols*, the petitioner requested the Commissioner to order the Jersey City Board to appoint the petitioner as Assistant Superintendent of Schools in place of an individual. The petition was dismissed and the State of Board affirmed the dismissal. The Appellate Division held that the case was moot because the court could not order appointment to a position where the position had been abolished.

The primary relief sought herein by the petitioner, namely, appointment as Educational Program Specialist in place of another employee, cannot be ordered as a remedy in this matter because the position is presently non-existent. I **FIND** that this controversy is moot because significant events have occurred, *i.e.*, the lack of approval of the Educational Program Specialist position by the County Superintendent and the school district's abolishment of the position. The remedy that petitioner is seeking in this matter cannot be granted to him even if he prevails because the position he is seeking no longer exists. See, *Anderson v. Sills*, 143 N.J. Super. 432, 437 (Ch. Div. 1976). There is no reason to conduct a factual hearing on the petition if there are no remedies available.

Respondent also argues that petitioner's claim is moot because he cannot be awarded the new title of Educational Program Teacher Specialist. As stated above, the school board created the new title of Educational Program Teacher Specialist when it abolished the disapproved title of Educational Program Specialist. (Certification, Exhibit 17) However, since the school board created the new title in July 2003, no person has been appointed to the position and the board does not have any individuals in the title of Educational Program Teacher Specialist. The school district did not use the title in the 2002-2003 or 2003-2004 school years and has abandoned its use. Thus, the petitioner cannot be awarded a title that is no longer in use in the school district.

Petitioner contends that the County Superintendent's determination to deny respondent the use of these titles is irrelevant, contending that only the Commissioner is authorized to make such a determination, citing *Pezzulo v. Willingboro Twp. Bd. of Educ.*, OAL Dkt. No. EDU 798-

86. However, the County Superintendent of Schools has the authority to take measures necessary to the enforcement of the State law requiring boards of education to employ only those teachers who are properly certificated for the positions held. See, *N.J.S.A. 18A:7-8* and *N.J.A.C. 6:56-1.1(d)*. *N.J.A.C. 6:11-3.6(b)*¹ gives authority to the county superintendent to exercise his discretion and approve a school district's request for permission to use an unrecognized position title and determine the appropriate certification and title for the position. Such permission has not been given in this case.

Petitioner argues in response that it is not a title that he is seeking, but rather a position consistent with his prior title of Reading Teacher. He asserts that he has legal entitlement to such a position and that he is at least entitled to have that assertion determined through a full hearing and an ultimate determination by the Commissioner of Education.

As stated above, from 1988 through 2001, the petitioner was assigned as a Teacher of Reading in one of respondent's high schools. (Certification, Exhibits 1, 2 & 3) It is undisputed that petitioner was employed as a Teacher of Reading until his reassignment to his current position as a Sylvan Lab Reading Teacher. Tenure is achieved by a teaching staff member who served the probationary period either in a specifically designated position, such as teacher, or in "positions which require them to hold appropriate certificates." *Ellicott v. Board of Educ., of Tp. of Frankford*, 251 *N.J. Super.* 342 (App. Div. 1991). In a case cited by respondent, *Wallen v. Bd. Educ. of Rancocas Valley Reg. H.S. Dist.*, 92 *N.J.A.R.* 2d. (EDU) 670, the Commissioner held that a media specialist was not entitled to claim a position as English teacher held by a non-tenured staff member even though the media specialist held an English endorsement under the instructional certificate. The media specialist also held an educational media specialist endorsement under an educational services certificate. The Commissioner stated that because the media specialist had been only employed as a librarian/media specialist and never as a teacher, she achieved tenure within the position of educational services but not within the position of teacher even though she held an instructional certificate.

In the present matter, from September 1988 through June 2001, the petitioner herein was employed as a Teacher of Reading. Petitioner acquired tenure in the position of teacher under

¹ Now repealed and replaced by *N.J.A.C. 6A:9-5.5(b)*.

his instructional certificate and not in any other position. Even though the petitioner held an endorsement as a reading specialist under the educational services certificate, he did not achieve tenure under his educational services certificate because he was employed solely as a teacher. Petitioner was never employed as a reading specialist. Thus, even if the Education Program Specialist position still existed in the school district and a reading specialist certificate had been required, the petitioner would not have tenure rights to the subject position. Based upon petitioner's Certification and the fact that his assignment from 1988 through 2001 was as a Teacher of Reading, I **FIND** that petitioner acquired tenure under his Instructional Certificate since his Teacher of Reading assignment was an instructional position.

Additionally, the petitioner has no seniority in the position of Educational Program Specialist Literacy. Rather, the petitioner has accrued seniority credit as a secondary teacher. The Educational Program Specialist position in question is unrecognized, and even if the position was in existence in the school district, an individual could not accumulate seniority in the position.

Petitioner previously argued that the disapproved title and the new title have the same duties. Even if the job duties for both titles were the same, the new title has been abandoned as it has not been used in the school district. Since its creation in July 2003, no person has been appointed as an Educational Program Teacher Specialist. In fact, all the teachers who were appointed as Educational Program Specialist (Literacy) have been appointed to other positions. (Certification, Exhibit 16). Therefore, the petitioner cannot be awarded a new title of Educational Program Teacher Specialist since the title is not used in the school district, and since its creation, no individual has been appointed to this title.

It should also be noted that the board of education has no plans to use the Education Program Teacher Specialist title going forward since the board has been advised by the County Superintendent that all of the Educational Program Specialist titles will not be approved in the 2004-2005 school year.

Whether the Commissioner has authority to order an appointment to a position

Respondent contends that the Commissioner does not have the authority to order an appointment to a position, especially where that position is non-existent. Thus, respondent

asserts that there is no authority permitting the Commissioner to award an employment contract to a new position.

N.J.S.A. 18A:16-1 provides the board of education with the sole authority to hire employees and to set the "length of terms of their employment." Respondent contends that a board of education, under *N.J.S.A.* 18A:27-4 and other sections of Education law, is vested with "the traditional management power to employ, promote, transfer and dismiss" employees and that "the boards were public officials charged with public responsibilities which they could not lawfully abdicate or bargain away" *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 N.J. 17, 23 (1973) (Citations omitted).

N.J.S.A. 18A:27-4.1 provides sole authority to promote and appoint to the board of education. There is no express or implied authority that allows the Commissioner to award a position. The Supreme Court has admonished that, "(a) court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication" *I/M/O Jamesburg High School*, 83 N.J. 540, 550-551 (1980). In the *Jamesburg* case, the Supreme Court found that neither the inherent authority of the enabling statute for the Commissioner, *N.J.S.A.* 18A:6-9, or the tenure statute for teachers, *N.J.S.A.* 18A:28-6.1, gave the Commissioner the authority to order the transfer of teachers. The Court there stated "[w]here there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied." *Id.* at 549.

Based upon the foregoing, I **FIND** that under the circumstances discussed above, the Commissioner does not have the authority to order an appointment to a position, especially where that position is non-existent.

Whether petitioner's tenure rights were triggered by the Board's action.

Respondent contends that rights emanating from the achievement of tenure are triggered only at the time of a reduction in force (RIF), and that since there was no RIF in this matter, petitioner's tenure rights were not triggered by the board's action, citing *Edison Twp. Educ. Assoc. v. Bd. of Ed. of Twp. of Edison*, Comm'n 1984 S.L.D. 1073, 1083, aff'd State Board of Education, 1984 S.L.D. 1085, aff'd, Docket #A-2030-84T7 (App. Div. 1986). Respondent

contends that since petitioner was not subjected to a RIF within the meaning of *N.J.S.A. 18A:28-9*, and that where there has been no reduction in the number of teaching staff, no RIF occurs, citing *Ivey Avery v. Bd. of Ed. of the City of Trenton*, OAL Dkt No. EDU 8316-93, Comm'n dec. 573-97 (November 3, 1997), <<http://www.state.nj.us/njded/legal/index.html>>.

In *Ivey Avery, Id.* the board abolished "teacher-specialist" positions and reassigned those teaching staff members holding the positions to classroom teaching assignments. The ALJ concluded that the board's action in abolishing petitioners' positions constituted a reduction in force. The Commissioner reversed, finding that no reduction in force had occurred because the board had not reduced the number of teaching staff members employed. The Commissioner further concluded that the board had acted within its managerial prerogative when it transferred the tenured individuals to alternative teaching assignments. The Commissioner determined that the individuals had acquired tenure as teachers and not as "teacher-specialists" and had been transferred within the scope of their certificates to alternative teaching assignments. *Id.*, at 35. The State Board of Education reversed the Commissioner's determination, State Board of Education Decision (July 10, 2001), <<http://www.state.nj.us/njded/legal/index.html>>, and held that there was a reduction in force because petitioner's positions were reduced from twelve months to ten months with a corresponding reduction in compensation. The State Board distinguished the facts in *Avery* from those in *Carpenito v. Board of Educ.*, 322 *N.J. Super.* 522, (App. Div. 1999), discussed *infra*. While the Commissioner's decision was reversed, the critical portion of the decision is the holding that where there is no RIF, an employee's tenure rights are not triggered by the board's action.

In *Carpenito v. Board of Educ.*, 322 *N.J. Super.* 522, (App. Div. 1999), the Court stated :

Teaching staff members, including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents and school nurses, who have acquired tenure, "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause" *N.J.S.A. 18A:28-5* (emphasis added). The Tenure laws create exceptions to the protections afforded to tenured teaching staff members. A school board has the managerial prerogative to transfer teaching staff members by a majority vote of the board. *N.J.S.A. 18A:25-1*.

"Transfer" refers to the right of a school board to assign a teacher to a position within the scope of his or her certification. A tenured teacher may be involuntarily transferred to another position within his or her certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis. See, e.g., *Greenway v. Board of Educ. City of Camden*, 129 N.J.L. 46 (E. & A.), *aff'd*, 129 N.J.L. 461 (1943) (finding that transfer of tenured teacher from high school to junior high school without reduction of salary and without impacting tenure rights gave teacher no cause of action); *Williams v. Plainfield Bd. of Educ.*, 176 N.J. Super. 154, 162-64, (App. Div. 1980) (holding that transfer of high school principal to position of elementary principal without any immediate reduction in compensation nor a reduction in rank did not violate principal's tenure rights), *certif. denied*, 87 N.J. 306 (1981); *Lascari v. Board of Educ. of Borough of Lodi*, 36 N.J. Super. 426, 430 (App. Div. 1955) (concluding that transfer of vice principal to regular teaching duties without reduction in salary was not a demotion or dismissal); *Moore v. Cherry Hill Township Bd. of Educ.*, 92 N.J.A.R.2d (Vol. 4) 585 (Div. on Educ.), *aff'd*, 93 N.J.A.R.2d (Vol. 4) 173 (Div. on Educ.) (determining that involuntary transfer of tenured teacher from position teaching reading in departmentalized junior high school to a position as third grade elementary teacher in connection with a district reorganization was not improper and teacher was not entitled to be returned to position); *Ciarcia v. Trenton City Bd. of Educ.*, 1991 S.L.D. 1422 (rejecting seniority claim of art teacher, who was reassigned from secondary to elementary level as part of district reorganization, where teacher suffered no loss of employment or salary reduction as a result of the transfer); *Stranzl v. Paterson Bd. of Educ.*, 2 N.J.A.R. 16 (Div. on Educ. 1980) (holding that tenure rights of elementary school principal were not violated when board involuntarily transferred principal from his position to the position of secondary school principal in the same district). A transfer is not a demotion or a dismissal under such circumstances. Indeed, transfers of teaching staff members are often advisable in the administration of schools for a variety of reasons.

Carpenito holds an instructional certificate with endorsements in English, social studies, and science. He also holds a tenure entitlement to any position for which a standard instructional certificate with any endorsement is the only necessary certification. The computer applications position to which he was assigned is such a position, because no particular certification, other than an instructional certificate, is required to teach computers. *Taxman v. Board of Educ. of Piscataway Township*, 92 N.J.A.R.2d (Vol. 4) 189 (Div. on Educ.). Thus, the transfer of Carpenito to teach computer applications was within the scope of his certification. [*Id.*, 322 N.J. Super. at 529-531]

Based on the foregoing, it is clear that a tenured teacher may be transferred or reassigned within the scope of his or her certificate. See, also, *Bonica v. Bd. of Ed. of River Dell Reg. Sch. Distr.*, EDU 5885-01; *Howley v. Bd. of Ed. of Ewing Twp.*, 1982 S.L.D. 1328, 1340, *aff'd* State Board of Education, 1983, S.L.D. 1554. In the present matter, the petitioner was reassigned from his Teacher of Reading position to an alternative teaching assignment, Teacher (Sylvan Reading Lab), which reassignment was within the scope of his certification. Therefore, I **FIND** that petitioner was not subject to a reduction in force so as to implicate tenure and seniority rights. I further **FIND** that petitioner was reassigned from his Teacher of Reading position to an alternative teaching assignment, Teacher (Sylvan Reading Lab), which reassignment was within the scope of his certification. In this matter, petitioner did not suffer a loss of compensation and is still employed by the respondent board of education. Thus, petitioner's tenure rights have been unharmed. I **FIND** that the transfer of petitioner from the position of Teacher of Reading to the position of Teacher (Sylvan Reading Lab) without any reduction in his salary and without impacting tenure rights give to the petitioner no cause of action.

Respondent also argues that petitioner's seniority rights are not implicated in this matter arguing that the Commissioner has concluded that the abolishment of positions with a reassignment or transfer to an alternative position within the scope of the individual's certification, with no dismissal from employment in the school district, does not compel the application of seniority regulations. *Ivey Avery v Bd. of the Cty of Trenton, supra*. In *Ivey Avery*, the Commissioner determined that even though tenured teachers' positions had been abolished, there had been no dismissal from employment and so to apply seniority regulations would "constitute a capitulation to semantics at the expense of sound educational policy." *Id.* at 35. In this case, petitioner's seniority rights were not violated as he did not suffer dismissal or any change in salary, and neither did any similarly situated teacher.

With regard to seniority, see the provisions of N.J.S.A. 18A:28-12 requiring that if any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs. The position espoused by respondent concerning petitioner's allegation that his seniority rights were violated was taken by

the Court in *Carpenito v. Board of Educ.*, *supra*, wherein the Court held that a tenured teacher's seniority rights are not triggered when a school board abolishes the teacher's position and assigns the teacher to teach different subjects within his or her certification without reducing the teacher's salary or other employment benefit. *Carpenito v. Board of Educ.*, 322 N.J. Super. at 542.

In this matter, petitioner was transferred from an abolished Teacher of Reading position to the position of Teacher (Sylvan Reading Lab), an equivalent position, with no impact on his tenure and seniority and no loss of pay or benefits. Therefore, I **FIND** that petitioner's seniority rights have not been impacted and that he has no basis to claim a new or different position.

Petitioner is now claiming entitlement to a retroactive appointment to the new position of Literacy Teacher Coach based on his allegation that this position is a successor position to the petitioner's former position and is the same or substantially similar to petitioner's former position of Teacher of Reading. However, respondent has submitted information, which petitioner has not disputed, that petitioner's former position of Teacher of Reading involved working with students, while the position of Literacy Teacher Coach is designed to be an aide for teachers. Thus, the position of Literacy Teacher Coach differs substantially from that of petitioner's abolished former position. "A mere overlap in duties.... does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position." *Skowronski v. Bd. of Ed. of Twp. of Jackson*, 95 N.J.A.R.2d (EDU) 451, 453 (1995), citing *Dennery v. Bd. of Educ.*, 131 N.J. 626, 640 (1993).

Since the position of Teacher of Reading and Literacy Teacher Coach differ substantially, I **FIND** that petitioner has no legal entitlement to the Literacy Teacher Coach position. In addition, there is no indication in the record of this matter that petitioner has ever applied for the new position of Literacy Teacher Coach.

Unfair practice charge

In the Joint Order on Consolidation and Predominant Interest entered by the

Commissioner of Education on March 5, 2003, and the Chair of the Public Employment Relations Commission on February 24, 2003, a procedure was established for hearing and deciding this matter. Under this procedure, the ALJ is to offer recommended findings of fact and conclusions of law to both the Commissioner of Education and the Public Employment Relations Commission disposing of all issues in controversy through a single initial decision and transmit the initial decision to both agencies. Upon such transmittal, the underlying record is to be forwarded to the Commissioner of Education to resolve the tenure and seniority issues within the Commissioner's jurisdiction. The Commissioner's decision and the complete record is then to be sent to the Public Employment Relations Commission which will then decide any remaining unfair practice issues within its jurisdiction.

In petitioner's unfair practice charge before PERC, petitioner alleges that he engaged in certain activities protected by the PERC Act of which respondent was aware. After respondent abolished petitioner's teaching staff position, it created new Educational Program Specialist positions for which petitioner contends he is uniquely qualified, and it placed less-qualified individuals in these positions. Petitioner contends that he was denied the opportunity to interview for and was denied placement in the new positions, and that those actions by respondent were retaliatory because of petitioner's engagement in the protected activity. Petitioner seeks a determination that the actions and conduct of respondent amounted to retaliatory action against petitioner for his engaging in protected activities and are unfair practices under the PERC Act, and he requests that PERC direct respondent to cease such conduct and retroactively appoint petitioner to one of the new positions.

N.J.S.A. 34:13A-5.4.a prohibits public employers from:

- (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.
- (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

Petitioner's own statement contained in his Certification at paragraph 22 is that,

It is not clear to me or, in any event, probably not legally provable, that the Superintendent desired to abolish middle and high school reading as a subject because of me and in retaliation against my determination to voice my opinion but what is clear is that the initiation of the new content area (First Reading Specialist and later Education Program Specialist) and the subsequent method by which administration filled those positions was engineered to eliminate me from consideration and to "box me out."

In this initial decision, I have concluded that the actions of the respondent were lawful exercises of its managerial prerogatives and did not violate petitioner's tenure and seniority rights. Since these actions were lawful, and based on petitioner's own statement, I see no reason for proceeding with a hearing regarding petitioner's unfair practice charge. Therefore, I **CONCLUDE** that I shall issue an initial decision in this matter recommending no further proceedings with respect to the unfair practice charge.

DECISION AND ORDER

Based on my finding that the actions of the respondent were lawful exercises of its managerial prerogatives and did not violate petitioner's tenure and seniority rights, it is hereby **ORDERED** that respondent's motion for summary decision on the education issues is hereby **GRANTED**. Since I have concluded that the actions of respondent were lawful, and based on petitioner's own statement, I see no reason for proceeding with a hearing regarding petitioner's unfair practice charge. Therefore, I **ORDER** that no further proceedings are necessary with respect to the unfair practice charge, and it is hereby recommended that it be **DISMISSED**.

I hereby **FILE** this Initial Decision with **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 **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 on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

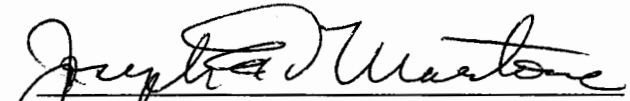
Pursuant to *N.J.A.C. 1:1-17.8*, upon rendering its final decision the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall forward the record, including this recommended decision and its final decision, to the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** which may subsequently render 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 **COMMISSIONER'S** 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**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 2005

DATE


JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

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

Aug. 1, 2005
DATE

AUG 2 2005
DATE

Mailed to Parties:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF EXHIBITS:

For petitioner:

- P-1 Certification of Thomas Derby
- P-2 Petitioner's Brief in Opposition to Motion for Summary Decision

For respondent:

- R-1 Notice of Motion for Summary Decision and/or Dismissal
 - 1. Letter dated August 26, 1988
 - 2. Board minutes of August 29, 1988
 - 3. Employment Agreement, August 30, 1988
 - 4. Teacher of English Certificate
 - 5. Reading Specialist Certificate
 - 6. Board Minutes of April 30, 2001
 - 7. Educational Program Specialist for Literacy Posting
 - 8. Teachers (Sylvan Reading Lab) Posting
 - 9. Educational Program Specialist for Literacy Job Description
 - 10. Teacher (Sylvan Reading Lab) Job Description
 - 11. Board Minutes of October 29, 2001
 - 12. Board Minutes of September 24, 2001
 - 13. Employment Histories
 - 14. Camden Education Association Teacher's Handbook 1999-2002
 - 15. County Superintendent letter of June 24, 2003
 - 16. May 13, 2004, List of Appointments
 - 17. Board Minutes of July 28, 2003
- R-3 Brief in Support of Motion for Summary Judgment and/or Motion to Dismiss
- R-4 Letter Reply Brief
- R-5 Supplemental Certification of Karen A. Murray, Esq., with the following exhibits:
 - 18. Board Minutes of May 24, 2004
 - 19. Literacy Teacher Coach Job Description

- 20. Fax of January 30, 2004
- 21. Board Minutes, January 29, 2004
- 22. Teacher (Literacy Coach) Posting

MICHAEL GUNTHER, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF HOWELL, MONMOUTH COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner, a former member of the Board of Education of Howell Township and a former officer with the municipality's police department, appealed the Board's refusal to pay attorney fees for defending a matter brought against him while a member of the Board. Respondent Board countered that the underlying conduct at issue did not arise out of the performance of Board member duties; underlying conduct relates to allegations that the petitioner obtained certain police reports and confidential information and disseminated same to members of the Board of Education without Board knowledge or authorization.

The ALJ denied a motion to bar testimony concerning, *inter alia*: petitioner's alleged violation of Howell Township Board of Education policy and the Board Member Code of Ethics; Monmouth County Prosecutor's Office return of indictment against the petitioner; and petitioner's entry into the Monmouth County Pretrial Intervention Program (PTI). The ALJ granted respondent Board's motion for summary judgment as there are no genuine issues of material fact in this case, and dismissed the petition. In doing so, the ALJ concludes that petitioner is not entitled to indemnification under *N.J.S.A.* 18A:12-20 because his entry into PTI was not a favorable disposition of criminal charges previously brought against him.

The Commissioner concurs with the ALJ's determination that petitioner has no right to indemnification pursuant to *N.J.S.A.* 18A:12-20, but finds that it is not necessary to reach to discussion of petitioner's participation in PTI. The Commissioner finds and concludes that petitioner's alleged conduct in the civil suit brought against him neither arose out of the performance of his board duties nor occurred in the course of performing those duties, but would have been undertaken on his own initiative and at his own peril, so that he is not entitled to be defended at public expense. Accordingly, the Initial Decision is adopted with this modification, and the petition is 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.

OAL DKT. NO. EDU 8380-02
AGENCY DKT. NO. 272-9/02

MICHAEL GUNTHER,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF HOWELL, MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

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

Petitioner's exceptions, *inter alia*, contend that the Administrative Law Judge's (ALJ) reliance on *Cressinger*,² *supra*, in support of her determination that he was not entitled to indemnification in this matter, was misplaced. That case, he asserts, dealt with a teaching staff member seeking reimbursement, pursuant to *N.J.S.A.* 18A:16-6.1, not *N.J.S.A.* 18A:12-20, for legal expenses in connection with the defense of a criminal matter. Here, he professes, *N.J.S.A.* 18A:12-20 is clear in mandating indemnification for a board member's counsel fees incurred in connection with the defense of a civil suit, notwithstanding the outcome of that action. Furthermore, the "favorable disposition" requirement of this statute is solely applicable

¹ It is noted that the Board did not file reply exceptions.

²The volume citation for this case is erroneously presented as 225 *N.J. Super.* on Page 12 of the Initial Decision. This should be 256 *N.J. Super.*

in instances where a board member is seeking reimbursement for defense of criminal charges. (Petitioner's Exceptions at 6) Petitioner further charges that "the ALJ's reference to Petitioner's criminal past manifests the prejudice suffered as a result of the improper introduction of this evidence which was entirely irrelevant on the issue of his reimbursement for counsel fees paid to his civil attorney," and urges that the Commissioner reject the Initial Decision and enter an Order directing petitioner's reimbursement of the costs of his defense of the Therien lawsuit. (*Id.* 6, 7)

Upon careful and independent review of the record, the Commissioner concurs with the ALJ's determination that petitioner has no right to indemnification pursuant to *N.J.S.A.* 18A:12-20 in this matter. However, contrary to the finding of the ALJ, the Commissioner concludes that such a determination is not a consequence of the ultimate result of the criminal charges previously brought against him. Consequently, the Initial Decision is adopted as modified below.

Initially, the Commissioner is compelled to clarify what appears to be confusion with respect to the applicability of the provisions of the governing statute vis-à-vis the situation existing herein. The statutory provision underlying petitioner's application for reimbursement is *N.J.S.A.* 18:12-20, which obligates a board of education to indemnify its members for the cost of defense of certain civil and criminal actions, and in its entirety specifies:

Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in

N.J.S. 59:10-4. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

By its very terms, central to qualifying for protection afforded under this statute -- which is intended to provide for the legal defense of a member of the board who is sued for official acts taken or omitted by him while actively engaged in carrying out his prescribed responsibilities as a board member -- is that *the conduct triggering the legal action against him must have: 1) arisen out of the performance of his duties, and 2) occurred in the course of performing those duties.* In the context of the defense of a civil action, the outcome of the litigation is irrelevant; the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied. However, in the context of a *criminal or quasi-criminal* charge made against a board member, the statute imposes a third criteria as a prerequisite to indemnification, *i.e., the legal action must result in a final disposition in favor of the board member.* Here, it is uncontroverted that petitioner is seeking reimbursement for defending a *civil* lawsuit brought against him by Robert Therien and his wife. As such, notwithstanding that the gravamen of this civil litigation is related to the underlying factual conduct contained in the prior indictment returned against petitioner, the focus here is upon the lawsuit for which petitioner is seeking to be indemnified. As such, the Commissioner finds it unnecessary to reach to the ALJ's Initial Decision discussion of petitioner's acceptance into and completion of a Pre-Trial Intervention program or the effect of the subsequent expungement of his criminal record with respect to these charges.

Turning next to the issue of whether petitioner has satisfied the two statutory requisites entitling him to the relief he seeks, guidance in this respect is gleaned from

consideration of the underlying scope of the statute. As found by the Court in *Errington v. Mansfield Tp. Bd. of Ed.*, 100 N.J. Super. 130 (App. Div. 1968):

The purpose of the ***statute is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his *prescribed duties*. *Those duties are prescribed by statute, by the rules and regulations of the board itself and of those who supervise its activities, and by resolutions of the board authorizing specific action to be taken.* (emphasis supplied)
(at 138)

A review of the statement of material facts prepared by counsel for Mr. Gunther in support of his motion to dismiss the Therien suit (See Initial Decision, pp. 8-10), indicates that he was accused of obtaining certain police reports and information with respect to Mr. Therien and disseminating these to board of education members. The Commissioner's review discloses, and nowhere does petitioner dispute, that he was not in any manner authorized or directed on behalf of the Board to acquire or disclose any such information in his capacity as a board member. (See Board's Answer to Petition of Appeal at 4-5). Furthermore, the record establishes that such conduct would be in direct violation of a specific board policy which states that board members "have no authority as individuals except when authorized by the Board." (*Ibid.* – Certification of Ronald Sanasac, Board President, at 2) The Commissioner, therefore, finds and concludes that it is clearly evident that petitioner's alleged conduct in the civil suit lodged against him -- no matter what the personal motivation for such conduct may have been -- neither *arose out of the performance of his board duties* nor *occurred in the course of performing those duties*, but rather would have been undertaken on his own initiative and at his own peril, so that he is not entitled to be defended against such allegations at public expense.

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

IT IS SO ORDERED.*

A handwritten signature in cursive script, reading "Lucille E. Dany".

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/16/05

Date of Mailing: 9/16/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8380-02

AGENCY REF. NO. 272-9/02

MICHAEL GUNTHER,

Petitioner,

v.

HOWELL TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Edward G. O'Byrne, Esq., for petitioner

Michael M. DiCicco, Esq. (Bathgate, Wegener and Wolf, P.C.) for respondent

Record Closed: May 10, 2004

Decided: August 10, 2005

BEFORE ANA C. VISCOMI, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a former member of the Howell Township Board of Education, appeals the respondent's refusal to pay attorneys' fees in the amount of \$5,000.00 for defending a civil matter brought against him while a member of the Board. Respondent asserted the underlying conduct did not arise out of and in the course of the performance of Board

Member duties and thus, petitioner is not entitled to indemnification pursuant to *N.J.S.A.* 18A:12-20. Petitioner Gunther filed an appeal *pro se* before the Commissioner of Education and the matter was transmitted to the Office of Administrative Law (OAL) on December 9, 2002, for a hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13 and *N.J.S.A.* 52:14B-1 to -15. Petitioner subsequently retained present counsel. The matter was scheduled for a hearing on January 8, 2004, before the Honorable Robert Miller, ALJ but was reassigned to this ALJ due to his retirement. On January 7, 2004, respondent filed a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5 and a motion to quash subpoenas on various board members.¹ The hearing date was adjourned in order to allow the parties to respond to the cross motions. It was then rescheduled for June 3, 2004.

FACTUAL DISCUSSION

Petitioner herein was an elected member of the Howell Township Board of Education. In addition, he was also an officer for the municipality's police department. Robert Therien was employed by the Howell Township Board of Education as a custodian. The following facts are derived from the Monmouth County Grand Jury indictment and attached to respondent's moving papers as Exhibit A.² On September 28, 1998, Gunther was indicted on four counts of official misconduct. The first count averred that on July 28, 1997 he acquired a 1994 MDT³ report on a closed incident contrary to the provisions of *N.J.S.A.* 2C: 30-2; the second count averred that in July 1997, he acquired a shoplifting incident report on a closed case, contrary to the provisions of *N.J.S.A.* 2C: 30-2; the third count averred that on July 18, 1997 and/or August 1, 1997, he acquired motor vehicle abstracts for two people, contrary to the provisions of *N.J.S.A.* 2C: 30-2; and the fourth count averred on or about the month of December 1996, Gunther acquired and disseminated incident reports on a closed police

¹ Petitioner had filed an *in limine* motion on December 29, 2003, seeking to "exclude the defense proffer" that a) a third party civil complaint alleged petitioner herein committed intentional torts; (b) petitioner violated various Board policies; c) petitioner was indicted by a Monmouth County Grand Jury; and d) petitioner entered the Monmouth County PTI program.

² As petitioner's *in limine* motion to bar evidence is denied for reasons set forth below in the Legal Analysis section of this opinion, these facts are included.

³ The parties have not indicated the exact nature of an "MDT" report.

investigation contrary to the provisions of *N.J.S.A. 2C:30-2*.⁴ On November 25, 1998, Monmouth County Assistant Prosecutor Richard Cremona forwarded correspondence to respondent Board's counsel indicating that "most of the counts of the indictment regard Mr. Robert Therien and his wife, Colleen Therien."⁵ On August 13, 1999, Cremona advised Board counsel that as of August 10, 1999, Gunther had been admitted into Pre-Trial Intervention (PTI) program.⁶ As part of the "several special conditions" that were set and "agreed to by all parties involved," Gunther executed an immediate resignation from all elective offices, included but not limited to the Board of Education of Howell Township. On April 6, 2000, Robert Therien and his wife Colleen filed a complaint with the Superior Court Law Division in Monmouth County against the Township of Howell, Howell Township Board of Education, Hopewell (improperly plead) Township Police Department, Michael Gunther, individually and in his capacity as an employee of the Howell Township Police Department and member of the Howell Board of Education and John Does one through ten. That complaint alleged, in part, that Gunther unlawfully obtained confidential information regarding Robert Therien from the Howell Township Board of Education files and forwarded the information to third party or parties at the Holland⁷ Township Board of Education meetings between June of 1997 and October of 1997.⁸ This civil action was dismissed on motion.⁹ The fact that Gunther was indicted and had applied to be admitted into PTI was the subject of at least one article in the regional daily newspaper.¹⁰ The indictment was later expunged by the February 23, 2001, Order for Expungement of Arrest Records.¹¹

The parties submitted a Joint Statement of Stipulated Facts. (J-1) They have stipulated to the following:

⁴ State of New Jersey v. Michael Gunther, Indictment No. 98-09-1781.

⁵ See Exhibit A to respondent's cross motion for summary decision.

⁶ See, Exhibit B to respondent's cross motion for summary decision.

⁷ Error in Complaint

⁸ *Robert S. Therien, Jr. et al v. Township of Howell, et al*, Docket No. L-1847-00 (Law Div.)

⁹ The dismissal was based on plaintiff's failure to comply with the notice provisions of the New Jersey Tort Claims Act, *N.J.S.A. 59:8-1 et seq.* and on statute of limitations grounds. See page 2 of respondent's reply dated January 29, 2004.

¹⁰ Howell cop applies for pretrial program, by Harriet Ryan, *Asbury Park Press*, July 3, 1999, p. B3 attached as Exhibit D to Respondent's Answer to Petition.

¹¹ See Exhibit D to petitioner's certification in support of *in limine* motion.

1. The Petitioner was elected as a member of the Respondent Board of Education in 1997.
2. Robert S. Therien, Jr. was employed by the Respondent Board of Education and served in its Transportation Department.
3. On April 6, 2000, Robert S. Therien, Jr. and Colleen Bay Therien, h/w filed a complaint in the Superior Court of New Jersey, Monmouth County, against the Township of Howell, the Township Board of Education, the Howell Township Police Department and Michael Gunther, individually and in the alternative. This matter was docketed as L-1847-00.
4. In defense of the Therien lawsuit, petitioner was represented by Daniel S. Waldman, Esq. (Waldman & Morierity), 212 Maple Ave., P.O. Box 578, Red Bank, New Jersey 07701.
5. On January 23, 2001, the Honorable Robert J. O'Hagen, J.S.C. granted petitioner's motion for summary judgment dismissing all claims set forth in the Therien lawsuit.
6. Petitioner requested that the Board of Education to (sic) reimburse him for the attorney's fees he incurred in the defense of the Therien lawsuit, as he was a member of the Board at the time the suit was filed. Respondent Board refused to indemnify Gunther maintaining that Gunther was not acting within the course of his duties by obtaining and disseminating information about Therien.
7. On September 6, 2002, Petitioner filed a "Petition of Appeal" from the Respondent Board's refusal to pay his legal fees in defense of the Therien lawsuit. (J-1)

LEGAL ANALYSIS

The following pleadings were considered in rendering this Initial Decision granting respondent's motion for summary decision:

*petitioner's *in limine* motion and certification in support of same received on December 29, 2003;

*respondent's opposition to petitioner's *in limine* motion to bar evidence and cross motions for summary decision and to quash subpoenas received on January 7, 2004;

*petitioner's opposition to respondent's cross motions received on January 20, 2004;

*respondent's reply to opposition to motion for summary decision received on January 30, 2004;

*petitioner's sur-reply received on February 9, 2004; and

*further legal argument submitted by respondent by date of May 5, 2004.

PETITIONER'S MOTION TO BAR EVIDENCE

Petitioner asserts that pursuant to *N.J.S.A.* 18A:12-20, the Board must, as a matter of law, indemnify a member of a Board of Education when he or she is sued by reason of such membership.¹² In addition, he asserts that evidence of the petitioner's later indictment violates the Superior Court Order expunging the indictment, is irrelevant to the reimbursement issue and violates *N.J.R.E.* 403(a)(b). Petitioner cites *N.J.S.A.* 2C:52-15 for the premise that after expungement, criminal records may no longer be disclosed and in response to an inquiry, the custodian must state there is "no record information." He further contends that disclosure of the existence of an arrest, conviction or legal proceeding with knowledge that the Expungement Order has been granted is a disorderly persons offense pursuant to *N.J.S.A.* 2C:52-30. In addition, petitioner asserts that disclosure of his entry into PTI violates confidentiality provisions set forth at *R.* 3:28(c)(5). Finally he asserts that the prejudice to petitioner in disclosing the indictment, expungement and entry into PTI far outweighs the probative value of such information.

¹² This issue will be further addressed below as part of the cross motion for summary decision.

Respondent asserts the Order of Expungement is inapplicable in this proceeding as an Order of Expungement only affects the ability of law enforcement personnel and criminal justice agencies to release expunged materials. Respondent relies on EA v New Jersey Real Estate Comm'n wherein the Appellate Division agreed with the lower court ruling that because the *N.J.R.E.C.* was not a law enforcement agency, it was beyond the reach of and not subject to the Expungement Order. 208 *NJ Super.* 65 (App Dive.) *certif. denied* 104 NJ 415(1986). The Court further found that plaintiff's claims of a violation of the Expungement Order had no merit and affirmed the dismissal of the plaintiff's complaint. Respondent asserts that in this matter, there are no issues whether law enforcement agencies or criminal justice agencies are releasing information. The dispute involves the Howell Township Board of Education, which is not subject to any of the confidentiality provisions of the expungement statute and order, and therefore the evidence is not barred. In addition, any bar that may have existed regarding the admissibility of the evidence related to the indictment and petitioner's entry into PTI has been waived by him by the filing of this petition of appeal.¹³ Respondent asserts that petitioner cannot be permitted to place conduct at issue by raising the issue of entitlement to indemnification from the Board and then attempt to prevent the Board from addressing that issue. Petitioner has waived any bar that may have existed with respect to evidence of his alleged criminal conduct and entry into PTI. Respondent analogizes the factual scenario herein to an attorney malpractice lawsuit where confidential communications would have to be revealed to the Court in order to be able to adequately defend the malpractice allegation.

The language from United Jersey Bank v Wolosoff, 196 *N.J. Super* 553, 567 (App Div 1984) referenced by respondent merits recitation.

. . . We note the inherent inequity in permitting plaintiff to use the privilege as a sword rather than a shield. If permitted to do so, plaintiff could

¹³ Respondent stresses that it does not seek to admit into evidence the particulars regarding petitioner's entry into and completion of PTI. Rather, the only evidence it seeks to admit regarding petitioner's admission into PTI is the fact that he was admitted and the conditions of admission, both of which are matters of public record.

divulge whatever information is favorable to its position and assert the privilege to preclude disclosure of the detrimental facts. The resulting half-truth that would be revealed might well be more disabling than a total distortion. We are persuaded that when confidential communications are made a material issue in a judicial proceeding, fairness demands waiver of the privilege.

Based on the foregoing, I **FIND** and **CONCLUDE** that petitioner has waived any bar that may have existed by placing his conduct at issue in this matter seeking reimbursement of attorneys' fees, that the respondent is beyond the reach of the Expungement Order and the fact that petitioner was admitted into PTI and the reasons thereof, are a matter of public record. Thus, the motion to bar testimony concerning: petitioner's alleged violation of Board policy #20¹⁴ and the Board Member Code of Ethics;¹⁵ the Monmouth County Prosecutor's Office return of an indictment against the petitioner; the petitioner having entered the Monmouth County Pretrial Intervention Program; and proof concerning allegations of defamation, tortious interference, etc. as set forth in the Complaint filed in the Monmouth County Superior Court by Robert S. Therien and Colleen Therien (Dkt. No. L-1847-00) is hereby **DENIED**.

RESPONDENT'S CROSS MOTION FOR SUMMARY DECISION

Respondent seeks summary decision pursuant to *N.J.A.C.* 1:1-12.5. In support thereof, the Board asserts petitioner is attempting to obfuscate the basis for the underlying Therien complaint in order to obtain indemnification for attorneys' fees. Respondent refers to the pleading filed by Gunther in connection with the underlying Therien matter. Specifically, in the statement of material facts pursuant to R. 4:46-2 in support of Gunther's procedural motions to dismiss the Therien civil suit, the following is indicated:

¹⁴ Board policy #20 provides that Board members "have no authority as individuals except when authorized by the Board." See Answer to Petition.

¹⁵ Section 10 of By-Law No. 31 of the Board Member Code of Ethics, provides as to each member, "I recognize that Authority rests with the whole Board assembled in [a] public meeting and will make no personal promises nor take any private action which may compromise the Board." Section 12 provides, "The Board will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools." See Answer to the Petition.

4. Plaintiffs alleged that defendant, Mr. Gunther, was a patrolman of the defendant, Howell Township Police Department, and also a member of the defendant, Howell Township, Board of Education. (Certification of Mr. Waldman, Exhibit B, Paras. 10 & 11)¹⁶

5. Plaintiffs alleged that defendant, Mr. Gunther, unlawfully forwarded the information to third parties at meetings of the defendant, Howell Township Board of Education. (Certification of Mr. Waldman, Exhibit B, para. 12)¹⁷

6. Plaintiffs admit they knew the above information was forwarded to defendant Howell Township Board of Education, between June 1997 and October 1997. (Certification of Mr. Waldman, Exhibit B, Para 13)¹⁸

7. Plaintiffs allege that, as a result of the disseminated information, plaintiff, Mr. Therien, was forced to resign his position with defendant, Howell Township Board Education, in December 1997. (Certification of Mr. Waldman, Exhibit B, para. 14)¹⁹

¹⁶ Exhibit B of Mr. Waldman's certification attaches the Therien amended civil complaint. Paragraphs 10 and 11 provide,

10. At times unknown to Plaintiffs, Defendant Gunther and/or John Does 1-10 unlawfully obtained confidential information regarding Plaintiff Robert S. Therien, Jr. from the Howell Township Board of Education's files.

11. At times unknown to Plaintiffs, Defendant Gunther and/or John Does 1-10 unlawfully obtained information regarding Plaintiff Colleen A. Therien from unknown sources.

¹⁷ Exhibit B of Mr. Waldman's certification attaches the Therien amended civil complaint. Paragraph 12 provides

Thereafter, Defendants Gunther and/or John Does One through Ten unlawfully forwarded the information to a third party and/or third parties at Holland Township Board of Education meetings held between June of 1997 and October 1997.

¹⁸ Paragraph 13 of the Therien amended civil complaint provides

13. Although Plaintiffs knew that said confidential information was forwarded to the Howell Township Board of Education between June of 1997 and October of 1997, plaintiffs did not know that Defendants Gunther and/or John Does 1-10 were responsible for unlawfully obtaining the information and for unlawfully forwarding the information until on or about April 7, 1999.

¹⁹ Exhibit B of Mr. Waldman's certification is paragraph 14 of the Therien amended civil complaint. It provides,

Due to the unlawful actions of Defendants Michael Gunther and John Does One through Ten, Plaintiff Robert S. Therien, Jr. was forced to resign from his position with the Howell Township Board of Education in December of 1997.

8. Stephen Pepe, Esquire, former attorney of plaintiffs, by letters advised the defendant, Howell Township Police Department, of the unlawful dissemination of the police department records and reports in September 1997. (Certification of Mr. Waldman, Exhibit C, attaching three September 1997 letters of Mr. Pepe)²⁰ ...

²⁰ By letter of September 18, 1997, Mr. Pepe advised Chief of Police Ronald Carter, in pertinent part,

My client is a custodian employed by the Board. Recently, members of the Board of Education of Howell Township were handed a copy of a Howell Township Police Department Investigative Report, dated November 18, 1987, concerning a very foolish act by my client, approximately ten years ago. We are very concerned as to how this material was removed from the Howell Township Board of Education. I enclose for you a front page copy of the report indicating in fact this is a report that was given to the members of the Board of Education. I would appreciate it if you would advise me as to the status of your investigation with regards to this matter and what action, if any, has been taken.

Additionally, it has also come to our attention that a copy of my client's driver's abstract has been turned over to members of the Board of Education. Again, it is our understanding that this came from the Howell Township Police Department. Please advise me as to the authority upon which an abstract of my client's driving record was obtained and under whose authority was it turned over to the members of the Howell Township Board of Education.

By letter of September 19, 1997 to Chief Carter, Mr. Pepe wrote,

Please be advised that I represent Alphonse Trocchia, Jr., on certain matters involving his position in the Howell Township Board of Education. My client is an employee of the Howell Township Board of Education and was recently asked to provide certain information to the Superintendent of Schools. I enclose for you a list of the materials that was requested from my client. While my client takes no issue in providing most of the information to the Board of Education, we are somewhat concerned about the attempt to influence him in some fashion by placing it on Police Department Momouth County Uniform Crime Report, stationery. It is our understanding that this material came from the Howell Township Police Department. We are concerned about the fact that someone within the police department would be utilizing their stationery in an attempt influence my particular client. ...

Finally, by letter of September 24, 1997, Mr. Pepe advised Chief Carter,

I had just written to you with regards to Mr. Therien, in a matter going back to 1987. Additionally, turned over to the Board of Education was a motor vehicle incident report concerning Mr. Therien, of a minor motor vehicle accident which occurred on February 8, 1994. If you will note on the copy, I have attached hereto and made a part hereof, this matter was obviously called up on July 28, 1997, somewhere in the Howell Township Police Department. We are at a loss to understand how this material is being turned over to members of the Howell Township Board of Education. ...

13. Defendant, Michael Gunther, was an employee of the defendant, Howell Township Police Department as a patrolman, and an agent of the defendant, Howell Township Board of Education, as a board member.

14. Defendant, Howell Township Police Department, began an internal investigation within its department in late September 1997 as a result of the letters from Stephen Pepe, Esquire, on behalf of the plaintiffs. The internal investigation was directed to Mr. Pepe's allegations that police information and reports were leaving the defendant, Howell Township Police Department and being turned over to defendant Howell Township BOE. The internal investigation resulted in defendant, Mr. Gunther being responsible. (Certification of Mr. Waldman, Exhibit E, Cert. of Captain Bryan Ehret.)²¹

²¹ Exhibit E, which was filed in support of the Township of Howell and the Howell Police Department's motion for summary judgment provides in its entirety,

Bryan Ehret, of full age, hereby certifies:

1. I am a Captain of the Howell Township Police Department and as such am fully familiar with the facts herein.
2. On or about September 29, 1997, I began an internal affairs investigation at the direction of Chief Ronald Carter as a result of receiving three (3) letters of complaint from a Mr. Stephen Pepe, Esq., an attorney representing Board of Education employees, one of whom was Plaintiff, Robert Therien, Jr.
3. The allegations brought forth by Mr. Pepe were that police information and reports were leaving the Howell Township Police Department and being turned over to the Howell Township Board of Education.
4. My investigation revealed that Defendant Gunther, a Howell Township Patrolman, was responsible for the release of police information and reports from the Howell Township Police Department to the Howell Township Board of Education.
5. Howell Township Police Department Rules and Regulations 4.1.3 entitled "Obedience to Laws and Rules" states that members and employees shall obey all laws, ordinances, rules, policies and procedures and directives of the Department.
6. Howell Township Police Department Rules and Regulations 4.3.1 entitled "Release of Information" states that members shall not release any information nor reveal any confidential business of the Department to the public or the press except as provided in Department policy or procedure.
7. Howell Township Police Department Rules and Regulations 4.3.2 entitled "Department Records" states that contents of any record or report filed within the Department shall not be exhibited or divulged to any person other than a duly authorized police officer, except with the approval of the appropriate superior officer or under due process of law, or as permitted, under Departmental policy or procedures.
8. Howell Township Police Department Rules and Regulations 4.8.5 entitled "Use of Department Property and Equipment" states that members shall not use any Department property or equipment for personal business or pleasure.
9. Howell Township Police Department Rules and Regulations 4.12.6 entitled "Truthfulness" states that members are required to be truthful at all times whether under oath or not.
10. As a result of my investigation, it was determined that Defendant Gunther violated the above-referenced Department Rules and Regulations by his actions.
11. Additionally, as a result of his actions, Defendant Gunther was indicted by a grand jury.

Further, respondent asserts that the underlying factual conduct in the indictment deals with Gunther's procurement of documents relating to Therien. Respondent contends that petitioner's assertion that Assistant Superintendent/Board Secretary Herbert Massa disseminated the information ignores the fact that Gunther illegally obtained the documents and disseminated them to Board members. He also improperly obtained the results of a drug test administered to Mr. Therien.

Petitioner asserts that the mere fact he was a Board member entitles him to indemnification pursuant to *N.J.S.A. 18A:12-20*, which provides,

Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting there from. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in *N.J.S.A. 59:10-4*. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

He further asserts that neither the allegations of the underlying complaint filed by the Theriens nor the Board policies are pertinent to his right to reimbursement as, he contends, the filing of the complaint obligates the Board to indemnify him. He also cites his previous argument in support of his *in limine* motion to bar evidence.

Respondent asserts that as a matter of law, unlawfully obtaining and disseminating records cannot be construed as “arising out of and in the course of the performance of his duties as a member of a board of education.” Additionally, respondent asserts that the unfavorable disposition of the indictment, *vis`a vis`*, entry into PTI, is dispositive on the issue against indemnification. Respondent cites Cressinger v Bd of Educ. of City of Newark, 225 N.J. Super 155, 157 (App. Div. 1992) and Grant v Board of Education of the Township of Green Brook, Docket No. A-2109-01T2 (App. Div., March 11, 2003.)

N.J.A.C. 1:1-12.5 sets forth the standard for consideration of a summary decision motion. The standard in this administrative setting is the same standard as set forth in the New Jersey Court Rules, R. 4:46-2 for summary judgment motions. Paragraph b of that rule sets forth the requirements in opposing a summary judgment motion.

A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant’s statement. Subject to R. 4:46-5(a),²² all material facts in the movant’s statement which are sufficiently supported will be deemed admitted for purpose of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record.

²² R. 4:46-5(a) provides,

Specific Facts Required of Adverse Party unless Affidavits are Unavailable.
When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted for reasons therein stated, that the party was unable to present by affidavits facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such other order as may be appropriate.

Similarly, *N.J.A.C.* 1:1-12.5 (b) provides, in pertinent part,

.... When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The petitioner herein, who bears the burden of proof in this administrative proceeding seeking indemnification of counsel fees, never submits an affidavit setting forth the existence of a genuine issue of fact.

Ultimately, respondent's motion must be granted as there can be no indemnification pursuant to *N.J.S.A.* 18A:12-20 because petitioner's entry into PTI is not, as a matter of law, a favorable disposition. In *Cressinger, supra*, the Appellate Division upheld the lower court ruling interpreting a similar statute²³ whereby the court found that successful completion of PTI by an employee of a school board was not a favorable termination of the criminal proceeding and he was not entitled to reimbursement of counsel fees pursuant to that statute. Similarly, the Appellate Division favorably quoted from a lower court ruling²⁴ interpreting a statute²⁵ which provided for indemnification to police officers when criminal charges were dismissed or determined in the officer's favor.

²³ *N.J.S.A.* 18A:16-6.1. This statute provided,

Should any criminal action be instituted against any ... person [holding any office, position, or employment under the jurisdiction of any board of education] for any ... act or omission [arising out of and in the performance of his duties; and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

²⁴ *Kerwick v Trenton*, 184 NJ Super 235 (Law Div. 1982)

²⁵ *N.J.S.A.* 40A:14-155

Clearly the statute intends that only an exoneration of the officer will entitle him to reimbursement of legal expenses. By taking advantage of ... diversionary treatment plaintiff cannot use a legal fiction to support a conclusion that there was a final determination in his favor. Disposition in his favor means exculpation and not some lesser degree of success.²⁶

DECISION AND ORDER

Respondent's motion for summary decision dismissing the within matter as petitioner is not entitled to indemnification pursuant to *N.J.S.A. 18A:12-20* 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*.

²⁶ Kerwick, *supra*, at 240.

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 10, 2005

DATE



ANA C. VISCOMI, ALJ

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

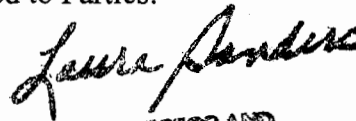
August 10, 2005

DATE

AUG 12 2005

DATE

Mailed to Parties:



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

/tmp

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

OAL DKT. NO. EDU 7931-05
(EDU 7964-04 ON REMAND)
AGENCY NO. 231-7/04

O.F., on behalf of minor children
C.F., S.F. and K.F.,

PETITIONERS,

V.

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

RESPONDENT.

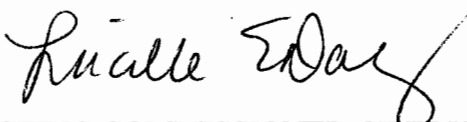
COMMISSIONER OF EDUCATION

DECISION ON REMAND

The record of this matter, the proposed settlement agreement, as revised on remand, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed.

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/19/05

Date of Mailing: 9/19/05



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07931-05

EDU 07964-04 (**REMAND**)

AGENCY REF.NO.231-7/04

**O.F., ON BEHALF OF MINOR
CHILDREN, C.F., S.F. AND K.F.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF BELLVILLE,
ESSEX COUNTY,**

Respondent.

Felix Lopez Montalvo, Esq., for petitioner

Mark A. Wenczel, Esq., (Gaccione, Pomaco & Malanga, attorneys) for respondent

Record Closed: July 28, 2005

Decided: August 4, 2005

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

The matter was transmitted to the Office of Administrative Law (OAL) on August 17, 2004 for determination as a contested case. A hearing scheduled for December 23, 2004 was adjourned by the respondent due to the unavailability of essential witnesses. The record opened on February 9, 2005 and the matter was continued to March 3, 2005.

However, on March 2, 2005 the parties were able to resolve the matter. The parties submitted a signed Settlement Agreement on April 21, 2005 whereafter the

undersigned issued an Initial Decision- Settlement on April 25, 2005. The Commissioner remanded the matter for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating Dr. Kliszus to sign on behalf of the Board. The Board has submitted a modified Settlement Agreement bearing the signature of Mark A. Wenczel, Esq., Attorney for the Belleville Board of Education, attached hereto. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 9, 2005
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

8-10-05
DATE

M. Kathleen Sullivan /CR
DEPARTMENT OF EDUCATION
John P. Andino
Mailed to Parties **DEPUTY AND**
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 11 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

1. O.F. shall deliver the sum of \$7,500.00 as full and final payment of tuition to the Belleville Board of Education for the education of his children, C.F., S.F. and K.F., by the Belleville Public Schools during the 2003-2004 school year.

2. The settlement sum referenced in paragraph 1 shall be paid in twelve (12) equal payments of \$625.00 by check made payable to the Belleville Board of Education, delivered to Mark A. Wenczel, Esq., Gaccione, Pomaco & Malanga, 524 Union Avenue, Belleville, New Jersey 07109 as follows:

A. \$625.00 on or before March 11, 2005 followed by monthly payments on or before the first of each month thereafter through and including February 1, 2006, or until the settlement sum is paid in full.

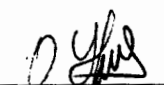
3. If O.F. should fail to make any required payment as specified in this agreement, the Respondent may obtain a judgment for the entire amount of tuition claimed due in the Respondent's Answer and Counterclaim (i.e. \$21,778.00, less credit for any payments made) by submitting a certification to the Court, certifying to the Petitioner's default.

4. Both parties acknowledge to having been represented by counsel of their choice in this matter and to having had the terms and significance of this Settlement Agreement explained to them prior to signing it.

BELLEVILLE BOARD OF EDUCATION

BY: 
DR. EDWARD KLISZUS
Superintendent

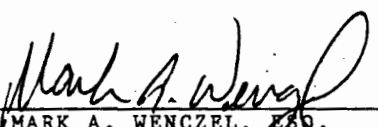
Dated: 4/13/05


OSWALDO FLORES

Dated: 4/4/05

(00198255)

2

BY: 
MARK A. WENCZEL, ESQ.
Attorney, Belleville Board of Education

AGENCY DKT. NO. 196-8/05

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

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

KATHLEEN CONNNORS RYAN, : DECISION

RESPONDENT. :

For Petitioner, Stephen J. Edelstein, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)
For Respondent, Joyce Wan, DAG (Peter C. Harvey, Attorney General)

This matter was initiated by way of the filing of a Petition of Appeal with Application for Emergent Relief on August 5, 2005 by the Board of Education of the Freehold Regional High School District (Board). As set forth by the Board in its petition, respondent was employed as a teacher by the Board from September 12, 1977 through September 2, 1991. (Petition at 2) In or about February 1990, the Board granted respondent a leave of absence for maternity and child care purposes through September 1, 1990. (*Ibid.*) Respondent's leave of absence was subsequently extended through June 30, 1991. (*Ibid.*) When respondent requested an additional extension of her leave of absence through September 1, 1992, the Board denied her request. (*Ibid.*) On September 3, 1991, respondent notified the Board that she would not report for duty pursuant to her rights under the New Jersey Family Leave Act (FLA). (*Ibid.*) In January 1992, respondent petitioned the Commissioner for an order compelling the Board to grant her request for an extension of her leave of absence. (*Id.* at 3) About the same time, the Board filed tenure charges against respondent for abandoning her teaching position and for

insubordination. (*Ibid.*) These two petitions were transmitted to the Office of Administrative Law (OAL) for hearing, and were then consolidated. (*Ibid.*) The parties subsequently reached a settlement agreement wherein respondent agreed to submit an irrevocable letter of resignation from the District with an effective date of June 30, 1991 (the effective date was later modified by mutual agreement) and withdraw her FLA claims. (*Ibid.* and Exhibit C) The Board agreed to withdraw its tenure charges and to provide respondent a letter of recommendation with agreed-upon language. (*Ibid.*)

Six years later, in July 1999, respondent applied for a psychology teaching job in the District. (*Id.* at 4) The Board avers that respondent did not mention in her application letter, resume or interview that she had previously tendered an irrevocable letter of resignation, and that the individuals who were responsible for recruiting in 1999 were thus unaware that respondent had previously tendered an irrevocable letter of resignation. (*Id.* at 4-5) The Board further asserts that respondent did not interview well and that she was, therefore, not hired for the position. (*Id.* at 5-6) Instead, a teacher was transferred from the Marlboro High School to fill the position and the Board hired two individuals to fill the vacancy created by the transfer. (*Id.* at 6)

In or about July 2000, respondent filed a Verified Complaint with the Division on Civil Rights (DCR) alleging that: 1) the Board discriminated against her on the basis of her sex by denying her employment application and hiring two less qualified males to fill the positions in violation of the Law Against Discrimination (LAD); and 2) she was denied employment in reprisal for previously filing a discrimination complaint against the Board. (*Id.* at 6-7) In February 2001, respondent amended her complaint, changing her reprisal allegations to read that the Board had retaliated against her for previously filing an action based on the denial of leave under the FLA. (*Id.* at 7) On May 12, 2005, the Administrative Law Judge (ALJ) hearing the matter issued an Initial Decision wherein he concluded that respondent had established a prima

facie case of sexual discrimination and found that the legitimate, articulated reason provided by the Board for not hiring respondent “was merely a pretext for improper retaliatory intent.” (Exhibit M, Initial Decision at 13-16) As a result, the ALJ recommended to the Director of the DCR that the Board be ordered to pay respondent \$50,000 in compensatory damages; back pay, with interest, in the amount of \$102,763.95; penalties of \$12,000; and reasonable attorney fees and costs. (*Id.* at 17-19) Moreover, the ALJ found that respondent should be hired by the Board for a position sufficiently similar to the one she was wrongfully denied when such position becomes available and that back pay should continue until such time as respondent is so hired. (*Id.* at 18)

In the instant matter, the Board claims that respondent’s failure to disclose the parties’ 1993 settlement agreement and the Commissioner’s decision approving the settlement when she applied for the vacant teaching position in 1999 constitutes conduct unbecoming a teacher and it seeks an order from the Commissioner that:

- 1) declares respondent unfit and/or unqualified to teach in the district;
- 2) enforces the parties’ 1993 settlement agreement, including respondent’s irrevocable resignation;
- 3) rejects “Judge Fidler’s Initial Decision in its entirety and dismiss[es] Ryan’s LAD and FLA claims with prejudice” and
- 4) grants other relief as the Commissioner deems just and equitable, including an award of fees and costs to the Board.”

(Verified Petition and Application for Emergent Relief at 10-15)

In reviewing the petition, there was a question as to whether the Commissioner has jurisdiction to consider this matter, particularly with respect to the rejection of an Initial Decision issued in respondent’s LAD and FLA claim filed with DCR. Accordingly, by letter of August 9, 2005, the Acting Director of the Bureau of Controversies and Disputes established a briefing schedule whereby the parties could brief the issue of the Commissioner’s jurisdiction to

consider this matter. The Board, therefore, was requested to submit a memorandum of law or letter brief addressing why the Commissioner should not dismiss the within petition and emergent relief application for lack of jurisdiction in that the relief sought is: 1) an enforcement of a 1993 settlement agreement, which, under *N.J. Court Rule 4:67-6*, is a matter for New Jersey Superior Court; and 2) the rejection of an Initial Decision in a matter transmitted to the OAL by a different agency. Respondent was provided an opportunity to respond to the Board's arguments.¹

In its submission, filed August 22, 2005, the Board contends that the principal relief it is seeking is a determination that respondent's dishonesty in not disclosing her previous settlement agreement with the Board and irrevocable resignation from the District when she applied for a teaching position in 1999 made her unqualified and unfit to teach in the Freehold Regional High School District. (Board's Brief at 2) The Board states that enforcement of the 1993 settlement is a secondary issue. (*Ibid.*) In support of its primary issue, the Board argues that respondent's fitness to teach clearly falls within the Commissioner's jurisdiction and is the gateway through which respondent must pass to reach the civil rights issues. (*Ibid.*) The Board points out that *N.J.S.A. 18A:6-9* gives the Commissioner jurisdiction to hear and determine all controversies and disputes arising under the school laws. (*Id.* at 4) Moreover, pointing to *N.J.S.A. 18:6-16*, governing tenure charges, and *N.J.A.C. 6A:9-17.23*, governing appeals of Board of Examiners' decisions regarding certifications, the Board asserts that it is well-established that the school laws impart upon the Commissioner the duty to determine whether an individual is qualified for employment in the public schools and that the Commissioner has exclusive jurisdiction to determine fitness for teaching. (*Id.* at 4-5) Finally, citing two tenure cases and a case involving a claim of violation of tenure rights, the Board claims that submitting

¹ It is noted that both parties requested and received approvals for extensions of time in which to file the requested briefs. Additionally, the Board requested and received approval to file an additional brief in reply to respondent's brief.

false information or omitting pertinent facts on an application for employment may constitute conduct unbecoming a teaching staff member. (*Id.* at 5)

In reply, respondent² states that she filed a complaint with the DCR on July 29, 2000 alleging that the Board discriminated against her in employment on account of her sex and in reprisal for filing a previous action under the New Jersey FLA in violation of the LAD. (Respondent's Brief at 2-3) After investigation, the Director of the DCR issued a finding of probable cause on July 10, 2001, crediting respondent's allegations. (*Id.* at 3) The matter was then transmitted to the Office of Administrative Law (OAL) on August 12, 2003, and was heard as a contested case on March 31 and April 1, 2004. (*Ibid.*) Respondent avers that at no time during the pendency of this action did the Board raise any issue about, or in any way question, her fitness to teach. (*Ibid.*) Respondent reiterates that the ALJ's Initial Decision found that the Board had failed to hire respondent in 1999 on the basis of her sex and in reprisal for attempting to invoke her perceived rights under the FLA in 1991, and determined that she was entitled to, *inter alia*, back pay, damages and reinstatement to a position similar to the one she was denied at such time as a comparable position becomes available. (*Ibid.*) The final decision of the Director of the DCR is expected on September 26, 2005. (*Id.* at 4)

With respect to the Commissioner's jurisdiction to consider this matter, respondent asserts that there is absolutely no legal basis for the Commissioner to disturb the process for litigating civil rights cases and points out that the Board cites no authority for such intervention. (*Ibid.*) Respondent also points out that the rule for emergent relief specifically states that emergent relief may be granted where authorized by law, yet there is no law that authorizes the Commissioner to grant emergent relief in a matter under the jurisdiction of a

² It is noted that a Deputy Attorney General representing the Division on Civil Rights filed the brief on respondent's behalf.

completely different state agency. (*Ibid.*) Moreover, citing *N.J.A.C. 6A:3-1.6(a)*, respondent contends that the Commissioner may only consider emergent relief if (s)he is already involved in the contested case. (*Id.* at 5) Since the contested case in this matter is before DCR, respondent avers that the Commissioner has no authority to grant the emergent relief sought.

Finally, respondent contends that the motivation behind the Board's request before the Commissioner is the desire to circumvent the DCR litigation, which is based upon rights to which she is entitled pursuant to the LAD and FLA. (*Id.* at 5-6) Having failed to challenge her fitness to teach during the DCR litigation at the OAL, respondent claims, the Board is now seeking to "get a second bite at the apple." (*Ibid.*) According to respondent, the Board asks the Commissioner to take *ultra vires* action in a vain attempt to undermine the statutory authority of DCR to enforce the LAD and the FLA. (*Ibid.*)

In a response submitted on September 16, 2005, the Board claims that respondent's opposition papers are deficient in that respondent makes no attempt to oppose the Board's contention that she is unfit to teach within the District, nor does she dispute that she failed to disclose pertinent information about her background or that she exhibited conduct unbecoming of a teacher as a result of such omissions. (Board's Reply Brief at 2) In this regard, the Board asserts that, because respondent misrepresented her background by omitting the information that tenure charges had previously been filed against her by the District and omitting the information that she had entered into a settlement agreement which resulted in her irrevocable resignation, the Board was released of any obligation to hire her for a teaching job in 1999. (*Ibid.*) Accordingly, the Board argues, respondent's discrimination claims against the Board should have never reached the DCR. (*Ibid.*)

Moreover, the Board points out that respondent failed to dispute the irreparable injury the Board will suffer as a result of continuation of respondent's claims with the DCR if the

Board is forced to place an unfit and unqualified teacher in a classroom, which would be detrimental to the students and the community. (*Id.* at 2-3) The Board further argues that respondent's allegations that it is trying to circumvent its obligations and undermine the authority of the DCR to enforce the LAD and FLA is nothing more than an attempt to portray the Board in a bad light and confuse the true issues presented in its petition, *i.e.*, the Commissioner is responsible for determining an individual's fitness to teach in a public school. (*Id.* at 3) Thus, the Board avers that it was not required to raise the question of respondent's fitness to teach in the DCR proceedings, asserting that, instead, it is an issue that should be decided through the Board's application for emergent relief. (*Ibid.*) "The importance of protecting school districts from unfit and unqualified teachers," the Board argues, "takes precedence over the non-existent rights of Ryan [respondent]." (*Ibid.*)

Upon a thorough review of the parties' submissions, the Commissioner finds no basis upon which she may consider the issues raised or grant the relief sought by the Board in this matter. Initially, with respect to whether the Commissioner may declare an individual unfit to teach, the circumstances under which the Commissioner may render such a determination are specifically set forth in statute; for example: as the result of tenure charges against a teaching staff member that have been certified to and sustained by the Commissioner; as the result of a criminal history background check; as the result of a psychiatric exam; or in the course of a review of an appeal of a denial of issuance of certification by the State Board of Examiners (SBE),³ *etc.* The Board has not provided any statutory authority, nor is the Commissioner aware of any, which would authorize the Commissioner to make such a determination under the circumstances presented herein. Moreover, as stated above, under *N.J. Court Rule* 4:67-6,

³ The Commissioner notes that, in contrast to SBE denial of issuance of certification determinations, suspension or revocation determinations of the SBE are appealable to the State Board of Education.

enforcement of a settlement agreement is a matter for the New Jersey Superior Court. Thus, the Commissioner is not authorized to enforce the 1993 settlement agreement. Certainly, there is no legal basis or statutory authority that would permit the Commissioner to effectively usurp the jurisdiction of a completely different State agency by "rejecting" the Initial Decision rendered in a contested case over which that agency has taken jurisdiction. Accordingly, as the Board has failed to state a claim which the Commissioner may grant, the petition must be dismissed.

Finally, an application for emergent for relief may be considered pending the Commissioner's final decision in a contested case. See *N.J.A.C. 6A:3-1.6(a)*. In that the Commissioner has determined to dismiss the petition in this matter, and in that there is no authority for the Commissioner to grant emergent relief in a contested matter before another State agency, the Board's request for emergent relief is concomitantly denied.

Accordingly, for the reasons set forth above, the Board's request for emergent relief is denied and the appeal in this matter is dismissed in its entirety for failure to state a claim upon which relief may be granted by the Commissioner.

IT IS SO ORDERED.⁴



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/23/05

Date of Mailing: 9/26/05

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.*

BOARD OF EDUCATION OF THE :
TOWN OF ~~PHILLIPSBURG~~, WARREN :
COUNTY, R.T.C., JR., individually and :
on behalf of minor child, R.T.C., III, :
C.S., individually and on behalf of minor :
child, R.S., and D.A.D., individually :
and on behalf of minor child, J.D.D., :

COMMISSIONER OF EDUCATION

DECISION

PETITIONERS, :

V. :

NEW JERSEY INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, :

RESPONDENT. :

SYNOPSIS

Petitioning Board, together with parents of three student-athletes, sought waiver of the "70% Rule" of the New Jersey Interscholastic Athletic Association (NJSIAA), which requires that a school play at least 70% of its regular season games against New Jersey schools in order to compete for a State championship. The request was based on a claim of hardship resulting from the extensive travel necessary to play New Jersey schools, and the availability of Pennsylvania schools in closer geographic proximity.

Pursuant to procedural rules agreed to by the parties, the NJSIAA Special Committee on Leagues and Conferences (SCLC) heard petitioners' request. The SCLC's denial was upheld by NJSIAA's Executive Committee on grounds that Phillipsburg's hardship was not significantly greater than that of other member schools, and that the school's reduced availability for New Jersey play would negatively impact on the Skyland Conference of which it is presently a member.

On appeal, the Commissioner upheld NJSIAA's position that: 1) the 70% Rule applies to Phillipsburg; 2) the prior grant of a waiver to the Moorestown Friends School does not compel a similar grant to Phillipsburg; 3) NJSIAA is entitled to bring broader policy considerations into its decisions in matters of this type; and 4) the Commissioner's review is to be conducted under the established "arbitrary and capricious" standard. However, due to procedural deficiencies in the NJSIAA hearings relating to the participation of Skyland Conference officials and the involvement of SCLC members in Executive Committee deliberations, the Commissioner remanded the matter to NJSIAA for proceedings as necessary to make a decision in the first instance—based upon a properly developed factual record, with no ambiguity as to appearance(s) by the adverse party(ies), full opportunity for prehearing discovery of the testimony and evidence to be relied upon by the party(ies), and recusal of Executive Committee members who are also members of the SCLC—as to whether Phillipsburg's situation is, in fact, so extreme relative to other member schools, that the hardship imposed on it by the 70% Rule outweighs any hardship that will result from its reduced availability for in-state play if a waiver is granted. Petitioners' federal claims were preserved for future litigation, and their claims with respect to NJSIAA's assessment of legal fees were reserved for such appeal of NJSIAA's decision on remand as petitioners deem warranted.

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.

AGENCY DKT. NO. 369-10/03

BOARD OF EDUCATION OF THE	:	
TOWN OF PHILLIPSBURG, WARREN	:	
COUNTY, R.T.C., JR., individually and	:	
on behalf of minor child, R.T.C., III,	:	
C.S., individually and on behalf of minor	:	
child, R.S., and D.A.D., individually	:	COMMISSIONER OF EDUCATION
and on behalf of minor child, J.D.D.,	:	
	:	DECISION
PETITIONERS,	:	
V.	:	
NEW JERSEY INTERSCHOLASTIC	:	
ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	

For Petitioners, David B. Rubin, Esq.

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on October 3, 2003, through the filing of a Petition of Appeal by the Phillipsburg Board of Education and three citizen-taxpayers who are also parents of minor student-athletes attending the Phillipsburg public schools ("petitioners"). In their filing, petitioners sought declarations invalidating: 1) the so-called "70% Rule" of the New Jersey Interscholastic Athletic Association (NJSIAA),¹ either on its face or as applied to petitioners; and 2) Article XIII, Section 8 of NJSIAA's bylaws,² either on its face or as

¹ Requires that, in order to compete in State tournament games, an entrant must have competed against New Jersey schools in 70% or more of their regular season games.

² Provides that a member school will be assessed for NJSIAA's litigation expenses if it is unsuccessful in appealing an action or decision of NJSIAA.

applied to appeals which are non-frivolous and brought in good faith. Petitioners sought a plenary hearing before the Commissioner because they were not appealing from a quasi-judicial determination of NJSIAA based on an existing evidentiary record, as contemplated by then-applicable rules for the hearing of appeals from NJSIAA decisions, *N.J.A.C. 6A:3-7.1 et seq.* (31 *N.J.R.* 4173(a), 32 *N.J.R.* 1177(a)) However, the parties and the Department subsequently agreed that, in lieu of a plenary hearing at the Office of Administrative Law (OAL), NJSIAA would: 1) convene its Special Committee on Leagues and Conferences (SCLC) to conduct a quasi-judicial hearing—complete with a record, sworn testimony and discovery rights comparable to those of an OAL hearing—prior to issuing a recommendation on petitioners’ request for a waiver of the 70% Rule; and 2) render a final decision through its Executive Committee which would then be appealable to the Commissioner in accordance with the above-noted rules.³ Pursuant to this procedure, a hearing before the SCLC was duly held on October 6, 2004, resulting in a written decision of November 9, 2004 recommending denial of petitioners’ request; the Executive Committee adopted this recommendation as NJSIAA’s final decision on January 12, 2005. On February 15, 2005, petitioners filed an Amended Petition of Appeal retaining the substance of their original submission and additionally pressing claims arising from subsequent proceedings at NJSIAA; NJSIAA’s Answer, the Record on Appeal, and briefs setting forth the positions of the parties were then filed in accordance with *N.J.A.C. 6A:3-7.1 et seq.*

³ Appeals of the type filed by petitioners are now addressed by *N.J.A.C. 6A:3-7.1(b)1*, which requires aggrieved party(ies) and NJSIAA to make mutually acceptable provisions for a hearing at NJSIAA prior to any request for review by the Commissioner. 36 *N.J.R.* 5032(a), 37 *N.J.R.* 1051(b)

As part of the above-referenced discussions, it was agreed that the issue to be addressed during NJSIAA proceedings would be whether the impact of the 70% Rule upon the Phillipsburg Board of Education, when weighed against the impact upon other NJSIAA members and conferences, constituted undue hardship upon Phillipsburg. It was further agreed that the OAL standard for intervention would be liberalized to allow other districts, upon request, to present testimony and evidence at hearing, provided that any such district would be subject to pre-hearing discovery to the same extent as a party. Petitioners' federal claims and NJSIAA's defenses to them were preserved for future litigation.

Consistent with the above, in proceedings before NJSIAA, petitioners did not pursue the claim made in their petition that the 70% Rule was facially invalid; rather, they argued that it did not apply to Phillipsburg based on its legislative intent, or—if applicable—that it necessitated a waiver in Phillipsburg's case because of the demonstrably greater hardship imposed on the district's student-athletes relative to others in purportedly similar situations, and because of the precedent set by a prior waiver granted to Moorestown Friends School, a private religiously affiliated school (Moorestown). Petitioners deferred addressing their other claims, and, in their brief before the Commissioner on appeal (at 45), indicated that they continued to reserve their constitutional claims and would withhold argument, if not otherwise directed, on NJSIAA's assessment of litigation costs unless and until NJSIAA prevailed on the issue of the 70% Rule.

BACKGROUND OF THE DISPUTE

The following undisputed facts are necessary to an understanding of the present controversy:

1. Phillipsburg High School is a Group IV NJSIAA member school located along the Delaware River in Warren County, across from Easton, Pennsylvania. It is contained within a legislatively designated "Abbott" school district (*N.J.S.A.* 18A:7F-3) and serves a community with longstanding ties to Pennsylvania's Lehigh Valley.
2. Prior to 1976, Phillipsburg belonged to football conferences (Big 4 and Big 5) in which all other members were Pennsylvania schools. During the 1970s, Phillipsburg was a "football powerhouse."
3. Beginning in 1976, Phillipsburg was a member of Pennsylvania's East Penn Conference (predecessor to the Lehigh Valley Athletic Conference) for football, having joined for basketball in 1963 and baseball in 1958. The school was permitted by NJSIAA to engage in New Jersey championship competition, which it did as a "powerhouse" team for several years; however, in 1980 an NJSIAA rule was adopted requiring entrants into championship games to have played at least 50% of their regular season games against New Jersey schools, and in the 1982 settlement of Phillipsburg's challenge to that rule, the school was barred from NJSIAA championship play in football, although an exception was made for other sports with the admonition that Phillipsburg was required to make a concerted effort to increase scheduling within New Jersey schools whenever possible.
4. When the East Penn conference increased its required regular season schedule in 1982-83 beyond the nine games permitted by NJSIAA, Phillipsburg was granted an exception from the nine-game rule due to the school's unique circumstances: These were identified as location, unavailability of regular season contests with reasonably close New Jersey Schools of comparable size, and the requirements of the Pennsylvania conference to which the school then belonged. In subsequent years, NJSIAA continued to grant nine-game-rule waivers to Phillipsburg to enable it to comply with the East Penn schedule.
5. In 1987, Phillipsburg applied for membership in New Jersey's then-existing Mid-State Conference, but was rejected in part because Phillipsburg was too distant from the other members and in part because the conference wished to retain its ten-team structure. On appeal of the Conference's decision, NJSIAA granted Phillipsburg's request to join the Conference, so long as it adhered to the required nine-game schedule. Phillipsburg declined to meet this condition because it would mean relinquishing the annual Thanksgiving football game against Easton, Pennsylvania; it withdrew its request for Conference membership

and elected to remain as a member of the East Penn Conference in Pennsylvania while still playing some games against NJSIAA schools.

6. In Fall 1995, because of the increasing difficulty in reconciling East Penn and NJSIAA requirements and the continuing impact of the 50% Rule on the school's ability to enter championship competition, Phillipsburg joined the newly-created Skyland Conference in New Jersey. This conference consisted of NJSIAA members in Somerset, Hunterdon and Warren Counties, essentially uniting the former Mid-State Conference (consisting primarily of Group III and IV schools) with the former Delaware River Conference (consisting primarily of Group I and II schools); its creation had been suggested in 1987 by Phillipsburg itself as a solution not only to its own situation, but to the problem generally of providing for meaningful athletic competition in the Northwest New Jersey region. The Skyland Conference arranged its schedule so that Phillipsburg could continue to play its traditional season-opening and Thanksgiving football games against Pennsylvania teams.
7. After a few years, Phillipsburg became dissatisfied with membership in the Skyland Conference and began exploring the possibility of returning to a Pennsylvania league through membership in the Lehigh Valley Athletic Conference, successor to the East Penn Conference. However, it has viewed NJSIAA's 70% Rule, adopted in 1999 as an amendment to the previously referenced 50% Rule, as an impediment to further consideration of this option, since, if Phillipsburg increases the number of regular season games it plays against Pennsylvania opponents, the 70% Rule—absent a waiver or finding of inapplicability—would prevent it from participating in New Jersey State championship competition.⁴

Petitioners take the position that Phillipsburg students suffer undue and ever-increasing hardship as a result of NJSIAA's requirement that they play 70% of their games in-state in order to be eligible for championship competition. They allege that the lack of nearby New Jersey opponents results in extraordinary travel times, necessitating that students: 1) miss classes (a problem made worse by the district's use of block scheduling); 2) lose the opportunity to use the district's after-school assistance programs; and 3) experience frequent late returns so as to deprive them of time needed for homework, study and rest. They also allege increased transportation costs and diminution of gate receipts which are used to offset the cost of the district's athletic

⁴ As a New Jersey school district, Phillipsburg is ineligible for Pennsylvania State tournament competition.

programs, causing fiscal problems in an already stressed district as evidenced by its “Abbott” status. Petitioners contend that Phillipsburg’s unique circumstances should compel that the school be permitted to enter NJSIAA championship competition notwithstanding that fewer than 70% of its regular season games are played against New Jersey opponents, and that there is precedent for doing so because a waiver of this type was previously granted to Moorestown.

NJSIAA takes the position that: 1) the hardship imposed on Phillipsburg as a result of its geographical location is not substantially greater than that of other Skyland Conference and NJSIAA member schools who must travel substantial distances to events; 2) the Moorestown situation was factually distinguishable; and 3) the requested waiver would be inherently unfair to other schools and student-athletes, since they must qualify for tournament eligibility based on competition against New Jersey opponents, and since the viability of NJSIAA’s leagues and conferences will be compromised by the inevitable absence of Phillipsburg from a conference having few other nearby options for competitors of comparable size.

POSITIONS OF THE PARTIES

Standard of Review

Petitioners argue that this matter should be judged under a heightened standard of review, positing that NJSIAA is subject to the same scrutiny as a government agency because of its domination by public school districts, funding by tax dollars and virtual monopoly over interscholastic sports; in order to prevail on appeal, therefore, it must be found to have exercised its powers in furtherance of the public interest rather than the narrow self-interest of its members. (Petitioners’ Brief at 14-18)

NJSIAA stresses that it is a fully voluntary organization, that the absence of any constitutional right to participate in sports is by now well established at both the state and federal levels, and that the “arbitrary and capricious” standard for review of NJSIAA actions has long since been accepted both by the courts and by the Commissioner and State Board (the latter through adoption of memorializing regulations at *N.J.A.C.* 6A:3-7.5). Therefore, because the decision under review in this matter has a rational basis, the NJSIAA urges, it must be upheld by the Commissioner on appeal. (NJSIAA Brief at 19-22)

Applicability of the 70% Rule

Petitioners contend that while the plain language of the 70% Rule applies without exception to any NJSIAA member school, it is necessary to look beyond plain language to legislative intent. In this regard, petitioners proffer that the rule, adopted in 1999 as an amendment to the existing rule requiring 50% of regular season games to be played in-state, was proposed to address the specific evil of certain small parochial schools scheduling large numbers of out-of-state basketball games so as to give them an unfair advantage in New Jersey tournament competition; according to the proposal’s sponsor and NJSIAA subcommittee discussion, such scheduling enabled these schools to obtain additional funding, engage in enhanced recruitment through national exposure, escape the degree of accountability associated with in-conference play, and increase the strength of the team by arranging for “powerhouse” schedules. Petitioners argue that there is no relationship whatsoever between a rule intended to discourage national schedules—with their concomitant recruitment and financial advantages—and the situation of Phillipsburg: a uniquely placed border school which seeks for historical and

geographical reasons to compete against Pennsylvania schools within a maximum distance of 30-45 minutes. According to petitioners, what must control in determining whether the rule applies to Phillipsburg is “not what some Committee sitting in 2004 wishes [the rule] meant, but what the Commissioner [who has statutory authority to approve or disapprove proposed amendments to the bylaws] was entitled to assume it meant [at the time of approval in 1999], based on the purposes that were apparent at that time.” (Petitioners’ Brief at 18-25, quotation at 25)

NJSIAA counters that, while reducing recruitment was unquestionably an important impetus for initial proposal of the rule, the discussion surrounding its adoption clearly shows its larger purpose to have been ensuring that schools qualifying for NJSIAA tournaments did so based on competition at the same level of their tournament opponents, that is, other New Jersey schools. NJSIAA finds it “self-evident” that entry into State tournaments should be based upon competitive success against schools within the state—which must observe uniform eligibility and competition rules—rather than against outside opponents. NJSIAA further notes that Phillipsburg voted against the 70% Rule when it was placed before NJSIAA members for adoption, thus indicating an understanding of the rule’s broader purpose and how that purpose would work to Phillipsburg’s disadvantage vis-à-vis Phillipsburg’s custom of playing of large numbers of games against Pennsylvania opponents. (NJSIAA’s Brief at 23-24)

Waiver of the 70% Rule

Petitioners argue that they have shown evidence of hardship which is at least as compelling as that which existed in 1983, when NJSIAA granted Phillipsburg a waiver from its nine-game rule in order for the school to continue in its East Penn

affiliation. Specifically, they note: 1) the distances from other schools in the Skyland Conference resulting from Phillipsburg's remote location; 2) already long travel times exacerbated by two decades of real estate development and ensuing traffic congestion; 3) attendant cost increases resulting from greater travel time; 4) gate receipts for football, basketball and wrestling which have "dropped precipitously," leading to a loss of funds in a district that is both needy and subject to heightened State scrutiny owing to its "Abbott" status; and 5) impact on students who must suffer early dismissals from last period classes (a situation made more serious by the district's use of block scheduling), miss after-school academic assistance in order to make game start times ranging from 2:45 to 4:00 (mostly the latter), and experience late arrivals home after games such as junior varsity which are frequently held in the evening, "from time to time" as late as 11 p.m. (Petitioners' Brief at 9-12, quotations at 11-12)

Petitioners point to the survey they conducted of schools characterized by NJSIAA as similarly situated "border schools," contending that, contrary to the unsupported generalization of NJSIAA, Phillipsburg's situation is truly unique because the schools referenced by NJSIAA either have close New Jersey opponents readily available or, to the extent they do not, have no viable options in New York, Pennsylvania or, in some cases, Delaware, that would easily alleviate the hardship caused by travel to remote in-state schools. (Petitioners' Brief at 29-31) According to petitioners, NJSIAA offers only vague, unsupported statements—no evidence as to actual distances, translation into travel time, or impact on students—in contending that Phillipsburg is not experiencing undue hardship. Petitioners acknowledge that Phillipsburg does travel long distances, without complaint, to occasional State contests and other important games, but

urge that these situations are plainly distinguishable from the daily wear-and-tear of regular season travel (*Id.* at 31-32); they also reject NJSIAA's reliance on Phillipsburg's 1987 Mid-State application letter stating that travel necessitated by Mid-State membership would not be of great concern to Phillipsburg, since such reliance takes no account of the fact that Route 78 has evolved over the intervening twenty years from a new super-highway into a congested commuter artery. (*Id.* at 32-33) Petitioners also argue that the requested waiver will give them no advantage over other New Jersey schools, since the Lehigh Valley Conference has gone on record as stating that, should Phillipsburg apply and be admitted to the Conference, the school will be allowed to adhere to all NJSIAA rules and regulations relating to athletic advantage. (*Id.* at 28, citing Record on Appeal, Tab 5(h); Petitioner's Exhibit P-9⁵)

Petitioners additionally contend that a waiver is compelled in Phillipsburg's case by the precedent of Moorestown, which received a waiver notwithstanding that it did not even claim hardship, but only a desire to continue its longstanding cultural ties with other Quaker schools; according to petitioners, if this was an adequate basis for waiver, then surely petitioners' case, based on demonstrated hardship as well as evident historic and cultural ties, cannot be denied. Moreover, petitioners argue, if Moorestown's religious affiliation had any role in NJSIAA's prior decision—as NJSIAA's response to Interrogatory No. 6 explicitly states it did—then petitioners' claim must be honored or NJSIAA will have “unfairly denied petitioners dispensation previously granted to another school because of its religious affiliation,” thereby violating the Fourteenth Amendment by according special treatment on the basis

⁵ This and all similar references refer to the designations used in the Statement of Items Comprising the Record on Appeal, as provided by NJSIAA under cover letter dated February 15, 2005.

of religion. NJSIAA cannot be permitted to “rewrite the record,” petitioners charge, by denying its own sworn statement—likely made in an attempt to avoid setting a precedent—regarding the religious basis for its decision. (Petitioners’ Brief at 37-40, 46; quotation at 46)

NJSIAA counters that the Moorestown situation was clearly distinguishable because: 1) Moorestown is a small, independent school, one of a handful in the state not affiliated with a specific league; and 2) although the school was required to play Friends School League opponents, it still played the majority of its games against smaller NJSIAA schools, mostly members of the Olympic Conference and the Burlington County Scholastic League, both of which fully supported the school’s application for waiver—in contrast to Phillipsburg, which intends to play most of its contests against Pennsylvania schools and which is a member of a conference that would be significantly impacted by any diminution of Phillipsburg’s availability for regular season games. The Moorestown waiver was, therefore, nothing more than “a rational decision to allow a small NJSIAA school to continue to play most of its contests (but not 70%) against NJSIAA member schools who fully supported the waiver without abandoning a 70 year association with an out-of-state conference, which coincidentally happened to be Quaker.” (NJSIAA Brief at 26)

NJSIAA notes that it also considered the “fundamental contradiction” of petitioners’ position that Phillipsburg should not have to travel for regular season play but is more than happy to do so for tournaments or to gain a higher ranking for its “powerhouse” wrestling team. (NJSIAA Brief at 29-30) The Association further notes its consideration of the contradiction between Phillipsburg’s 1987 application to the

Mid-State Conference and its present request, pointing out on appeal to the Commissioner—although conceding that this was not mentioned in the SCLC report—that, in addition to conflicting statements about the ease of such travel, the actual distances given for travel to specific schools presented in 1987, when Phillipsburg *wanted* to join a New Jersey league, were consistently less than the comparable distances presented in the current effort to play more games in Pennsylvania. (*Id.* at 30-32)

NJSIAA further points to what it characterizes as Phillipsburg's lack of regard for: 1) Skyland's willing accommodations to the town's geographic location, including scheduling non-football contests in relative proximity (because size of school is not a dominant factor in such contests) and designing football schedules that allow Phillipsburg to play its traditional opening and closing games against Pennsylvania schools, including the Thanksgiving game against Easton; 2) Phillipsburg's instrumental role in Skyland's creation and subsequent development; and 3) the fact that Phillipsburg's inevitable departure as a conference member if it is granted a waiver from the 70% Rule would require a substantial number of other member schools to schedule—in baseball, softball, basketball, cross country and soccer—at least two regular season contests at great distance, and, in football, to search for large schools outside the region against which to play. (NJSIAA Brief at 33-34)

Procedural Issues

In addition to reiterating their substantive arguments before the NJSIAA, petitioners challenge the Association's determination on procedural grounds. Petitioners stress that the NJSIAA proceeding in this matter was not an ordinary NJSIAA hearing, but a negotiated compromise between the full-blown trial-type OAL hearing sought by

petitioners and the purely appellate review sought by NJSIAA. They contend that, notwithstanding that Skyland representatives were allowed to testify at hearing and that their testimony was taken as fact by both the SCLC and Executive Committee, Skyland never made a formal request to intervene; thus, petitioners had no notice other than through the “rumor mill” that any other district intended to participate in the hearing, and, in the absence of such notice—given the rules established for the proceeding—they had no opportunity for discovery of the evidence Skyland intended to introduce. Skyland, on the other hand—as the result of petitioners’ compliance with the directives of NJSIAA counsel that Skyland be copied on petitioners’ papers—appeared at the hearing with full foreknowledge of the arguments and evidence upon which petitioners intended to rely. Petitioners object that, in clear contravention of the agreed-upon rules, Skyland officials were “not only allowed to present argument to the Committee but, armed with full disclosure of [petitioners’] evidence, were also permitted to present a detailed factual rebuttal,” a situation tantamount to “trial by ambush.” Moreover, petitioners state, NJSIAA cannot claim that petitioners knew of Skyland’s intentions; to the contrary, they specifically noted in their brief submitted to NJSIAA (and provided to Skyland) a week before hearing that, to petitioners’ knowledge, Skyland had not requested to intervene. (Petitioners’ Brief at 33-35, quotation at 34)

Petitioners further contend that, even if Skyland’s testimony were not disallowed on the aforementioned grounds, NJSIAA erred in crediting it because Skyland witnesses relied on “double- or triple-hearsay, unsupported by any competent data in the record other than [their own] off-the-cuff ruminations.” According to petitioners, when a Skyland witness was questioned on cross-examination about his testimony regarding

travel time and frequency, he stated that he “didn’t know,” “hadn’t examined,” or “wasn’t sure,” yet he “attempted elsewhere in his testimony to insinuate through generalized, undocumented statements” that there were other Skyland Conference members who were forced to travel as much as Phillipsburg, and these statements were in turn (improperly) relied upon by both committees of the NJSIAA. (Petitioners’ Brief at 35)

Petitioners similarly object to what they characterize as the committees’ conflation of petitioners’ request for waiver of the 70% Rule and NJSIAA’s criteria for withdrawal from leagues and conferences. They stress that this matter is *not* an application to withdraw from the Skyland Conference—a development which, if it should come to pass, would be the subject of an entirely separate proceeding—and that NJSIAA erred in allowing testimony and applying standards as if it were; indeed, they contend, the Skyland officials’ entire presentation should be discounted because they actually stated on record that they were “not there about the 70% Rule,” but “to defend about leaving the conference if that were to take place, how it would affect our league” and that they had “no comment” on the 70% Rule issue. (Petitioners’ Brief at 35-37) Petitioners insist that the 70% Rule and withdrawal from a conference are two separate and distinct matters, and that considerations of one cannot be permitted to influence decisions about the other. They explain that Phillipsburg is addressing the 70% Rule first because it is “reluctant to pursue [leaving the Skyland Conference to join a Pennsylvania league] further without an assurance that its students’ dream of an NJSIAA championship will not be compromised in the process.” Granting relief here, petitioners proffer, will be “but the beginning of a lengthy process” before the Skyland Conference and NJSIAA where

“all considerations pertinent” to any withdrawal from the Conference by Phillipsburg will be explored and “all parties’ interests adequately protected.” (Petitioners’ Brief at 26-27)

Finally, petitioners object to the NJSIAA Executive Committee decision because, they allege, the transcript of its underlying deliberations reveals that—despite attempts by NJSIAA counsel to keep the group focused on the record before the SCLC—committee members made no attempt to make a judicial determination, instead reaching a policy-political decision centered on the perceived danger of setting a precedent with any decision in favor of petitioners, treating the record before the SCLC as “nothing more than a starting point for a political discussion.” Furthermore, while petitioners and the Skyland representatives were dismissed following their presentations before the Committee, the SCLC representative—along with other Executive Committee members who were also members of the SCLC—were permitted to remain and participate fully in Executive Committee deliberations. (Petitioners’ Brief at 41-44, quotation at 44)

In response, NJSIAA counters that while petitioners claim “ambush,” the fact is that in November 2003 the Skyland Conference adopted a resolution opposing any departure by Phillipsburg and any “exemption from any NJSIAA regulation.” (NJSIAA Brief at 36, citing Record on Appeal, Tab 1, Exhibit G) Moreover, although Skyland did not formally move to intervene, NJSIAA contends, petitioners had been advised well before the hearing that:

As you are aware, the Skyland Conference has expressed opposition to the application and we are therefore sending a copy of this notice to that Conference so that they may participate in the proceedings. If that conference wishes to submit any document or brief, it should observe the same schedule [as set forth herein for petitioners]. Copies should be furnished to each party. We would ask that copies of any documents be sent to that Conference as well.

(*Ibid.*, citing Record on Appeal, Tab 2)

Additionally, according to NJSIAA, Skyland notified both petitioners and NJSIAA that it would be represented at the hearing, and, once there, its witnesses relied on their own personal experience as athletic directors and seasoned arrangers of conference schedules, and they introduced no documents not previously provided—in contrast to petitioners, who were allowed to introduce previously unprovided documents in rebuttal to the statements of Skyland witnesses and who made questionable claims as previously indicated. NJSIAA urges that Skyland did not act as an intervenor, but

“simply provided testimony which was critical in the assessment of the impact of a waiver of the 70% Rule or the departure of Phillipsburg from that Conference. Representatives of Skyland were present without counsel and were subject to full cross-examination”; everything to which they testified was “consistent with their pre-hearing submissions. What appears to have occurred is that [Skyland’s representatives] presented damaging testimony and after never availing itself of the opportunity to take discovery, Phillipsburg now asserted (*sic*) that they were somehow treated unfairly. Further, Phillipsburg fails to specify what it could have uncovered if it had propounded interrogatories on the Skyland Conference.” (NJSIAA Brief at 36-37)

With respect to petitioners’ “conflation” argument, NJSIAA argues that petitioners are inappropriately trying to “compartmentalize” issues that are, in fact, inextricably intertwined, thereby placing form over substance; NJSIAA notes that Phillipsburg’s own athletic director admitted on record that receiving a waiver of the 70% Rule would result in Phillipsburg playing less than the number of games required of it as a member of the Skyland Conference. It was, therefore, not improper for NJSIAA to consider the impact on Skyland of Phillipsburg’s departure, which would seriously damage efforts to arrange for a fair and balanced competition schedule in a less-populated area of the state where more travel time is necessarily required of student-athletes. According to NJSIAA, petitioners want to “have it both ways” in a

“manifestly unfair” proposition that attempts to provide them with “the benefits of tournament competition without any of the obligations of conference membership.” (NJSIAA Brief at 27-28)

Finally, NJSIAA protests petitioners’ suggestion that the proceedings before the Association in any way denied them due process. To the contrary, NJSIAA urges, petitioners were provided with: complete answers to interrogatories; all documents that would be referred to by Skyland witnesses at hearing; the opportunity to present briefs, full arguments of counsel and sworn testimony, as well as to cross-examine Skyland witnesses; a full stenographic record; and a separate appeal to the Executive Committee, the closed session proceedings of which were recorded by a court stenographer. Under the circumstances, NJSIAA concludes, petitioners cannot claim to have been treated unfairly in any respect. (NJSIAA Brief at 37)

COMMISSIONER’S DETERMINATION

Standard of Review

It is by now settled law that the Commissioner’s scope of review in matters involving NJSIAA is appellate in nature. *See N.J.S.A. 18A:11-3; Board of Education of the City of Camden v. NJSIAA*, 92 N.J.A.R.2d (EDU) 182, 183. Thus, the Commissioner may not overturn an action by NJSIAA absent a finding that NJSIAA acted in a patently arbitrary, capricious or unreasonable manner, nor may she substitute her judgment for that of NJSIAA, even if she would decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision finally reached. *B.C. v. Cumberland Regional School District*, 220 N.J. Super. 214, 231-232 (App. Div. 1987); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*,

1987 *S.L.D.* 259 As codified in 2000 to provide notice of this long-held standard to the public and regulated parties:⁶

1. If 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 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:3-7.5(a)⁷

Although petitioners argue that a heightened standard of review should be applied herein, citing to constitutional constraints and the obligation of a quasi-governmental body to uphold the public interest, the Commissioner is unpersuaded that NJSIAA's actions in this matter are not appropriately judged by the established standard.

Participation in interscholastic sports has long been held to be a privilege which may be circumscribed by reasonable rules governing eligibility, not a constitutional right. *Burnside et al. v. NJSIAA et al.*, 1984 *S.L.D.* 1695 (App. Div. 1984), *cert. denied* 101 *N.J.* 236 (1985); *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182. To that end, NJSIAA was created as 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, adopted annually by the member schools, and thereafter deemed school policy enforced in the first instance by the internal procedures of NJSIAA.

⁶ See, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

⁷ Formerly *N.J.A.C.* 6A:3-7.4(a). See, 36 *N.J.R.* 5032(a), 37 *N.J.R.* 1051(b).

It is beyond dispute that NJSIAA must fulfill its obligations in a manner that is not arbitrary or unreasonable. The courts have held 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).

The law is thus clear that, while the party challenging an administrative action bears the burden of proof that such action was deficient, *Kopera v. West Orange Bd. Of Education*, 60 N.J. Super. 288, 297 (App. Div. 1960), the administrative agency must still be found to have acted reasonably based upon the facts at hand in order to prevail on appeal; notwithstanding that the challenger may not agree with the manner in which the agency has exercised its discretionary authority, an action withstanding the “rational basis” test is likely to be inherently consistent with the public interest. Even granting, *arguendo*, that NJSIAA is a quasi-governmental entity as claimed by petitioners, public bodies are frequently required to weigh the legitimate concerns of particular individuals or groups—such as petitioners—against broader-based but equally legitimate considerations such as the need to ensure consistency and fairness statewide.⁸ As long as they do so based upon the facts before them and in a rational manner, the public interest is likely to have been adequately served.

⁸ Although petitioners pose the dilemma facing Phillipsburg student-athletes as a “Catch 22” (remain in New Jersey and suffer “extraordinary” travel burden, or affiliate with a Pennsylvania league and be unable to compete for State championships) and characterize their position as “for the kids” in contrast to NJSIAA’s paramount goal of protecting the “interests of the organization,” the Commissioner stresses that NJSIAA’s concern with the integrity of its league/conference structure—which affects every student-athlete in the state—cannot be automatically dismissed as “narrow self-interest.”

Accordingly, the Commissioner's review of this matter will proceed under the established "arbitrary, capricious or unreasonable" standard, so that NJSIAA's determination will be upheld if it is found to have been factually based and reasonably reached, with the appropriate level of due process having been provided to petitioners.

Applicability of the 70% Rule

With the aforementioned standard in mind, the Commissioner first upholds NJSIAA's interpretation of the 70% Rule as applying uniformly to all member districts unless a waiver is specifically granted.

In support of their respective arguments, both parties point in whole or part to the pertinent section of the official minutes of the December 1999 annual meeting of the full membership at which the rule was adopted:

The purpose of this legislation is to limit out-of-state competition to influence schools to remain in conferences within the state to reduce funding and exposure provided by outside out-of-state tournaments and their sponsors, and lastly it would require all NJSIAA tournament teams to place a priority on scheduling New Jersey teams above a national schedule and a national agenda. (Record on Appeal, Tab 1, Exhibit C at 9-10)

Both also point to the April 21, 1999 discussion of Subcommittee C of NJSIAA Advisory Committee as reflected in the committee minutes:

Amended Proposal: "NJSIAA tournament entries must compete against a schedule composed of no less than 70% NJ schools. If a team does not meet this criteria (*sic*) they will forfeit their entry into NJSIAA tournaments."

Advisory Committee Vote: Unanimously in Favor

Discussion:

- the number of schools now playing extended out of state competition was not supplied in the proposal and was not available on the day of the meeting
- present regulations permit individual schools to leave a conference for a single sport, to play a national schedule

- this type of schedule enables recruitment because of greater exposure
- proposal refers predominately to small parochial schools competing in basketball
- schools have little accountability when they leave a conference to play a schedule comprising a much larger area
- a full schedule of “powerhouse” teams increases the strength of the team, and therefore provides an unfair advantage in the State Tournament
- all schools pay dues to the Association and should be entitled to enter a tournament on a relatively equal basis as determined by the size of the school
- since the proposal as stated would affect all sports, baseball and softball teams may not be able to play as many spring recess games in other areas of the country
- acceptance of the proposal may deny schools/players exposure when players from other states do not have the same restrictions
- schools allowing one team to travel out of state for most [of] the schedule, frequently do not sponsor a broad program of additional sports
- suggestion to change the percentage from 90% to 70% was proposed and accepted by the submitting school

(Record on Appeal, Tab 1, Exhibit B at 4-5)

These documents and other evidence on record leave no doubt—and, indeed, the parties do not truly dispute—that the sponsor’s original impetus for offering a proposal to increase in-state game requirements from 50% to 70% arose out of concern over a specific situation not analogous to that of Phillipsburg. *However*, it is equally clear from the committee and plenary discussions surrounding the rule’s official proposal—and from the plain and unambiguous language of the rule as finally adopted by NJSIAA, approved by the Commissioner, and applied in the years since its enactment—that the rule is not, and never has been, intended to be selectively aimed at schools deliberately attempting to obtain national exposure for recruitment and sponsorship

purposes, let alone at the small parochial schools or basketball games referenced in the explicit sponsor statements relied upon by petitioners. Rather, as proffered by NJSIAA, notwithstanding the rule's origin as a response to a specific circumstance, from the outset its overarching purpose has clearly been the maintaining of fairness and uniformity in State championship competition by keeping regular season contests substantially in-state and within officially sanctioned structures.

The Commissioner, therefore, cannot agree with petitioners that NJSIAA's interpretation of its rule is "overbroad" under the circumstances (Petitioners' Brief at 46), nor can she find that NJSIAA has acted in anything other than a reasonable and lawful manner in adopting the rule as written and applying it to Phillipsburg along with all other member schools not specifically exempted by waiver.

Waiver of the 70% Rule

Initially, the Commissioner rejects petitioners' argument that NJSIAA erred in "conflating" the questions of waiver of the 70% Rule and "withdrawal" from the Skyland Conference. While petitioners are correct in asserting that no application for withdrawal has been made—and that if and when it is, there is a process in place to consider it—it is disingenuous in the extreme for petitioners to argue that NJSIAA must be foreclosed, in a waiver proceeding, from considering the impact that will inevitably result from grant of a waiver, in the form of the requesting school's reduced availability for contests within its own conference and New Jersey contests generally. As stated by the Skyland Conference President in his December 16, 2003 letter to the Phillipsburg Director of Secondary Education:

We realize that Phillipsburg has not announced any intention to leave the conference, but if they are successful in the lawsuit [challenging the 70%

Rule] it would have an impact on our conference.***By restructuring into three (3) basic divisions, [the conference] addressed the primary concern of travel, as discussed by several schools including Phillipsburg. ***To replace the contests that would need to be filled by the void of Phillipsburg High could create additional travel depending on the location of those contests. (Record on Appeal, Tab 5(j))

The issue was raised again during the SCLC hearing:

MR. HERBERT: Couldn't there be a waiver of the 70 percent rule and yet allow Phillipsburg to remain a member of the Skyland Conference?

MR. WEIGNER [Skyland Conference President]: It would be pretty difficult based upon our divisional setups.

MR. HERBERT: Why is that?

MR. WEIGNER: You have to look at the numbers that would be in existence here. We play each other twice in some sports. We could give you a ten-game schedule that would be more than the 70 percent that would be required. Other than we have a mandatory, a crossover of three which would be a 13th game that would exceed the 70 percent they're looking to have relief from. (*Ibid.*, Tab 6, Transcript of Hearing at 101-02)

Moreover, in Phillipsburg's case, obtaining a waiver from the 70% Rule is plainly the first step in the school's strategy to position itself for a withdrawal from Skyland; the school clearly wants to assure its right to New Jersey championship play, and its entitlement to play fewer than the number of games required to sustain conference membership, before it submits an application to sever its New Jersey affiliation and join a Pennsylvania league. The following excerpt from the transcript of the SCLC hearing is instructive:

MR. HERBERT: Well what I'm getting to is that wouldn't you have to -- in order to get a waiver of the 70 percent rule, wouldn't that involve playing less than what was required as a member of the Skyland Conference or am I misreading that?

THE WITNESS [Phillipsburg Athletic Director Fisher]: That would be true in all sports, yes.

MR. HERBERT: Isn't the 70 percent rule tied in directly with continued membership in the Skyland Conference? I would think the 70 percent rule is tied into, directly into, membership and NJSIAA as well as the Skyland Conference.

MR. RUBIN: Maybe you're raising a point that's not in dispute. The reason why we're concerned about the 70 percent rule – and, frankly, about the only effect your decision on the 70 percent rule would have on us is if and when we apply for withdrawal from the Skyland Conference. We don't dispute that. We haven't made the decision yet to apply for withdrawal from the Skyland Conference. That decision may well be affected by your decision in this proceeding. (*Ibid.*, at 76-77)

The school's intentions are likewise signaled by the September 29, 2004 letter to the Phillipsburg Superintendent from the President of the Lehigh Valley Conference, confirming their prior conversation to the effect that, if Phillipsburg joins Lehigh Valley, officials there would work to create schedules that comply with NJSIAA practice and first-contest start dates, and ensure that the school can conclude its Pennsylvania commitments in time to participate fully in New Jersey championship play. (Record on Appeal, Tab 5(h); Petitioner's Exhibit P-9)

Under the circumstances, it was not only appropriate but *necessary* for the NJSIAA to consider, as part of the relative hardship of Phillipsburg as compared to other member schools, the effect of granting the requested waiver on these schools;⁹ otherwise, the Association would not be fulfilling its statutory responsibility as the governing agency for interscholastic athletics statewide. While viewing Phillipsburg's waiver request in a vacuum undoubtedly serves the school's purpose,¹⁰ it is also an abrogation of NJSIAA's duty to its other member student-athletes and their schools. Accordingly, the Commissioner holds that broader consideration of the impact of any waiver granted to Phillipsburg was, and is, entirely proper in this matter.

⁹ The Commissioner contrasts this standard with the far more comprehensive league withdrawal criteria alluded to by petitioners in their allegation of "conflation."

¹⁰ See, for example, the transcript of the SCLC Hearing at 109-13, 135-36.

With respect to the question of whether NJSIAA's grant of a waiver to Moorestown compels a similar grant to Phillipsburg, the Commissioner fully concurs with NJSIAA, for the reasons set forth by the Association above, that the Moorestown matter is factually distinguishable and that the record clearly shows the waiver in that instance to have been granted for lawful reasons having no basis in preferential treatment due to religion.¹¹ Therefore, petitioners cannot claim that NJSIAA's decision was deficient in this regard.

There is, however, one respect in which petitioners' challenge to NJSIAA's determination has merit. Petitioners are correct in their contention that the "compromise" proceeding directed in this matter was quasi-judicial in nature and envisioned that petitioners would have specific foreknowledge of adverse testimony and evidence to be presented at hearing:

The standard for intervention will be liberalized to allow other districts, upon request, to present testimony and evidence at the hearing, provided that they are subject to pre-hearing discovery to the same extent as if they were a party. (Record on Appeal, Tab 2, Attachment, January 26, 2004 Letter to Counsel from Director of Controversies and Disputes)

As petitioners correctly note, at no point did Skyland formally request to intervene. Instead, what appears to have occurred is that—based on Phillipsburg's desire for a waiver and Skyland's opposition to it being a matter of common knowledge generally, and of prior discussion between officials of Phillipsburg and Skyland specifically—Skyland's participation in waiver proceedings before NJSIAA was treated

¹¹ The Commissioner is unpersuaded by petitioners' attempt to force a contrary conclusion. It is apparent from the context of the statements (from NJSIAA's response to Interrogatories) on which petitioners rely, as well as from documentation in the record, that "religious" is nothing more than a description of the particular affiliation Moorestown sought to preserve in requesting a waiver, and that the religious nature of the affiliation—as opposed to the fact that it was long-standing, deep-rooted and central to the school's identity—was not a determinative factor in NJSIAA's decision to grant the school's request.

by NJSIAA as implicitly understood and less formal protocols were observed. In preparation for hearing, counsel for NJSIAA wrote:

As you are aware, the Skyland Conference has expressed opposition to the application [for waiver of the 70% Rule] and we are therefore sending a copy of this notice to that Conference so that they may participate in the proceedings. If that Conference wishes to submit any documents or brief, it should observe the same schedule. Copies should be furnished to each party. We would ask that copies of any documents be sent to that Conference as well. (*Ibid.*, Tab 2, July 13, 2004 Letter from Counsel for NJSIAA to Counsel for Petitioners, copy to Skyland President)

To which Skyland responded:

On behalf of the Skyland Conference I would like to submit 15 copies of our 2004-2006 Divisional alignments.

The addition of Ridge and Immaculata high schools necessitated new alignments which aided some concerns of several members of our conference. Travel, strength of program and size of schools were the main criteria used in developing the enclosed document. (*Ibid.*, Tab 3, August 25, 2004 Letter from Skyland Conference President to NJSIAA)

Noting the above-quoted exchange and prior communications between petitioner and Skyland, NJSIAA contends that petitioners were well aware of Skyland's intention to participate in the NJSIAA hearing despite the lack of formal intervention proceedings. NJSIAA urges that technical objections based on strict procedural standards should not be allowed to obscure the fact that petitioners were given extensive due process in this matter, and that notice of Skyland's participation was provided to petitioners in substance if not in precise conformance with the rules of administrative practice; thus, it would be truly unfair if petitioners are allowed to benefit because they chose not to avail themselves of the opportunity to seek discovery.

While the Commissioner understands NJSIAA's position given the history of this matter and the lack of precedent for a "hybrid" proceeding of the type

arranged to accommodate it—and while she recognizes that petitioners might well have chosen to seek clarity about Skyland’s actual intentions prior to the hearing rather than standing on ceremony—the fact remains that the “ground rules” established for this proceeding by mutual consent of the parties entitled petitioners to rely on the normal process for effectuating intervention, notwithstanding liberalization of the standard for entitlement to intervene. Therefore, the Commissioner must concur with petitioners that the testimony of Skyland’s witnesses cannot serve as a basis for the NJSIAA decision on appeal herein. Similarly, petitioners are correct in their contention regarding the participation of SCLC members in the Executive Committee’s quasi-judicial review of the SCLC decision.

Notwithstanding these deficiencies, however, the Commissioner cannot in good conscience conclude that petitioners are entitled at this point to prevail on appeal. Although petitioners have presented skillfully prepared evidence and argument in order to demonstrate their own hardship and rebut the “other districts similarly situated” claim proffered by NJSIAA in its Answers to Interrogatories—and have succeeded on procedural grounds in disposing of substantial testimony and evidence adverse to that presentation¹² and, consequently, to the viability of the NJSIAA decision based upon them—the Commissioner simply cannot decide this matter in petitioners’ favor on a record that does not permit her to fully and fairly assess the situation of Phillipsburg relative to other member schools and student-athletes, including those who

¹² Skyland representatives: discussed the history of the conference and its present structure, including the current divisional alignment as supported by Phillipsburg; disputed many of petitioners’ travel claims and opined that Phillipsburg is only one of many conference districts that experience longer travel times than typically found elsewhere in the state; contended that the conference tried to be flexible and accommodating in attempting to reduce travel time; and noted that its membership was surveyed and—by a vote of 15-2 (18-member conference, Phillipsburg did not vote)—determined that Phillipsburg should neither leave the conference nor receive a waiver of the 70% Rule.

will be impacted if Phillipsburg is granted the requested waiver. Moreover, the Commissioner notes that, even if the requisite record could be developed before the Commissioner, NJSIAA is the appropriate entity to make such an assessment in the first instance, and that the Association must be given the opportunity to do so based upon a sufficient factual record and without the participation of SCLC members in Executive Committee deliberations.

Accordingly, the Commissioner finds that the appropriate remedy at the present juncture is to remand this matter to NJSIAA for such proceedings as are necessary for the Association to make the requisite decision—after due deliberation based upon a properly developed factual record, with no ambiguity as to appearance(s) by adverse party(ies), full opportunity for prehearing discovery of the testimony and evidence to be relied upon by such party(ies), and recusal of Executive Committee members who are also members of the SCLC—as to whether Phillipsburg’s situation is, in fact, so extreme relative to other member schools that the hardship imposed on it by the 70% Rule outweighs any hardship that will result to other schools from its reduced availability for in-state play if a waiver of the rule is granted. In so holding, the Commissioner stresses that **it has already been decided herein that:** 1) the 70% Rule applies to Phillipsburg; 2) the prior grant of a waiver to Moorestown does not compel a similar grant to Phillipsburg; 3) NJSIAA is fully entitled to bring broader policy considerations into its determination in this matter; and 4) any subsequent appeal to the Commissioner of NJSIAA’s decision on remand will be reviewed under the established “arbitrary and capricious” standard. Petitioners’ federal claims (and NJSIAA’s defenses thereto) remain preserved for future litigation, while their claims with respect

to NJSIAA's assessment of legal fees may be pursued—since neither party has fully prevailed herein—in any appeal of NJSIAA's decision on remand that petitioners deem warranted.

IT IS SO ORDERED.¹³



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/26/05

Date of Mailing: 9/26/05

¹³ This decision, as the Commissioner's final determination, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

J.M.R., o.b.m. T.G. and K.G., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF EWING, MERCER :
COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner filed a *pro se* Residency Appeal challenging the respondent's resolution that disenrolled her children, T.G. and K.G., from the Ewing School District. Petitioner claimed that -- during the time frame in question -- she and her children resided in Ewing with petitioner's parents, but visited her fiancé frequently at his Trenton residence. The matter was transmitted to the OAL, and a hearing was scheduled for September 30, 2004. Petitioner failed to appear at the hearing; respondent filed a certification stating that petitioner owes the Ewing School District \$10,668.90 in tuition for the 110 days that petitioner's children were illegally enrolled.

The ALJ found that petitioner enrolled her two children in the Ewing School District for 110 school days while the petitioner was not domiciled therein. Accordingly, the ALJ concluded that petitioner owes respondent \$10,668.90, and ordered that petitioner reimburse respondent said amount.

Upon careful and independent review of the record in this matter, the Initial Decision, and the petitioner's exception letter, the Commissioner adopts the decision and recommended order of the ALJ. It was proper under the circumstances for the ALJ to enter an initial decision based upon respondent's *ex parte* proofs, and, pursuant to *N.J.A.C. 1:1-18.4(c)*, petitioner's exception letter cannot resuscitate her appeal.

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

October 13, 2005

OAL DKT. NO. EDU 6269-04
AGENCY DKT. NO. 236-7/04

J.M.R., o.b.m. T.G. and K.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF EWING, MERCER	:	
COUNTY,	:	
RESPONDENT.	:	

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been carefully and independently reviewed, and the Commissioner is constrained to adopt the decision and order of the Administrative Law Judge (ALJ).

On June 7, 2004, respondent Ewing Township Board of Education passed a resolution disenrolling T.G. and K.G. from the Ewing School District, based upon surveillance evidence, gathered primarily in February 2004, indicating that they lived in Trenton. On July 8, 2004, J.M.R. submitted a petition challenging respondent's action. In it she alleged that she and her children resided in Ewing with her parents, but that she and the children often stayed with her fiancé in Trenton. Attached to her petition were copies of respondent's June 7 resolution and the surveillance reports upon which the resolution had been based.

Other than a notation in one of the surveillance reports that J.M.R.'s car was registered to her parents' address in Ewing, petitioner submitted with her petition no support of her allegation that she and the children resided in Ewing. To the contrary, eleven of the above

mentioned twelve surveillance reports supported the conclusion that petitioner's children were not staying in Ewing. Surveillance on nine of the eighteen days in February 2004 showed the children leaving for school from the Trenton address of petitioner's fiancé.

The matter was transmitted to the OAL on July 23, 2004. On August 9, 2004, the OAL sent a notice to counsel for respondent, and to petitioner at the address of her parents in Ewing. The notice acknowledged receipt of the case, advised that another notice with a hearing date would be sent, and instructed, in pertinent part, that:

All discovery must be complete 5 days before the hearing unless another date is established by the judge. Therefore, parties must begin immediately to exchange information, to seek access to public documents, to exhaust other informal means of obtaining information and, if necessary, to serve discovery notices and motions.

On August 30, 2004, the OAL notified the parties that the hearing would begin on September 30, 2004. This notice included the following instructions:

A judge will decide the case based on only what is presented at the hearing. If there are any papers you would like the judge to consider, you must have them at the hearing. Please bring two copies of each paper. If you want any witnesses to testify, you must arrange for their attendance at the hearing. If you are not sure that they will attend the hearing, you should serve them with a subpoena together with the appropriate fee at a reasonable time before the hearing, if possible, three days before the hearing.

The notice also advised that briefs would not be allowed after the hearing without the judge's permission, and that non-attendance at the hearing could result in dismissal of the case.

It is undisputed that petitioner did not attend the hearing on September 30, 2004. A letter dated October 8, 2004 from respondent's counsel to the ALJ indicates that the ALJ agreed to accept a certification by respondent's residency officer to serve as support for respondent's answer and counterclaim, which contended that petitioner's children attended 110 days of school in Ewing while residing in Trenton, and that petitioner consequently owed

respondent tuition. At \$47.92 per day for the younger child and \$49.07 for the older daughter, the certification calculated \$10,668.90 as the total tuition due. The Commissioner notes that this October 8, 2004 correspondence and certification were not copied to petitioner. Nor was a follow-up letter dated May 12, 2005 from respondent to the ALJ.

On July 18, 2005 the ALJ wrote to respondent. In the letter the ALJ referred to the fact that petitioner had not appeared at the hearing, and stated "I was advised that the petitioner had moved and her children were registered in the Trenton school system." The ALJ appeared not to have received respondent's certification concerning tuition, and advised: "I will dismiss petitioner's claim for lack of prosecution and return the file to the Department of Education as a failure to appear if I do not receive the certificate within 10 days." This letter was sent to both parties. The respondent replied to the ALJ's letter on July 26, 2005, forwarding a copy of the October 2004 certification, but did not copy petitioner on this correspondence.

In the initial decision, issued on August 30, 2005 and mailed on September 1, 2005, the ALJ established that on September 30, 2004, respondent's counsel had informed him that petitioner's children had been registered for school in Trenton. Nonetheless, respondent wished to recoup tuition for the year that the children had attended school in Ewing. (Initial Decision at 1)

Based upon his review of respondent's unopposed certification, the ALJ found that petitioner had enrolled her two children in respondent's district for 110 school days while she was not domiciled therein, and that the calculations in respondent's certification showed that petitioner owes respondent \$10,668.90. (Initial Decision at 2) Accordingly, he ordered petitioner to pay respondent said amount. (*Ibid.*)

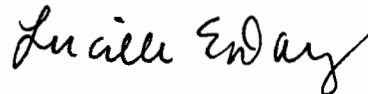
In her “exceptions,” dated September 7, 2005, petitioner reiterates the allegations in her petition that she resided in Ewing during the 110 days in question and only visited (frequently) her fiancé in Trenton. (Petitioner’s Exceptions at 1-2) As was the case with her petition, petitioner includes no evidentiary support for the allegations. Rather, she states “I will be willing to provide any documentation needed to support my appeal.” (*Id.* at 2) Petitioner does not deny that she received notices from the OAL advising that she must prepare all her documentary and testamentary evidence before the hearing that would be scheduled for her case, and submit the evidence at the hearing. Nor does she deny that she received notice that the hearing would be on September 30, 2004, or explain why she did not attend the hearing.

The Commissioner cannot disagree with the ALJ’s determination that respondent has prevailed on its counterclaim for tuition. Under the circumstances of this case, it was proper for the ALJ to enter an initial decision on the merits based upon respondent’s *ex parte* proofs, provided that in the decision he memorialized petitioner’s failure to appear, which he did. *N.J.A.C.* 1:1-14.4(c). I note with disapproval that respondent did not copy petitioner on his correspondence with the ALJ. However, petitioner does not deny that she had two notices from the OAL advising her to prepare her evidence and present it at the hearing, and that she received both a notice and a copy of a letter from the OAL advising her that failure to appear at the hearing could result in the dismissal of her petition for lack of prosecution. That same letter made clear that the ALJ would award respondent tuition upon respondent’s submission of a certification.

Petitioner’s “exceptions” cannot resuscitate her appeal, because “[e]vidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be

incorporated or referred to within exceptions.” *N.J.A.C. 1:1-18.4(c)*. Accordingly, the Initial Decision and recommended Order of the ALJ are hereby adopted.

IT IS SO ORDERED*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/13/05

Date of Mailing: 10/13/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6269-04

AGENCY REF. NO. 236-7/04

J.M.R., o/b/o T.G. AND K.G.,

Petitioner,

v.

EWING TOWNSHIP BOARD

OF EDUCATION,

Respondent.

No appearance by petitioner

Jeffrey F. Belz, Esq., for respondent

Record closed: July 28, 2005

Decided August 30, 2005

BEFORE ANTHOY T. BRUNO, ALJ:

This matter originated as a *pro se* Residency Appeal filed by J.M.R., mother of T.G. and K.G., of the decision by respondent ("Ewing") that T.G. and K.G. are disenrolled from the Ewing Township School District. J.M.R.'s appeal was transmitted to the Office of Administrative Law, Mercerville, New Jersey. On that date J.M.R. did not appear; counsel for Ewing advised this tribunal that T.G. and K.G. were registered in the City of Trenton School District. Counsel also requested leave to file a certification of the amount due to Ewing for educational services rendered T.G. and K.G. while T.G. and K.G. resided outside of the Ewing School District.

Respondent's Certification (Exhibit R-1) states that petition's 2 children were illegally enrolled in the Ewing School District for 110 days each. K.G. was enrolled as an elementary student and T.G. was enrolled as a middle school student. The per diem tuition as determined by the New Jersey Department of Education for an elementary student as \$47.92 and for a middle school student was \$49.07. The total tuition owed by petitioner for K.G. is \$5271.20 (110 days x \$47.92 = \$5271.20); and the total tuition owed by petitioner for T.G. is \$5397.70 (110 days x \$49.07 = \$5397.70). For both students petitioner owes \$10,668.90.

Having reviewed the calculations in respondent's certification, I Find as a Fact that petitioner enrolled her 2 children in the Ewing School District while petitioner was not domiciled therein for 110 school days. I **CONCLUDE** that petitioner owes Ewing \$10,668.90.

ORDER

Accordingly, it is **ORDERED** that petitioner reimburse respondent in the amount of \$10,668.90 as tuition due respondent for 110 days of attending school in the Ewing Township School District.

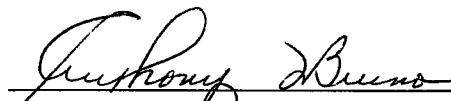
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 30, 2005

DATE



ANTHONY T. BRUNO, ALJ

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

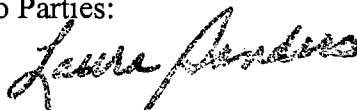
August 30, 2005

DATE

SEP - 1 2005

DATE

Mailed to Parties:



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

/tmp

BERGEN CENTER FOR CHILD	:	
DEVELOPMENT, INC.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
OFFICE OF COMPLIANCE INVESTIGATION,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, an approved private school for the disabled, appealed the determination by the respondent Department disallowing certain costs in its final approved tuition rate for the 2002-03 fiscal year; specifically, an expenditure of \$1,739 for an event that the petitioner describes as a "field trip" or "group activity" designed to promote social skills and as a reward for successful students under the school's behavior modification program. Petitioner claimed that the activity advances legitimate instructional goals and objectives consistent with each student's Individualized Education Program (IEP), and that the respondent acted arbitrarily, capriciously and unreasonably by failing to include the cost in the approved tuition rate. The parties filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: petitioner promoted the field trip in question as an opportunity for students to practice social skills, improve their ability to communicate and learn proper behavior outside the school setting; participation in the event was integral to the token economy plan of behavior modification used by the petitioning school; respondent Department failed to introduce any countervailing evidence to rebut petitioner's showing that the activity is fully consistent with the contents of the students' IEPs. The ALJ concluded that respondent Department misapplied the controlling regulations in disallowing the cost in question, and ordered that the sum of \$1,739 be included in setting the tuition rate that petitioner charges to sending public school districts.

The Commissioner concurs with the ALJ's determination that the respondent Department erred in disallowing the cost at issue in this matter, adopts the recommended decision of the OAL, and directs that the sum of \$1,739 is appropriately included in setting the tuition rate that the petitioner charges to its sending public school districts.

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 14, 2005

OAL DKT. NO. EDU 1807-05
AGENCY DKT. NO. 358-10/04

BERGEN CENTER FOR CHILD	:	
DEVELOPMENT, INC.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
OFFICE OF COMPLIANCE INVESTIGATION,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent sought and was granted an extension of time within which to file exceptions to the Initial Decision. Petitioner, similarly upon request, was granted an extension to file reply exceptions. These submissions were filed in accordance with the modified timelines, and were fully considered by the Commissioner in reaching her determination herein.

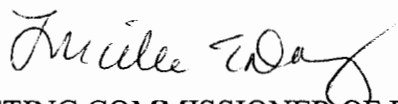
Respondent's exceptions present suggested interpretative analysis of *N.J.S.A.* 18A:36-21 to 23, *N.J.A.C.* 6A:23-4.5(a)(30), *N.J.A.C.* 6A:23-4.2(a)(1), *N.J.A.C.* 6A:23-4.2(a)(1)(ii) and *N.J.A.C.* 6A:23-4.2(a)(1)(iv), which it avers leads to the conclusion that the Administrative Law Judge (ALJ) erred in his determination that the Department misapplied these provisions in excluding the \$1,739 field trip cost from the tuition rate charged to sending public school districts. It urges that the Commissioner subscribe to this interpretation in order "to avoid any implication arising from the decision in this matter that private schools for the disabled may simply incur a charge for any type of student activity – whether a field trip, social activity, or other event deviating from regular day-to-day

instruction – and then pass this cost along to its sending districts by justifying the activity as ‘educational’ in retrospect.” (Respondent’s Exceptions at 15)

Upon careful and independent review of the record, the Commissioner, finding respondent’s exceptions unpersuasive under the particular circumstances existing in this case, concurs with the Administrative Law Judge’s (ALJ) determination, for the reasons clearly presented in his Initial Decision, that the Department erred in disallowing the cost at issue in this matter. The certification offered by petitioner establishes that the field trip advanced the goal of implementing petitioner’s behavior modification program and afforded a learning experience for the students. As noted by the ALJ, respondent offered no countervailing affidavit or certification.

Accordingly, the recommended decision of the OAL is adopted. It is hereby directed that the sum of \$1,739 is appropriately included in setting the tuition rate that the Bergen Center for Child Development, Inc. charges to its sending public school districts.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/14/05

Date of Mailing: 10/17/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1807-05

AGENCY DKT. NO. 358-10/04

**BERGEN CENTER FOR CHILD
DEVELOPMENT, INC.,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT
OF EDUCATION, OFFICE OF
COMPLIANCE INVESTIGATION,**

Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Melanie M. Brooks, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: July 12, 2005

Decided: August 31, 2005

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal brought by the Bergen Center for Child Development, Inc. ("BCCD"), an approved private school for the disabled, from the disallowance of certain

costs in its final approved tuition rate for the 2002-03 fiscal year ("FY 2003"). Pursuant to *N.J.S.A. 18A:46-14-21*, private schools for the disabled receiving students from public school districts may not charge a tuition rate that exceeds the actual cost per student as determined under rules prescribed by the Commissioner of Education ("Commissioner") and approved by the State Board of Education.

Auditors from the New Jersey Department of Education ("Department") excluded the amount of \$1,739 incurred for an event involving 109 luncheon guests at the Colonial Inn. In their written findings, the auditors disallowed the cost on three separate grounds: first, that it constitutes "an ordinary living expense for a student that is not normally assumed by the parents of a student" and, therefore, non-allowable under *N.J.A.C. 6A:23-4.5(a)(30)*;¹ second, that BCCD has failed to show that the cost is "consistent with the individualized education programs (IEP) of a disabled student," as required by *N.J.A.C. 6A:23-4.2(a)(1)*;² and, third, that the cost is unreasonable within the meaning of *N.J.A.C. 6A:23-4.2(a)(1)*, which limits allowable expenses to those that are "ordinary and necessary and not in excess of the cost which would be incurred by an ordinary prudent person in administration of public funds."³

BCCD describes the event as a "field trip" or "group activity" designed to promote social skills and as a reward for successful students under the school's behavior modification program. Originally, BCCD had characterized the event as a school "prom," but now contends that such label is a misnomer. Despite its misleading name, BCCD explains that the activity is not an after-school dance. Since the activity allegedly advances legitimate instructional goals and objectives, BCCD maintains that the Department acted arbitrarily, capriciously and unreasonably by failing to include the cost in the approved tuition rate.

¹ OCI erroneously cited this regulation as *N.J.A.C. 6A:23-4.4(a)(3)*. The correct citation for the pertinent regulation during FY 2003 was *N.J.A.C. 6A:23-4.5(a)(30)* (1996). Effective August 16, 2004, this regulatory section was amended and recodified. 36 *N.J.R.* 1313(a), 36 *N.J.R.* 3895(a). Identical language is still found at *N.J.A.C. 6A:23-4.5(a)(30)* (2004).

² This section is recodified in the current regulations as *N.J.A.C. 6A:23-4.2(a)(ii)* (2004).

³ This section is recodified as *N.J.A.C. 6:23-4.2(a)(iv)* (2004).

Procedural History

By letter, dated March 10, 2004, the Department notified BCCD that it had completed a fiscal monitoring of petitioner's budget for FY 2003 and had approved all but \$1,739 of its \$2.2 million request.⁴ On or about May 13, 2004, BCCD filed an appeal with the Department's Office of Compliance Investigation setting forth in detail the reasons for its disagreement with the disallowance. Thereafter, on June 24, 2004, the Office of Compliance Investigation reviewed BCCD's submissions and upheld its earlier determination. On or about July 7, 2004, BCCD filed a second-level appeal to the Department's Chief of Staff. A week later, on July 14, 2004, the Chief of Staff issued a letter of denial. Consequently, on October 8, 2005, BCCD filed an appeal to the Commissioner of Education ("Commissioner"). The Department filed an answer on November 4, 2005.

On November 5, 2005, the Commissioner requested that the parties submit cross-motions for summary decision. The Department filed a motion for summary decision, together with supporting brief and exhibits, on December 10, 2004. BCCD filed a motion for summary decision, together with supporting brief and certification, on December 13, 2004. On December 30, 2004, the Department filed a reply brief. Subsequently, on February 16, 2005, the Commissioner transmitted the matter to the Office of Administrative Law for ruling on the motions. The OAL heard oral argument by telephone conference on July 12, 2005.

Findings of Fact

All of the material facts are derived from financial and other official records maintained by BCCD and subject to inspection by the Department during its fiscal monitoring. **I FIND** the following facts to be undisputed:

⁴ The auditors also recommended that BCCD exclude similar items for the following fiscal year should the same type of costs be incurred.

Bergen Center for Child Development, Inc. is a nonprofit private school for the disabled organized under the laws of New Jersey and located in Haworth, New Jersey. BCCD has been approved by the Department to provide special education programs to public school children.⁵ Most of BCCD's students come from low income households. Ninety percent of its student population qualifies for the free or reduced lunch program. Because of their economic hardship, BCCD infers that the majority of its students cannot afford to participate "in many outside community experiences that are crucial to developing appropriate social behaviors and community awareness."

More than 100 participants attended the school-sponsored event held at the Colonial Inn on May 23, 2003. BCCD expended \$16.50 per person for use of the facility and a multi-course meal. Unlike the typical school prom, the event was not held at night, the students did not bring dates, and participation was not limited to a single grade or class. Staff-to-student ratio at the event was one staff member to every two students, consistent with a regular day of instruction at BCC. School administration had directed staff members in attendance "to carry out each student's instructional goals" and "to discharge their regular instructional duties and responsibilities." The record does not reflect whether any formal academic instruction occurred and, if so, what subjects were taught to such a large group comprised of students of different ages and abilities.

Instead, BCCD promoted the activity as an opportunity for students to practice social skills, improve their ability to communicate and learn proper behavior outside of the school setting. Students had to demonstrate appropriate behavior at school in order to earn enough tokens to attend the event.⁶ As such, the event was said to be "an integral part of the token economy plan of behavior modification in effect at BCCD."

⁵ The Department's website lists BCCD as a private school approved for classified children with behavioral disabilities, moderate cognitive impairment or multiple disabilities. <http://www.nj.gov/njded/specialed/instate/>

⁶ Those students who did not qualify for the reward were assigned to "an alternative in-school education day."

In support of its contention that the event is consistent with each student's IEP, BCCD relies on the social and life skill goals incorporated "in every student's Annual Instruction Guide (AIG)."⁷ Among other desirable outcomes, these goals include: helping children recognize the importance of applying what they learn in school to real life situations, understanding stressful situations and ways to cope with stress, becoming aware of the difference between appropriate and inappropriate behaviors, and demonstrating the importance of good manners for the development of positive relationships with others. Furthermore, BCCD refers to various skill sets taught as part of its regular curriculum, such as etiquette and table manners, proper grooming and hygiene, social interaction, public speaking and learning how to dance. Significantly, the Department has failed to introduce any countervailing evidence to rebut BCCD's showing that the activity is fully consistent with the contents of the students' IEPs.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Department misapplied the controlling regulations in disallowing the cost in question.

The Legislature has expressed concern for the quality of education for handicapped pupils as well as its overall cost to the public. *Council of Private Schools for Children With Special Needs, Inc. v. Cooperman*, 205 N.J. Super. 544 (App. Div. 1985). A private school receiving pupils from a local public school district may not charge the local board tuition that exceeds "the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." N.J.S.A. 18A:46-21. *Council of Private Schools, supra*. Pursuant to this statutory grant of rule-making power, the Commissioner, with the approval of the State Board, has promulgated regulations governing the maximum tuition rates that may be

⁷ An individualized education program means written plan developed jointly by the parents and school staff "which sets forth present level of performance, measurable annual goals and short-term objectives or benchmarks and describes an integrated sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives." N.J.A.C. 6A:14-1.3.

charged by private schools for the handicapped. *N.J.A.C.* 6A:23-1.1 to -4.6.

N.J.A.C. 6A:23-4.5(a)(30) (1996) prohibits a private school from passing along to the sending public districts “an ordinary living expense for a student that is normally assumed by the parent of a student attending a public day school.” Uncontradicted proofs establish, however, that the event was not a school “prom” in any traditional sense, but more in the nature of a “field trip” outside the school. The event held by BCCD satisfies the literal definition of a “field trip” as “a journey by a group of pupils, away from the school premises, under the supervision of a teacher.” *N.J.S.A.* 18A:36-22. Educators recognize that field trips “are a regular part of a District’s program and are designed to help familiarize the students with their community and foster their independence.” *Clifton Bd. of Educ. v. D.C.*, OAL Dkt. No. EDS 19771-97, 1998 *N.J. AGEN LEXIS* 345 (May 1998). Teachers may be assigned to supervise educational trips which are properly part of the curriculum. *Parrish v. Moss*, 200 *Misc.* 375, 106 *N.Y.S.2d* 577 (Sup. Ct. 1951), *aff’d without opinion*, 270 *App. Div.* 608, 107 *N.Y.S.2d* 580 (App. Div. 1951).

Although public boards of education are legally authorized to impose all or part of the costs of a field trip on the pupils’ parents or legal guardians, an express exception exists for “pupils in special education classes and pupils with financial hardship.” *N.J.S.A.* 18A:36-21. In determining financial hardship, the criteria shall be the same as the statewide eligibility standards for free and reduced price meals under the state school lunch program. *Id.*⁸ Consequently, the cost of this field trip would not be normally assumed by the parent of a student who attends public day school. All of the students at BCCD are in special education and, therefore, exempt on that basis alone. Ninety percent of the students at BCDD receive free or reduced price school lunches and are entitled to attend field trips free of charge.

⁸ Regardless of whether or not a student can meet these criteria for financial hardship, “no student shall be prohibited from attending a field trip due to inability to pay the fee.” *N.J.S.A.* 18A:36-23.

Next, consideration must be given to whether the cost is “consistent with the students’ individualized education program” as mandated by *N.J.A.C. 6A:23-4.2(a)(1)* BCCD’s director has represented in his sworn certification that the field trip is “consistent with the objectives of the IEP that address the need for social and life skills as well as personal growth and development.” Documents attached to the certification, including annual instructional goals and various curricular materials, substantiate that the teaching of appropriate behavior in social situations is an essential element of each child’s program in this specialized school for children with behavioral disabilities. For its part, the Department has not offered any evidence suggesting otherwise. Absent the production of opposing evidence that creates a genuine issue of material fact, summary decision must be entered in favor of BCCD on this issue. *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995); *Contini v. Board of Educ.*, 286 N.J. Super. 106 (App. Div. 1995).

Finally, the question arises whether the cost is “ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds” as provided by *N.J.A.C. 6A:23-4.2(a)(1)* (1996). This particular requirement is more subjective than the others, due to the difficulty of articulating a bright line test for separating reasonable from unreasonable expenses. Few would seriously argue that a sending public district must pay for a trip to Madrid by the Spanish class or front row seats at a top Broadway show for a theater class, although certainly such costs could be justified as serving a legitimate educational purpose. Nonetheless, the Department concedes that the cost of \$16.50 per person for a field trip is not inherently excessive and makes no showing that it is unusual or extraordinary. In its reply brief, “the Department does not take issue with whether the amount of money is reasonable, but with whether the event itself was a reasonable expenditure of funds toward special education.” Framed in this way, the inquiry becomes whether the field trip advanced the goal of implementing BCCD’s behavior modification program and afforded a learning experience for the students. Since the undisputed facts clearly establish the educational value of the field trip, the sending districts must bear their fair share of its cost.

Order

It is **ORDERED** that the sum of \$1,739 be included in setting the tuition rate that BCCD charges to sending public school districts.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 31, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

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

8/31/05
DATE

Mailed to Parties: Leanne Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 1 2005
DATE
sej

OFFICE OF ADMINISTRATIVE LAW

374-05

D.L. and Z.Y. on behalf of minor children

T.L. and K.L.,

PETITIONERS,

V.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF PRINCETON
REGIONAL SCHOOL DISTRICT

DECISION

RESPONDENT.

SYNOPSIS

Petitioners originally filed a *pro se* Residency Appeal in 2001 challenging the respondent's determination that their children, T.L. and K.L., had lived in West Windsor from January 2000 until April 2001, and therefore owed tuition to Princeton Regional Schools for the period of their ineligible attendance. Petitioners ultimately appealed to the Superior Court, Appellate Division, where it was determined that, despite owning property in both Princeton and West Windsor for a period of time, petitioners' intent during the period at issue was to sell the West Windsor property and establish a permanent home in Princeton. The Appellate Division remanded the matter for the purpose of determining the amount of tuition owed, if any, to the Princeton Regional School District for the period during which the petitioners' children were enrolled between January 3 and February 29, 2000, the date on which petitioners' closed on the purchase of a home in Princeton. A remand hearing was scheduled for August 4, 2005, and notice was mailed to a former address of petitioners. Petitioners failed to appear at the hearing, and aver that they were not properly notified.

At the scheduled hearing, respondent presented *ex parte* proofs to establish a *per diem* tuition cost of \$56.59 for the 1999-2000 school year; the number of days that school was in session during the period in question was estimated at 37. Based on this information, and the fact that there was no opposition to the certification, the ALJ concluded that petitioners owe respondent \$4,187.66 as prorated tuition for T.L. and K.L. for the period from January 3 to February 29, 2000 when they were attending school in Princeton Regional School District while not domiciled there.

Upon review of the record and the initial decision of the ALJ, the Commissioner remands the matter to the OAL for a hearing to determine whether petitioners owe respondent tuition and, if so, how much is due. In so deciding, the Commissioner finds that although petitioners had properly advised the OAL of their change of address, the OAL sent the hearing notice to an address that was a year out of date, preventing petitioners from their right to appear and be heard. The Commissioner further notes that a hearing is necessary in light of the existence of School Policy #5118 (Admission of Non-Resident Students), which allows the waiver of tuition charges for up to sixty days where families intend to move into the district but are temporarily prevented from doing so due to reasons beyond their control.

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 17, 2005

OAL DKT NO. EDU 6015-04
AGENCY DKT. NO. 335-8/01

D.L. and Z.Y. on behalf of minor children	:	
T.L. and K.L.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF PRINCETON	:	DECISION
REGIONAL SCHOOL DISTRICT	:	
	:	
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions have been independently reviewed. Upon such review the Commissioner is constrained to remand the matter to the OAL.

Petitioners lived in Princeton from March 1995 to June 1998, during which time their children attended Princeton district schools. They moved to West Windsor in 1998 and the two children consequently attended West Windsor schools during the 1998-1999 school year. In November 1999, petitioners listed their West Windsor house for sale and in December 1999, they contracted to purchase a condominium in Princeton. They returned the children to Princeton Schools on January 3, 2000, and closed on the Princeton condominium on February 29, 2000. Because the West Windsor home was on the market for a long time, the family spent time in both homes for the next year and a half, until the West Windsor house was sold.

In March of 2001, upon the report of a guidance counselor, a Princeton attendance officer conducted a residence investigation and observed the children and mother

leaving the West Windsor house a few times in the mornings to drive to school in Princeton. Petitioners conceded that they spent time in both homes. They believed that a lived-in home (i.e., the one in West Windsor) would sell faster, and they were, further, redecorating to attract buyers. In addition, petitioners explained that their parents had been visiting from China and staying in the West Windsor home. Nonetheless, on April 4, 2001, respondent notified petitioners that their children were not legal residents of Princeton and would have to be removed from the district schools by April 9, 2001. The notice further advised that tuition would be due for past “illegal” attendance.

On July 24, 2001, petitioners closed on another house in Princeton, at B. Lane, and on August 10, 2001 they moved in. Respondent sent petitioners a letter on August 1, 2001 that the Princeton Board of Education determined after a hearing that petitioners’ children had lived in West Windsor from January 2000 through April 6, 2001, and owed tuition. Petitioners appealed to the Commissioner of Education on August 22, 2001.

Petitioners pursued their administrative remedies and ultimately appealed to Superior Court, Appellate Division. The Appellate Division determined that the evidence supported petitioners’ position that, although they owned property in both Princeton and West Windsor for a period of time, their intent during the period at issue was always to sell the West Windsor property and establish a permanent home in Princeton. Accordingly, the Appellate Division remanded the matter for the specific purpose of determining “the amount of tuition owed, *if any*, to the Princeton Regional School District for the period of time the children were enrolled in the district from January 2000 until February 29, 2000, when petitioners closed on the purchase of the Princeton [condominium] home” (emphasis added).

The case was remanded back down the chain to the OAL. A notice for an August 5, 2004 pre-hearing conference was sent out on July 26, 2004. Petitioners wrote to the administrative law judge (ALJ) on July 30, 2004 requesting an adjournment because of a business trip, notifying him that petitioners' address had changed, and asking that all future communications be sent to the new address: H. Drive, Princeton, NJ 08540. Nonetheless, the OAL's notice for the remand hearing, which was set for August 4, 2005, was sent out on July 18, 2000, to B. Lane, where petitioners apparently had not resided for over a year.

Not surprisingly, petitioner did not attend the August 4, 2005, hearing. Respondent presented *ex parte* proofs to establish a *per diem* tuition fee to be multiplied by 37 days for two students. The ALJ found that petitioners owed respondent \$4187.66, and ordered petitioners to pay.

In their exceptions, petitioners argue: 1) that they were not properly notified about the August 4, 2005, hearing; and 2) that charging them tuition for January 3 through February 29, 2000 would be contrary to respondent's School Policy # 5118, Admission of Nonresident Students, which allows the waiver of tuition charges for up to sixty days where families intend to move into the district but are temporarily prevented from doing so due to reasons beyond their control. As to petitioner's first argument, respondent contends in its reply exceptions that because petitioners received a conference notice a year before the hearing, and were able to acquire a copy of the ALJ's September 2, 2005, Initial Decision on Remand, the Commissioner should assume that petitioners received notice of the August 4, 2005 hearing. As to petitioners' second argument, respondent maintains: 1) that petitioners are precluded from making the argument now because they did not make it at the hearing or at any other time during the proceedings in this matter; 2) that School Policy #5118 is permissive, and does not mandate a

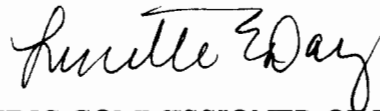
waiver for petitioners; and 3) that petitioners did not follow the procedure for requesting a tuition waiver.

The Commissioner need not reach to the merits of the issues raised about Princeton School Policy #5118, because she finds that petitioners did not receive proper notice of the August 4, 2005 hearing. Petitioners properly advised the OAL of their change of address, but the OAL sent the hearing notice to an address that was a year out of date, preventing petitioners from their right to appear and be heard.

Further, the Appellate Division remanded for a finding as to the amount of tuition, if any, that petitioners might owe to respondent. An examination of School Policy #5118, the history of its application, and any facts about the petitioners' circumstances that might be pertinent to the policy, are clearly relevant to an ultimate determination about whether and/or how much tuition is due.

Accordingly, the Commissioner finds that petitioners are entitled to a hearing to determine whether they owe respondent tuition and, if so, how much is due. The Commissioner hereby remands the matter to the OAL for that purpose.

IT IS SO ORDERED*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/17/05

Date of Mailing: 10/18/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6015-04

AGENCY REF. NO. 335-8/01

D.L. and Z.Y., o/b/o K.L.,

Petitioners,

v.

**BOARD OF EDUCATION OF
PRINCETON REGIONAL
SCHOOL DISTRICT,**

Respondent.

No appearance by D.L. or Z.Y.

Steven M. Fleischer, Esq., appeared for respondent (Sills, Cummins, Epstein & Gross,
P.C., attorneys)

Record Closed: August 4, 2005

Decided: September 2, 2005

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

This matter originated as a *pro se* Residency Appeal filed by D.L. and Z.Y., parents of T.L. and K.L., of the decision by respondent ("Princeton") that D.L. and Z.Y. owned Princeton \$27,292.38 for tuition for the period when T.L. and K.L. attended school in the Princeton School District but were not domiciled within the said district. The decision by the State Board of Education affirming the decision of the Commissioner of Education affirming the action of Princeton was appealed to the Appellate Division of Superior Court of New Jersey. The

Appellate Division reversed the determination of the State Board of Education and remanded the matter "for a determination of the amount of tuition owed, if any, to the Princeton Regional High School District for the period of time the children were enrolled in the district from January 2000 until February 29, 2000, when petitioners closed on the purchase of the Princeton home."

The matter was eventually transmitted back to the Office of Administrative law for further consideration consistent with the decision of the State Board of Education to conduct such proceedings as may be required to fulfill the terms of the Appellate Division decision. A prehearing conference was scheduled for August 5, 2004 but was adjourned at petitioners' request because they would be on a business trip. The hearing was scheduled for August 4, 2005 at 2 p.m. at the Office of Administrative Law, Mercerville, New Jersey. On that date, time and place counsel for respondent appeared, but neither respondent appeared, nor did anyone telephone or otherwise communicate with the Office of Administrative Law to explain petitioners' non-appearance. Counsel for respondent was granted leave to present *ex parte* proofs, as permitted at *N.J.A.C. 1:1-14.4 (c)*, to establish the per diem tuition for Princeton schools in January and February 2000.

The Certification of Judy A. Wilson, Superintendent of Schools for the Princeton Regional School District, (Exhibit R-1) affirms that the tuition rate for the 1999-2000 school year was \$56.59 per day. Wilson further estimated that school was in session for 37 days during the 8 week period between January 3, 2000 and February 29, 2000, and concludes that the tuition calculated by multiplying \$56.59 x 37 days x 2 children was \$4187.66. Note should be taken that the information concerning tuition was developed during the March 21, 2002 hearing and was not contested by the petitioners.

There being no opposition to the certification, and the calculations being accurate, I Find as a Fact that the tuition rate of Princeton School District for the 1999-2000 school year was \$56.59 per day and there were 37 school days between January 3 and February 29, 2000. I therefore **CONCLUDE** that petitioners owe respondent \$2093.83 for each of their 2 children enrolled in the Princeton school between January 2 and February 29, 2000.

ORDER

Accordingly, it is **ORDERED** that petitioners reimburse respondent in the amount of \$4187.66 as the prorated tuition due between January 3, 2000 and February 29, 2000 for T.L. and K.L. attending school in Princeton Regional High School District while not domiciled therein.

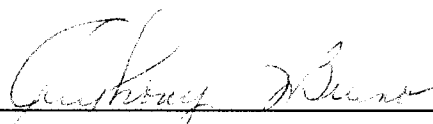
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 2, 2005

DATE



ANTHONY T. BRUNO, ALJ

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

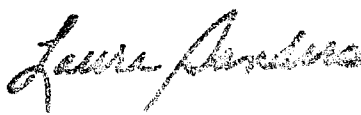
September 2, 2005

DATE

SEP - 7 2005

DATE

Mailed to Parties:



OFFICE OF ADMINISTRATIVE LAW

/tmp

BOARD OF EDUCATION OF THE	:	
TOWN OF <u>NEWTON</u> , SUSSEX COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
	:	
NEW JERSEY STATE DEPARTMENT	:	
OF EDUCATION,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Newton Board of Education appealed Department's determination that the Board was responsible for the 1998-99 and 1999-2000 educational costs of a State-placed student pursuant to *N.J.S.A.* 18A:7B-12. The State had become the student's legal guardian in January 1996.

The ALJ addressed the matter in two separate decisions, one an Order dealing with the 1998-99 school year and the other an Initial Decision incorporating the Order by reference and dealing with the 1999-2000 school year. For 1998-99, the ALJ found that, on the determinative date for fixing the parents' residency for purposes of local district fiscal responsibility, the parents actually resided in Frankford Township. For 1999-2000, the ALJ found that a newly promulgated rule pertaining to students for whom the State was legal guardian—adopted by the State Board of Education in July 2004—applied retroactively, so that, pursuant to this rule, the State as legal guardian was responsible for the student's 1999-2000 educational costs.

The Commissioner adopted the ALJ's determination that Newton was not responsible for the student's educational costs in either of the years at issue, but modified the ALJ's analysis to hold that the State was responsible for both years in light of the deference to be accorded to the State Board's now-established interpretation of a previously ambiguous aspect of *N.J.S.A.* 18A:7B-12 and its implementing rules.

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 21, 2005

OAL DKT. NO. EDU 7399-00
 AGENCY DKT. NO. 221-6/00

RECORD SEALED

BOARD OF EDUCATION OF THE	:	
TOWN OF NEWTON, SUSSEX COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
	:	
NEW JERSEY STATE DEPARTMENT	:	
OF EDUCATION,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), incorporating a Partial Summary Decision issued on July 28, 2004, but not submitted for final agency decision at that time, have been reviewed. The Department of Education (Department) filed exceptions addressing both decisions, and the Newton Board of Education (Newton) duly replied.

In its exceptions, the Department objects, without elaboration, to the Administrative Law Judge's (ALJ) "seemingly inconsistent use of the applicable regulations, i.e., the former *N.J.A.C.* 6A:23-5.2 and the current *N.J.A.C.* 6A:23-5.2, to reach irreconcilable conclusions." (Respondent's Exceptions at 2)

In reply, Newton references its prior submissions and contends that the ALJ's two decisions—one addressing 1998-99 and the other 1999-2000—together provide a "cohesive resolution" to the underlying appeal. In response to the Department's claim of inconsistency, the district counters that the two decisions are entirely consistent, and it additionally points to the ALJ's statement that the outcome of

the second decision—made subsequent to amendment of *N.J.A.C.* 6A:23-5.2—would have been the same regardless of which version of the rule was applied. Accordingly, Newton urges, the Commissioner should adopt the ALJ’s decisions and issue an order directing the Department to restore all funds withheld for B.S.’s tuition for the 1998-99 and 1999-2000 school years, together with interest, costs and fees. (Petitioner’s Reply Exceptions at 2-4, quotation at 2)

Upon review, the Commissioner adopts the ALJ’s ultimate determination that Newton is not responsible for B.S.’s educational costs for the years at issue, but modifies the ALJ’s reasoning as follows.

Initially, the Commissioner notes that during proceedings at the OAL, this matter was argued largely as a dispute concerning the point at which the residency of B.S.’s parent or guardian should be fixed for purposes of identifying the school district responsible for B.S.’s educational costs. Simply stated, under this framing of the issue, if the determinate date were the point immediately prior to B.S.’s first admission to Devereux-Deerhaven¹ as a resident student (October 21, 1995), as contended by Newton, then the district where B.S.’s parents then resided (Frankford Township) should be responsible for costs; alternatively, if it were the point prior to B.S.’s first placement of any kind by the Division of Youth and Family Services (DYFS), as contended by the Department, then Newton would be the responsible district.

However, as became apparent by the time the OAL proceedings were reaching closure, the parties’ dispute more accurately turns on the question of how

¹ Although the school’s name is given at various places in the record and Initial Decision as “Devereaux-Deerhaven,” the Commissioner uses the spelling found in DYFS records, e.g. Exhibit H, Petitioner’s December 18, 2003 Motion for Summary Judgment (DYFS Placement Report).

N.J.S.A. 18A:7B-12 is to be applied in instances where the State has become the legal guardian of a covered student, as it did for B.S. in January 1996.

N.J.S.A. 18A:7B-12 provides in pertinent part, as substantially unchanged from the law's enactment in 1979 (P.L. 1979, c. 207):²

For school funding purposes, the Commissioner of Education shall determine district of residence as follows:

a. The district of residence for children in resource family homes shall be the district in which the resource family parents reside. If a child in a resource family home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such resource family placement had occurred.

b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child.***

During all times at issue herein, *N.J.A.C.* 6A:23-5.2, the rule promulgated to implement this statute, read in pertinent part as follows:

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A.* 18A:7F-3 and referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.

2. The "present district of residence" of a child placed by a State

² P.L. 2004, c.130, s.39, changed the term "foster" to "resource family" throughout *N.J.S.A.* 18A:7B-12.

agency in a group home, skill development home, private school or out-of-State facility also referred to in the first paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above. The "district of residence" referred to in the second paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.

(b) The "present district of residence" or "district of residence" referred to in *N.J.S.A. 18A:7B-12b* shall be determined by the Commissioner or his or her designee based upon the address submitted by the Department of Corrections, the Department of Human Services or the Juvenile Justice Commission on forms prepared by the Department of Education.

B.S. was placed in Devereux-Deerhaven as a residential student on October 21, 1995; she remained in this placement until November 6, 1998. At that point, she was consecutively placed in two foster homes, but neither placement proved successful. On January 26, 1999, B.S. was once again placed as a resident student in Devereux-Deerhaven, where she remained for the balance of the period at issue herein.

Thus, under the statutory-regulatory scheme set forth above, responsibility for B.S.'s educational costs would have been fixed on dates when the State was undisputedly the student's legal guardian: For 1998-99, the determinative date would have been the last school day prior to October 16, 1998, since 1998-99 was a "subsequent school year" in the same educational placement, pursuant to the second sentence of *N.J.A.C. 6A:23-5.2(a)2*. For 1999-2000, it would have been October 16, 1999, since B.S. was at Devereux-Deerhaven at all times subsequent to October 21, 1995—other than the period between November 6, 1998 and January 26, 1999, when she was in foster homes—and *N.J.S.A. 18A:7B-12a* provides that residency determinations for placements

made *subsequent* to placement in a foster home shall be made as if the foster placement(s) had not occurred.

The Department, in applying the above-quoted law to B.S., interpreted her status as a ward of the State to mean that her guardian's "district of residence" could not be determined pursuant to the first paragraph of *N.J.S.A. 18A:7B-12b*; thus, in the Department's reading, the second paragraph of that section would apply instead, so that the district where B.S. resided with her parents immediately prior to her initial placement by DYFS (Newton) would be responsible for her educational costs.

Given the ambiguity of the then-existing legal framework with respect to the effect of State legal guardianship on determining the district of residence pursuant to *N.J.S.A. 18A:7B-12*, the Commissioner finds the Department's approach—seeking to the greatest extent possible to assign fiscal responsibility for a State-placed student to a local school district based upon the residence of the student's parent or guardian—to have been a reasonable and lawful attempt to fulfill the statute's intent of consistency with the general principles of New Jersey school funding.³ Indeed, had this matter come to the agency for final decision prior to July 2004, the Commissioner might well have sustained the Department's conclusion that Newton was the district responsible for the years in question.

However, the fact remains that the State Board of Education has now enacted a specific regulation interpreting *N.J.S.A. 18A:7B-12* with respect to the central question in this matter. On July 7, 2004, the State Board adopted amendments to the above-referenced rule "to clarify and ensure the determination of financial responsibility

³ See legislative history, P.L. 1979, c. 207.

based on district of residency,”⁴ so that, as amended effective August 16, 2004, *N.J.A.C.* 6A:23-5.2 now reads in pertinent part as follows (changes in italics *thus*):

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A.* 18A:7F-3 and referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.

2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, private school or out-of-State facility also referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above. The "district of residence" referred to in the second paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence in which the child resided [*with his or her parent or guardian*] immediately prior to his or her [*initial*] most recent admission to a State facility or most recent placement by a State agency.

3. If the State becomes the child's legal guardian after the date of the child's initial placement by a State agency, the State will assume financial responsibility for the child's educational costs in subsequent school years.

(b) The "present district of residence" or "district of residence" referred to in *N.J.S.A.* 18A:7B-12b shall be determined by the Commissioner or his or her designee based upon the address submitted by the Department of Corrections, the Department of Human Services or the Juvenile Justice Commission on forms prepared by the Department of Education.

Rules and regulations promulgated by the State Board of Education—as head of the Department of Education pursuant to *N.J.S.A.* 18A:4-1 and the body empowered to implement the school laws of the State, *N.J.S.A.* 18A:4-15—are to be accorded great deference in interpreting statutes under the agency's jurisdiction.

⁴ See 36 N.J.R. 1313(a), 1316; adopted 36 N.J.R. 3895(a).

St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1; *Nelson v. Board of Educ.*, 148 N.J. 358, 364 (N.J. 1997); *GE Solid State, Inc. v. Director, Div. of Taxation*, 132 N.J. 298, 306, 625 A.2d 468 (1993); *Merin v. Maglaki*, 126 N.J. 430, 436-37, 599 A.2d 1256 (1992). Given that the State Board of Education has—by adopting a clarifying rule precisely on point—now acted to interpret *N.J.S.A. 18A:7B-12* clearly and unequivocally with respect to the effect of State guardianship⁵ on district of residency determinations, the Commissioner is guided by the State Board's reading of the statute. Consequently, the Commissioner finds that, because the State undisputedly became B.S.'s legal guardian by virtue of the January 17, 1996 court order⁶ issued pursuant to *N.J.S.A. 30:4C-15 et seq.* (Exhibit B, Petitioner's January 2005 Motion for Partial Summary Decision on Remaining Issues), responsibility for her 1998-99 and 1999-2000 educational costs pursuant to *N.J.S.A. 18A:7B-12* are properly found to lie with the State.

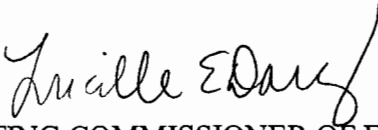
Accordingly, the Initial Decision of the OAL, as expanded and modified herein, is adopted as the final decision in this matter. Newton's motion for summary decision is granted with respect to both years at issue, and the Department is directed to restore all funds withheld from the district as payment for B.S.'s tuition for the 1998-99 and 1999-2000 school years. However, the Commissioner rejects Newton's request for prejudgment interest as without support in the record, *N.J.A.C. 6A:3-1.17*, and its request for costs and attorney fees as contrary to the well-established principle that the Commissioner may not direct such compensation in the absence of express statutory

⁵ The Commissioner stresses that the referenced rule addresses State *legal guardianship* of a student, as distinct from State *custody*. (See *N.J.A.C. 6A:23-5.3*)

⁶ At various places in the record and Initial Decision, the date of State assumption of B.S.'s guardianship is given as January 16, 1996 and January 17, 1995; the date of the actual court order is January 17, 1996. The Commissioner also notes that this order is erroneously referenced, in the ALJ's Order at 2 and Initial Decision at 3, as the instrument of effectuating B.S.'s placement into DYFS custody in 1992.

authority. *Balsley v. North Hunterdon Bd. of Educ.*, 117 N.J. 434, 441 (1990). Finally, in the interest of protecting the confidentiality of the numerous DYFS records contained in the file, the Commissioner directs that the record of this matter be sealed.

IT IS SO ORDERED.⁷


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/05

Date of Mailing: 10/21/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

**ON MOTION AND CROSS MOTION
FOR SUMMARY DECISION**

OAL DKT. NO. EDU 7399-00

AGENCY DKT. NO. 221-6/00

**BOARD OF EDUCATION TOWN OF
NEWTON, SUSSEX COUNTY,**

Petitioner,

**NEW JERSEY DEPARTMENT OF
EDUCATION, DIVISION OF FINANCE,**

Respondent.

Heidi M. G. Handley, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Patricia M. O'Neil, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General, attorneys)

Record Closed: April 22, 2005

Decided: June 7, 2005

BEFORE IRENE JONES, ALJ:

STATEMENT OF THE CASE

On June 5, 2000, the petitioner, Newton Board of Education ("Newton" or "Board") filed a verified petition with the Commissioner of Education seeking an Order reversing the determination of the respondent, New Jersey Department of Education,

Newton School District is the district of residence for B.S., and therefore, responsible for B.S.' tuition costs. Additionally, petitioner sought costs, attorney's fees and such other relief that the Commissioner deemed equitable.

On June 22, 2000, the NJDOE filed an Answer wherein it sought, *inter alia*, dismissal of the petition.

On August 10, 2000, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. After a prehearing conference, the matter was scheduled for hearing on December 11, 2001. The matter was adjourned and rescheduled on several occasions. On October 23, 2002, an Order was issued by the undersigned providing for a disclosure of certain Division of Youth and Family Service records of B.S. A June 17, 2003, an Order issued that denied Emergency Interim Relief and or a Stay which, if granted, would have enjoined the respondent from withholding \$55,000 in state aid to the Newton School District.

Thereafter the parties moved for summary judgment. On July 28, 2004, Partial Summary Decision was entered in favor of the petitioner, Newton BOE. Specifically, it was found that for the September to November portion of the 1989-1999 school year, B.S. did not reside in the district but resided in Frankford Township, the place of residence of her parents. However, Summary Decision was denied for the period beginning January 26, 1999, since no evidence was submitted concerning the parents' residence at that time.

Thereafter, the parties exchanged further discovery and motions were filed on the subsequent time period. This decision addresses that subsequent time frame, commencing on January 26, 1999.

FACTS

Based on the record, I **FIND** the following **FACTS**:

On or about August 26, 1992, the Division of Youth and Family Services ("Division") notified the Newton Public School Child Study Team, that B.S., a 10-year-old District student, was placed in the care and custody of the Division on or about August 14, 1992. The placement was pursuant to an Order of the Superior Court on January 17, 1995.

The Division placed B.S. and a sibling in a foster home in Branchville, Sussex County, outside of the Newton School District. While in the Sussex-Wantage Regional School District, B.S. was assessed by their child study team. She was classified as emotionally disturbed (ED) and was placed at the Durand Academy. In October 1995, B.S. was placed at Devereaux Deerhaven (Devereaux) Chester, N.J. Devereaux is a residential facility that treats emotionally disturbed and sexually abused adolescents. B.S.' parents continued to reside in Newton, N.J. On November 10, 1992, the NJDOE determined B.S.'s district of residence to be Newton, N.J. where B.S.'s parents resided. B.S. attended Devereaux from October 21, 1995 until November 6, 1998. Thereafter, B.S. was placed in two separate foster homes. On January 26, 1999, B.S. was again placed in Devereaux.¹ DYFS was awarded guardianship of B.S. on January 17, 1996²

On November 1, 1996, the NJDOE sent a letter to the Frankford Township Board of Education notifying it that it was the responsible school district for B.S., as her parents' residence "lies within the boundaries of the Frankford Township School District." Therefore, a determination was made that the responsible district for B.S.'s tuition costs was Frankford Township.

On March 18, 1999, the NJDOE again determined that B.S.'s district of residence as the Newton School District pursuant to *N.J.S.A. 18A:7B-12(b)*. The letter from the NJDOE provided:

¹ Newton is only seeking reimbursement of budgetary funds withheld through the 1999-2000 school year.

² The NJDOE letter to the Frankford Township Board of Education states that the parents' residence is in "Frankford Township School District. However, the street address is listed as Newton, in portions of the record. The actual school district was the Frankford School District. It is argued that Newton is listed as the street address because that is the post office location for residents of the Frankford School District.

The Department of Human Services has asked my office to determine the district of residence for [B.S.], a child who was placed by DYFS with Devereaux-Deerhaven . . . on January 27, 1999.

The specific facts in this case are as follows:

1. The child has been a ward of the state since January 17, 1996, but the state was not legal guardian at the time of initial placement by DYFS with the Teaching Family Home of [redacted]³ Therefore, we must refer to the second criteria in our determination, which is the address of parent or guardian as of the date of initial placement. . .
2. Parent(s) [were residents at [redacted information] as of the date of initial placement on August 19, 1994.⁴ (Exhibit K)

LEGAL ARGUMENT

The NJDOE argues that this initial placement in 1993 is the date that should be utilized when determining the responsible district of residence and at that time the parents' address was in Newton, New Jersey. Petitioner contends that on October 21, 1995, the initial date of admission to Devereaux-Deerhaven, B.S.'s parents' residency was in Frankford Township, and that is the date that should be used for determination of the responsible district of residence.

FINDINGS, DISCUSSION AND CONCLUSIONS

Under the New Jersey Uniform Procedure Rules, a party may move for summary decision upon all or any of the substantive issues in a case. *N.J.A.C. 1:1-12.5(b)*. When considering this motion, the Administrative Law Judge may make a ruling in favor

³ The information is redacted because it is confidential pursuant to *N.J.S.A. 9:6-8.10(a)*.

of the motion when the papers filed along with any supporting affidavits show that no genuine issue as to any material fact exists and that the moving party is entitled to a decision as a matter of law. *Ibid.*

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for summary judgment if:

The pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

[R. 4:46-2(c).]

The Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 523 (1995), provided further guidance for the summary decision analysis: “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. Thus, a court should deny a summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. *Id.* at 529. I **FIND** that the instant matter is appropriate, in part, for summary disposition.

As noted, I have previously determined that the Frankford School District was the responsible party for B.S.’ tuition costs for October 21, 1995 to November 6, 1998. One month after my decision, the controlling regulation, N.J.A.C. 6A:23-5.2 was amended. It provides in its pertinent part that:

If the State becomes the child’s legal guardian after the date of the child’s initial placement by a State agency, the State

⁴ The actual date of initial placement was August 19, 1993, not 1994, since 1993 is the year used by the NJDOE in its brief and in Newton’s reply letter, dated August 4, 1999 (Exhibit L) and is the date listed in Exhibit H, which is a DYFS placement report.

will assume financial responsibility for the child's educational costs in subsequent school years.

[N.J.A.C. 6A:23-5.2(a)(3).]

Consequently, petitioner argues that, pursuant to the "time of decision" rule, the regulation as amended, should apply herein. The respondent opposes this contention and argues that the "time of decision" rule is inapplicable because this matter was not "pending" at the time the current regulation became effective. Respondent argues that this case is on appeal since June 2000, when the petitioner filed an appeal from the NJDOE's determination that it was the district of residence. Thus, it must be decided whether the previous regulation applies pursuant to the presumption against retroactivity or whether the current regulations apply pursuant to the "time of decision" rule.⁵

Courts have found current law generally applicable for administrative decision-making, when the law changes while a case is pending. *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1942); see also *Commissioner v. Peter A. Ladas*, 2004 WL 3743375 (N.J. Adm). An administrative agency must apply the law at the time of its decision, "[o]therwise the administrative body would issue orders contrary to the existing legislation." *Ziffrin, supra*, 318 U.S. at 78. An exception to the "time of decision" rule is that a current law may not be applied if it will divest a vested right a party obtained under the prior law. *Riggs v. Long Beach Tp.*, 101 N.J. 515, 521 (1986).

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the United States Supreme Court examined the distinction between the presumption against retroactivity and the "time of decision" rule. The Court found the general presumption against retroactive legislation "deeply rooted in our jurisprudence." *Id.* at 265. The Court reasoned "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Ibid.* Indeed, it has been recognized that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and

⁵ Administrative regulations are subject to the same rules of construction and constitutional standards as a statute. *State, Dept. of Health v. Tegnazian*, 205 N.J. Super. 160, 174 (1985).

universal appeal.” *Ibid.* The Court found, however, the “time of decision” rule applies when the statute either affects the propriety of prospective relief, or clearly states it is to be applied retroactively. *Id.* at 273.

The New Jersey Supreme Court described the “time of decision” rule as “a well-established principle that an appellate court on direct review will apply the statute in effect at the time of its decision, at least when the legislature intended that its modification be retroactive to pending cases.” *Kruvant v. Mayor & Council of Cedar Grove*, 82 N.J. 435, 440 (1980); *S&L Assocs., Inc. v. Washington Twp.*, 35 N.J. 224, 227 (1961); *Borough of Little Ferry v. Bergen County Sewer Auth.*, 9 N.J. 536 (1952). The purpose underlying the principle is to effectuate the current policy declared by the legislative body. *Kruvant*, *supra* 82 N.J. at 440.

Current statutes and regulations “may be retroactively applied where ‘the Legislature has expressed its intent, either explicitly or implicitly,’ that they should be so applied, ‘when the reasonable expectations of those affected by the regulations warrant such application,’ or when the regulation is ameliorative or curative.” *Seashore Ambulatory Surgery Ctr., Inc. v. State Dep’t of Health*, 288 N.J. Super. 87 (App. Div. 1996) (citing *Twiss v. State, Dep’t of Treasury*, 124 N.J. 461 (1991)). Pursuant to the ameliorative or “curative exception to prospective application, a new law is given retroactive effect ‘if it is designed merely to carry out or explain the intent of the original statute.’” *Serrano v. Gibson*, 304 N.J. Super. 314, 319 (App. Div. 1977). Stated another way, the new law’s purpose is merely to remedy a perceived imperfection in or misapplication of a statute.” *Ibid.*

In the instant matter, the New Jersey Register provides that N.J.A.C. 6A:23-5.2 was amended “to clarify and ensure the determination of financial responsibility based on district of residency.” CF: 36 N.J.R. 1313(a), 1316 (emphasis added). Section (a)(3) was added to N.J.A.C. 6A:23-5.2 to clarify and ensure the results set forth in N.J.S.A. 18A:7B-12. Therefore, I **FIND** that “time of decision” rule applies because section (a)(3) falls under the ameliorative or curative exception to prospective application because it is designed merely to carry out or explain the intent of the original

statute, *N.J.S.A. 18A:7B-12*. The agency intended *N.J.S.A. 18A:7B-12* to obtain the exact same results whether applying the previous or current version of *N.J.A.C. 6A:23-5.2*.

The next issue is the determination of B.S.'s residing during the period in issue.

Determining a child's district of residence is governed by *N.J.S.A. 18A:7B-12* which states in relevant part:

For school funding purposes, the Commissioner of Education shall determine district of residence as follows:

- b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

...

- d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child.

[*N.J.S.A. 18A:7B-12*.]

The criteria for determining a school child's district of residence is provided in *N.J.A.C. 6A:23-5.2*:

- (a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A. 18A:7F-3* and referred to in the first paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, private school or out-of-state facility also referred to in the first paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above. The "district of residence" referred to in the second paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence in which the child resided immediately prior to his or her most recent admission to a State facility or most recent placement by a State agency.
3. If the State becomes the child's legal guardian after the date of the child's initial placement by a State agency, the State will assume financial responsibility for the child's educational costs in subsequent school years.

[*N.J.A.C. 6A:23-5.2.*]

The facts in this case are clearly governed by *N.J.A.C. 6A:23-5.2(a)(3)*. I **FIND** that the State became B.S.'s legal guardian on January 16, 1996, which is after the date of B.S.'s initial placement by DYFS in Devereaux-Deerhaven in 1995. Further, the State remained B.S.'s legal guardian when she was enrolled for subsequent school years and after she left Devereaux-Deerhaven from November 6, 1998 through her re-enrollment on January 26, 1999. Therefore, pursuant to *N.J.A.C. 6A:23-5.2(a)(3)*, I **CONCLUDE** the State is financially responsible for B.S.'s educational costs for the period of January 26, 1999 through June 27, 2000.

I further **FIND** that this holding still prevails even under the previous version of *N.J.A.C. 6A:23-5.2*. I **FIND** that under the prior version, B.S. most recent placement was the January 26, 1999 placement at Devereaux-Deerhaven. Her prior placement (October 21, 1995) ended when she was discharged from the facility on November 6, 1998. Pursuant to *N.J.S.A. 18A:7B-12(b)*, the district of residence for B.S. "shall be the present district of residence of the parent or guardian with whom the child lived prior to his . . . most recent placement by a State agency." Guardianship of B.S. was awarded to the State on January 17, 1996. Therefore, the State, and neither of B.S.'s parents, was B.S.'s guardian prior to her most recent placement on January 26, 1999. *C.F. Prospect Park Bd. Of Educ. V. State of New Jersey, Dept. of Education, 97 N.J.A.R.2d (EDU) 134, affirmed in part and remanded in part, Comm.r at 140.*

CONCLUSION

Thus, for the foregoing reasons, summary decision is hereby **GRANTED** in favor of the petitioner Newton Board of Education for the placement of B.S. from January 26, 1999 to June 27, 2000 and respondent's cross motion 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/7/05
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

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

6/7/05
DATE

Mailed to Parties:

JUN 08 2005
DATE
sej

Laure Sanders
DIRECTOR A.L.J.
CHIEF ADMINISTRATIVE LAW
OFFICE OF ADMINISTRATIVE LAW



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PARTIAL
SUMMARY DECISION

OAL DKT. NO. EDU 7399-00

AGENCY DKT. NO. 221-6/00

**BOARD OF EDUCATION TOWN OF
NEWTON, SUSSEX COUNTY,**

Petitioner,

**NEW JERSEY DEPARTMENT OF
EDUCATION, DIVISION OF FINANCE,**

Respondent.

2

Allan P. Dzwilewski, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Kimberley Lake Franklin, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General, attorneys)

BEFORE **IRENE JONES, ALJ:**

STATEMENT OF THE CASE

On June 5, 2000, the petitioner, Newton Board of Education ("Newton" or "Board") filed a verified petition with the Commissioner of Education seeking an Order reversing the determination of the respondent, New Jersey Department of Education, Division of Finance, Office of School Finance ("NJDOE" or "Respondent") that the

Newton School District is the district of residence for B.S., and therefore, responsible for B.S.' tuition costs. Additionally, petitioner sought costs, attorney's fees and such other relief that the Commissioner deemed equitable.

On June 22, 2000, the NJDOE filed an Answer wherein it sought, *inter alia*, dismissal of the petition.

On August 10, 2000, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. After a prehearing conference, the matter was scheduled for hearing on December 11, 2001. The matter was adjourned and rescheduled on several occasions. On October 23, 2002, an Order was issued by the undersigned providing for a disclosure of certain Division of Youth and Family Service records of B.S. A June 17, 2003, an Order issued that denied Emergency Interim Relief and or a Stay which, if granted, would have enjoined the respondent from withholding \$55,000 in state aid to the Newton School District.

FACTS

The salient facts that give rise to the instant controversy are as follows:

On or about August 26, 1992, the Division of Youth and Family Services ("Division") notified the Newton Public School Child Study Team, that B.S., a 10-year-old District student, was placed in the care and custody of the Division on or about August 14, 1992. The placement was pursuant to an Order of the Superior Court on January 17, 1995.

The Division placed B.S. and a sibling in a foster home in Branchville, Sussex County, outside of the Newton School District. While in the Sussex-Wantage Regional School District, B.S. was assessed by their child study team. She was classified as emotionally disturbed (ED) and was placed at the Durand Academy. In October 1995, B.S. was placed at Devereaux Deerhaven (Devereaux) Chester, N.J. Devereaux is a residential facility that treats emotionally disturbed and sexually abused adolescents.

B.S.' parents continued to reside in Newton, N.J. On November 10, 1992, the NJDOE determined B.S.'s district of residence to be Newton, N.J. where B.S.'s parents resided. B.S. attended Devereaux from October 21, 1995 until November 6, 1998. Thereafter, B.S. was placed in two separate foster homes. On January 26, 1999, B.S. was again placed in Devereaux.¹ DYFS was awarded guardianship of B.S. on January 17, 1996²

On November 1, 1996, the NJDOE sent a letter to the Frankford Township Board of Education notifying it that it was the responsible school district for B.S., as her parents' residence "lies within the boundaries of the Frankford Township School District." Therefore, a determination was made that the responsible district for B.S.'s tuition costs was Frankford Township.

On March 18, 1999, the NJDOE again determined that B.S.'s district of residence as the Newton School District pursuant to *N.J.S.A. 18A:7B-12(b)*. The letter from the NJDOE provided:

The Department of Human Services has asked my office to determine the district of residence for [B.S.], a child who was placed by DYFS with Devereaux, Deerhaven. . . on January 27, 1999.

The specific facts in this case are as follows:

1. The child has been a ward of the state since January 17, 1996, but the state was not legal guardian at the time of initial placement by DYFS with the Teaching Family Home of [redacted]³ Therefore, we must refer to the second criteria in our determination, which is the address of parent or guardian as of the date of initial placement. . .
2. Parent(s) [were residents at [redacted information] as of the date of initial

¹ Newton is only seeking reimbursement of budgetary funds withheld through the 1999-2000 school year.

² The NJDOE letter to the Frankford Township Board of Education states that the parents' residence is in "Frankford Township School District. However, the street address is listed as Newton, in portions of the record. The actual school district was the Frankford School District. It is argued that Newton is listed as the street address because that is the post office location for residents of the Frankford School District.

³ The information is redacted because it is confidential pursuant to *N.J.S.A. 9:6-8.10(a)*.

placement on August 19, 1994.⁴
(Exhibit K)

LEGAL ARGUMENT

The NJDOE argues that this initial placement in 1993 is the date that should be utilized when determining the responsible district of residence and at that time the parents' address was in Newton, New Jersey. Petitioner contends that on October 21, 1995, the initial date of admission to Devereaux-Deerhaven, B.S.'s parents' residency was in Frankford Township, and that is the date that should be used for determination of the responsible district of residence.

FINDINGS, DISCUSSION AND CONCLUSIONS

Under the New Jersey Uniform Procedure Rules, a party may move for summary decision upon all or any of the substantive issues in a case. *N.J.A.C. 1:1-12.5(b)*. When considering this motion, the Administrative Law Judge may make a ruling in favor of the motion when the papers filed along with any supporting affidavits show that no genuine issue as to any material fact exists and that the moving party is entitled to a decision as a matter of law. *Ibid*.

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for summary judgment if:

The pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving

⁴ The actual date of initial placement was August 19, 1993, not 1994, since 1993 is the year used by the NJDOE in its brief and in Newton's reply letter, dated August 4, 1999 (Exhibit L) and is the date listed in Exhibit H, which is a DYFS placement report.

party, would require submission of the issue to the trier of fact.

[R. 4:46-2(c).]

The Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 523 (1995), provided further guidance for the summary decision analysis: "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. Thus, a court should deny a summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. *Id.* at 529. I **FIND** that the instant matter is appropriate, in part, for summary disposition.

There are two determinations required in the instant matter. The first is to determine the district of residence of B.S.' parents on October 21, 1995, as that is the pertinent date for the first portion of the 1998-1999 school year (through November 6, 1998). The second determination required is B.S.'s parents' address as of January 26, 1999, as that is the pertinent date for the second portion of the 1998-1999 and the full 1999-2000 school years.

The district of residence determination is governed by N.J.S.A. 18A:7B-12, which states in relevant part that:

For school funding purposes, the Commissioner of Education shall determine district of residence as follows:

- a. The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement has occurred.
- b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior

to his most recent admission to a State facility or most recent placement by a State agency.

If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

- c. If the district of residence cannot be determined according to the criteria contained herein, ... the State shall assume fiscal responsibility for the tuition of the child. ...

[N.J.S.A. 18A:7B-12.]

The implementing regulations defines district of residence as:

- (a) The district of residence for school funding purposes shall be determined according to the following criteria:
 - 1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A. 18A:7F-3* and referred to in the first paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
 - 2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, private school or out-of-State facility also referred to in the first paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. ... The "district of residence" referred to in the second paragraph of *N.J.S.A. 18A:7B-12b* means the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.

[*N.J.A.C. 6A:23-5.2* (emphasis added).]⁵

Prospect Park Board of Education v. State of New Jersey, Department of Education, Bureau of School Finance, et. al, 97 N.J.A.R.2d(EDU) 134, affirmed in part and remanded in part, Comm'r at 140. The School District contested the NJDOE's finding that it was the responsible district, pursuant to *N.J.S.A. 18A:7B-12*. There, the child was placed in foster care on November 2, 1990 and remained in a foster home until November 26, 1990, at which time she was admitted to Bergen Pines County Hospital. In December of 1990, it appears that she was admitted to the Holley Center for the first time until her discharge on August 29, 1991.⁶ After her discharge from the Holley Center, she was consecutively placed in two different foster homes. Thereafter, she then stayed in a shelter for two weeks prior to returning to the Holley Center on June 15, 1992. It was determined that L.L.'s mother's residence during her second stay at the Holley Center was Prospect Park. It was held that:

Viewed in its correct context, the term "initial placement" in the regulation must mean the latest or most recent time when the child was placed in a state facility or private school and not an earlier placement that occurred years ago and has been superseded by intervening events. ... Any contrary interpretation would run directly counter to the express statutory language and thereby exceed the agency's proper rule-making authority. Administrative regulations cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute.

[*Prospect Park BOE, supra* 97 N.J.A.R.2d (EDU) at 137. (citations omitted)]

The Commissioner agreed with findings and conclusions that Prospect Park was the responsible school district within the meaning of *N.J.S.A. 18A:7B-12*. The Commissioner remanded the case for further findings concerning the unilateral placement of the student by DYFS.

⁵ The regulation in effect on January 26, 1999, was codified as *N.J.A.C. 6:20-5.3*. The current regulation is essentially the same after the recodification to 6A, with only minor administrative changes that do not affect the current matter.

⁶ The dates of the Bergen Pines and Holley Center placements are not clear, but the date of discharge from L.L.'s first stay at the Holley Center is certain.

I **FIND** and **CONCLUDE** that the *Prospect Park BOE* is controlling herein. The respondent is attempting to refer back to DYFS' initial placement of B.S. and not the current placement. During the placement of B.S. in Devereaux from October 21, 1995 to November 6, 1998, her parents lived within the Frankford School District, as was acknowledged by the NJDOE in its November 1, 1996, letter to the Frankford Township Board of Education. Therefore, pursuant to *N.J.S.A. 18A:7B-12*, *N.J.A.C. 6A:23-5.2*, and *Prospect Park BOE, supra*, Frankford Township Board of Education is the responsible district for B.S.'s tuition costs for the first portion of the 1998-1999 school year.

However, I **FIND** that because B.S. was discharged from Devereaux on or about November 6, 1998, but readmitted on January 26, 1999, more information is needed to determine the residence of her parents on January 26, 1999 that a determination of the responsible school district as of January 26, 1999 can be made.

CONCLUSION

Consequently, partial summary decision is hereby **GRANTED** in favor of the petitioner Newton Board of Education for the September to November 6th portion of the 1998-1999 school year since the parents resided in Frankford Township. Summary Decision is hereby **DENIED** for the period beginning January 26, 1999, the date of the most recent placement, because there is no evidence submitted concerning the residence of B.S.'s parents at that time. This matter is set down for plenary hearing on October 18, 2005.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, either upon interlocutory review, pursuant to *N.J.A.C. 1:1-14.10*, or at the end of the contested case, pursuant to *N.J.A.C. 1:1-18.6*.

7/28/04
DATE

Irene Jones
IRENE JONES, ALJ

sej

379-05

OAL DKT. NO. EDU 4733-01
AGENCY DKT. NO. 169-6/01

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONROE,
GLOUCESTER COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF
EDUCATION AND BOARD OF
EDUCATION OF THE BOROUGH OF
STRATFORD, CAMDEN COUNTY,

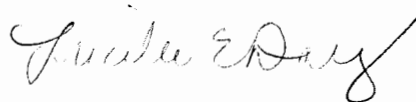
RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/05

Date of Mailing: 10/21/05



RICHARD J. CODEY
Acting Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

PETER C. HARVEY
Attorney General

October 4, 2005

Sent via facsimile and regular mail

Honorable John Tassini, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
P.O. Box 049
Mercerville, NJ 08625-0049

Re: Monroe Township Board of Education v. New Jersey
Department of Education and Board of Education of
the Borough of Stratford, Camden County
OAL Dkt. No. EDU-0473-01

4733-01

Dear Judge Tassini:

Enclosed please find a signed stipulation of settlement which fully resolves the issues between the parties in this matter. Unless the parties hear to the contrary, it will be assumed that the 1:30 p.m. settlement conference scheduled tomorrow, October 5, 2005, is adjourned.

If you have any questions, or need any additional information, please do not hesitate to contact me. Thank you for your assistance in this matter.

Respectfully submitted,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: _____

Allison Colsey Eck
Deputy Attorney General

enc.

c. John J. Armano, Jr., Esq.
Peter J. Bonfiglio, III, Esq.



PETER C. HARVEY
 ATTORNEY GENERAL OF NEW JERSEY
 Attorney for New Jersey
 Department of Education
 R.J. Hughes Justice Complex
 P.O. Box 112
 Trenton, New Jersey 08625

2005 OCT -4 P 4: 26

OFFICE OF ADMINISTRATIVE LAW

By: Allison Colsey Eck
 Deputy Attorney General

MONROE TOWNSHIP BOARD OF
 EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY
 DEPARTMENT OF EDUCATION and
 BOARD OF EDUCATION OF
 BOROUGH OF STRATFORD,
 CAMDEN COUNTY,

Respondents.

BEFORE THE OFFICE OF
 ADMINISTRATIVE LAW

OAL Docket No. EDU-~~0473~~-01

STIPULATION OF SETTLEMENT

WHEREAS, petitioner, Monroe Township Board of Education ("Monroe") and respondents, New Jersey Department of Education ("Department") and Board of Education of the Borough of Stratford, Camden County ("Stratford"), have mutually agreed to settle the above-captioned matter, with Trimble & Associates (John J. Armano, Jr., Esq., appearing) on behalf of Monroe, Peter C. Harvey, Attorney General of New Jersey (Allison Colsey Eck, Deputy Attorney General appearing) on behalf of the Department, and ~~Wade, Long,~~ ^{Peter J. Bonfiglio, III} ~~Wood & Kennedy, LLC~~ ^{Peter J. Bonfiglio, as} (John D. Wade, Esq., appearing) on behalf of Stratford; and

WHEREAS, this matter arose from Monroe's challenge to its fiscal responsibility for Shane Usilton's public education for the 2000-01 school year; and

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this matter in the public interest; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

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

1. Monroe is responsible for the cost of public education for Shane Usilton for the 2000-01 school year.

2. Monroe shall pay Somerset Hills School the sum of \$48,598.20 for tuition for Shane Usilton for the 2000-01 school year

3. Since Shane Usilton's mother died on March 1, 2001, the State will assume financial responsibility for the public education of Shane Usilton for the 2001-02 school year and in subsequent years thereafter until such time as Shane Usilton may be adopted.

4. Upon the execution of this Stipulation of Settlement, Monroe will withdraw its petition currently before the Office of Administrative Law.

8. The parties agree that this stipulation of settlement fully resolves all issues between them arising from

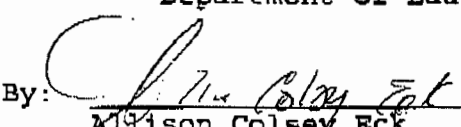
Monroe's challenge to its fiscal responsibility for the educational costs of Shane Usilton for the 2000-01 school year.

Date _____

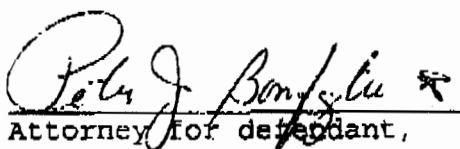
Attorney for Petitioner,
Monroe Township Board of
Education
John J. Armano, Jr., Esq.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date: 10/4/05

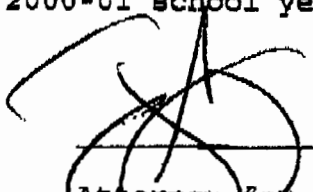
By: 
Madison Colsey Eck
Deputy Attorney General

Date: 9/29/05


Attorney for defendant,
Board of Education of
Stratford, Camden County

Monroe's challenge to its fiscal responsibility for the educational costs of Shane Usilton for the 2000-01 school year.

Date 10/3/05



Attorney for Petitioner,
Monroe Township Board of
Education
John J. Armano, Jr., Esq.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date: _____

By: _____

Allison Colsey Eck
Deputy Attorney General

Date: _____

Attorney for defendant,
Board of Education of
Stratford, Camden County

MONMOUTH-OCEAN EDUCATIONAL
SERVICES COMMISSION,

PETITIONER,

V.

COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF
EDUCATION, MONMOUTH COUNTY
SUPERINTENDENT OF SCHOOLS,

DECISION

RESPONDENT.

SYNOPSIS

Petitioner Monmouth-Ocean Educational Services Commission (ESC) filed a Petition of Appeal alleging that the NJDOE, through the Office of the County Superintendent, has improperly denied reimbursement for administrative costs under *N.J.S.A.* 18A:46-19.1 to 9 (Chapter 193), which provides remedial services for handicapped students in both public and private schools. NJDOE asserts that petitioner could not charge for administrative expenses under Chapter 193 funding. The parties filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: petitioner ESC is contracted to provide educational services on behalf of several school districts in Monmouth and Ocean counties; petitioner included general administrative expenses in their budget between 1979 and 2004; in April 2004, subsequent to periodic monitoring of one of the districts to which the ESC is contracted for services, respondent issued – for the first time – a non-compliance order regarding petitioner's charge of administrative expenses to Chapter 193 funding; the legislative intent was that administrative expenses could be charged from Chapter 193 funding, but with some limitation; in the absence of any specific legislative limitation on administrative funding, the 6% standard found in *N.J.S.A.* 18A:46A-8 shall apply to Chapter 193 expenses; and the respondent's rejection of the administrative expenses after twenty-five years represents a new policy or rule that was not properly promulgated according to the New Jersey Administrative Procedure Act. (APA) The ALJ ordered that the respondent's decision to deny reimbursement or administrative expenses for Chapter 193 services be reversed, and recommended that the respondent formulate new regulations to clarify the limitation and reimbursement issues as to Chapter 193 administrative expenses.

The Commissioner concurs with the findings and conclusions of the ALJ in this matter, emphasizing that – when read in conjunction with the statutory and regulatory provisions found at *N.J.S.A.* 18A:46-19.8 and *N.J.A.C.* 6A:14-6.3(a), which relate directly to Chapter 193 funds – the ALJ's analysis conclusively establishes that funding for administrative costs must come from Chapter 193 funds; moreover, the Commissioner concurs that the respondent's denial of reimbursement for administrative expenses for Chapter 193 services constitutes an administrative rule that should have been promulgated pursuant to the APA. Accordingly, the Initial Decision of the OAL is adopted 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.

OAL DKT. NO. EDU 8786-04
 AGENCY DKT. NO. 286-8/04

MONMOUTH-OCEAN EDUCATIONAL	:	
SERVICES COMMISSION,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
EDUCATION, MONMOUTH COUNTY	:	
SUPERINTENDENT OF SCHOOLS,	:	
	:	
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The exceptions filed by the Department of Education (Department) were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching her determination herein.

In its exceptions, the Department takes issue with the Administrative Law Judge's (ALJ) reliance on *N.J.S.A.* 18A:6-51(e) and (j), claiming that it formed the basis for the ALJ's holding that Chapter 193 funds can be used for administrative costs. (Department's Exceptions at 2-3) The Department avers that *N.J.S.A.* 18A:6-51(e) and (j) expressly allow Educational Service Commissions (ESCs) to charge their client districts for administrative expenses, but that the issue is not whether ESCs may charge their client districts for administrative costs; instead, the issue is whether the specific State aid provided to districts under Chapter 193 may be used in this manner. (*Id.* at 3) Thus, the Department avers, whether administrative costs may be charged

against Chapter 193 funding should be limited to a consideration of the services required by Chapter 193 itself and should not include a discussion of the laws governing the creation and administration of ESC's generally. (*Id.* at 4)

The Department also excepts to the ALJ's reliance on *Airwork, supra*, arguing that, in that matter, the Supreme Court rejected plaintiff's claim that an administrative policy conformed with legislative intent because the Legislature had not objected upon publication of a press release that set forth the administrative agency's policy regarding the statute at issue. (*Id.* at 5) Moreover, the Department contends, unlike the situation in *Airwork*, there is no previously enacted policy or statutory interpretation at issue in the present matter. (*Ibid.*) The Department thus urges that the Legislature's failure to prevent petitioner's practice of using Chapter 193 funds for payment of administrative costs for the last twenty-five years does not constitute Legislative approval of any pre-existing administrative policy. (*Ibid.*) Moreover, the Department claims that it simply had not recognized the need to either develop monitoring procedures or create regulations with respect to the use of Chapter 193 funds for administrative costs until the instant litigation. (*Id.* at 5-6)

Additionally, the Department disagrees that its noncompliance determination underlying this issue satisfies each of the six criteria for an administrative rule as set forth in *Metromedia, supra*, and thus constitutes a new administrative rule made in violation of the Administrative Procedure Act. (*Id.* at 6) In this regard, the Department takes exception to the ALJ's determination that its noncompliance determination meets the third *Metromedia* criterion for constituting an administrative rule, *i.e.*, that it was "designed to operate prospectively." (*Id.* at 7) Although the Department admits that its finding against petitioner is intended to prevent Chapter 193 funds from being used for administrative costs in the future, it also argues

that its noncompliance finding was not intended “to create a new rule ‘designed to operate only in future cases,’” but “was meant only as an application of the Chapter 193 laws as written, in the best judgment of the Department at that time.” (*Ibid.*) Additionally, the Department asserts that its noncompliance determination does not meet the fifth *Metromedia* criterion because its “publication of the Chapter 193 laws in this case was not ‘contrary to twenty-five years of existing policy’ of the Department, but only contrary to petitioner’s own practice” because the Department has not articulated a policy regarding administrative costs under Chapter 193. (*Id.* at 7-8) Finally, the Department states that it welcomes the opportunity to promulgate State Board regulations regarding the use of Chapter 193 funds as urged by the ALJ. (*Id.* at 8)

Upon a careful and independent review of the record, the Initial Decision, and the exception arguments filed in this matter, the Commissioner determines to adopt the ALJ’s findings and conclusions as set forth in the Initial Decision. Notwithstanding the Department’s contention that *N.J.S.A.* 18A:6-51(e) and (j) should not be utilized to form the basis for finding that Chapter 193 funds can be used for administrative costs, the Commissioner disagrees. *N.J.S.A.* 18A:6-51(e) and (j) simply set forth the definitions of “Commission expenses” and “program or service expenses,” respectively, and, thus, are instructive to the assessment of the operation of ESCs. However, the conclusion that Chapter 193 administrative funds are recoverable does not turn on these definitions, but, instead, turns on the conclusion that the statutes governing commissions and the interpretative case law provide for collection of all costs with respect to the provision of remedial and auxiliary services to school districts.

Although Chapter 193 itself is silent on administrative costs, as fully explained by the ALJ, statutes should be read in *pari materia* when the statutes in question were enacted during the same session, went into effect at the same time and/or when the sections are part of

the same act, as in this case. The ALJ reached the conclusion that Chapter 193 funds can be used for administrative costs only after a thorough analysis of *all* the statutes that are inextricably a part of the provision of remedial and auxiliary services to local school districts, *i.e.*: *N.J.S.A.* 18A:6-51 to -70, specifically *N.J.S.A.* 18A:6-51(e) and (j), *N.J.S.A.* 18A:6-52(a) and *N.J.S.A.* 18A:6-63; *N.J.S.A.* 18A:46A-8; *N.J.S.A.* 18A:46-19.1; and a review of interpretative case law.

In this regard, the Commissioner determines that the ALJ correctly analyzed the statutory provisions related to funding sources for ESCs to arrive at the conclusion that the legislative scheme contemplates that the ESC will recover all its costs. The following statutory and regulatory provisions, which relate directly to Chapter 193 funds, further support the ALJ's conclusion:

***In preparing its annual budget, each board of education shall include as a revenue State aid in an amount equal to the estimated costs of providing services to nonpublic school children, pursuant to *P.L.*1977, c.193 (*C.18A:46-9.1 et al.*) *N.J.S.A.* 18A:46-19.8.

Each board of education of the district in which the nonpublic school is located shall provide programs and services under this subchapter at a cost not to exceed the amount of State aid funds. *N.J.A.C.* 6A:14-6.3(a).

When read in conjunction with the above-quoted statutory and regulatory provisions, the ALJ's analysis conclusively establishes that funding for administrative costs must come from Chapter 193 funds; public schools and educational services entities may not subsidize the costs of nonpublic programs by diverting funds for or from other public educational programs.

Moreover, the Commissioner rejects the Department's argument that the ALJ's reliance on *Airwork, supra*, is misplaced. While the court in *Airwork* rejected the plaintiff's

claim that an administrative policy conformed with legislative intent because the Legislature had not objected upon publication of a press release that described the administrative agency's policy regarding the statute at issue in that matter, the court in *Airwork* also clarified the circumstances when Legislative intent could or could not be inferred from administrative construction, stating:

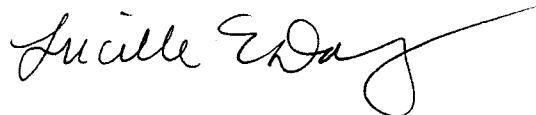
We note that courts have acknowledged that the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts. (citations omitted) Nevertheless, the court will consider this factor only when it is not satisfied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. (citations omitted) *Airwork, supra*, at 296.

In the instant matter, there is no clear legislative intent regarding the issue of the payment of administrative costs from Chapter 193 funds. To conclude that the omission of specific language in Chapter 193 prevents the ESCs from calculating administrative expenses in determining the costs of providing remedial services would result in a departure from the legislative scheme as set forth in similar statutes governing the provision of remedial and auxiliary services. Moreover, notwithstanding the Department's contention to the contrary, the Department permitted, whether consciously or by inaction, the payment of administrative expenses out of Chapter 193 funds for approximately twenty-five years. Thus, in the absence of a clear legislative intent within the statute itself and the Department's practice of permitting the use of Chapter 193 funds for administrative expenses without legislative interference over a twenty-five year period, the Commissioner agrees that such inaction can be construed as evidence of conformity with legislative intent pursuant to the parameters established in *Airwork, supra*.

The Commissioner also rejects the Department's claim that its denial of reimbursement for administrative expenses from Chapter 193 funds does not satisfy the third and fifth criteria of *Metromedia* so as to constitute an administrative rule. Whether the Department's noncompliance finding was intended to create a new rule designed to operate only in future cases, or, as argued, was meant only as an application of the Chapter 193 law as written, it was "designed to operate only in future cases" and, thus, satisfies the third criterion. See *Metromedia, supra*, at 331. Likewise, with respect to the fifth criterion of *Metromedia*, the Department's determination to deny reimbursement for administrative expenses from Chapter 193 funds is, in effect, an "administrative policy," whether articulated or not, that was "not previously expressed in any official and explicit agency determination, adjudication or rule or constitutes a material and significant change from a clear, agency position on the identical subject matter." (*Ibid.*) The Commissioner, therefore, concurs that the Department's denial of reimbursement for administrative expenses for Chapter 193 services constitutes an administrative rule that should have been promulgated pursuant to the Administrative Procedures Act.

Accordingly, as explicated above, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/05

Date of Mailing: 10/24/05

* 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.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8786-04

AGENCY DKT. NO. 286-8/04

**MONMOUTH-OCEAN EDUCATIONAL
SERVICES COMMISSION,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF EDUCATION,
MONMOUTH COUNTY SUPERINTENDENT OF
SCHOOLS,**

Respondent.

J. Peter Sokol, Esq., for petitioner (McOmber and McOmber, attorneys)

Melanie M. Brookes, Deputy Attorney General, for respondent (Peter J. Harvey,
Attorney General of New Jersey, attorney)

Record Closed: July 15, 2005

Decided: July 20, 2005

BEFORE **DONALD J. STEIN, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 18, 2004, the Monmouth-Ocean Educational Services Commission (Petitioner) filed a petition of appeal with the Commissioner of Education alleging that

the Department of Education through the office of County Superintendent (respondent) has improperly denied reimbursement for administrative costs under *N.J.S.A.* 18A:46-19.1 to -19.9 (Chapter 193), which provides remedial services for handicapped students in both public and private schools. On October 4, 2004, respondent filed an answer to the appeal, asserting that petitioner could not charge for administration expenses under Chapter 193 funding. The matter was transmitted to the OAL on October 22, 2004.

On June 15, 2005, the petitioner moved for summary decision. On June 17, 2005, respondent filed a cross-motion for summary decision. On July 15, 2005, oral argument was scheduled and heard, and the record closed.

STATEMENT OF FACTS

The facts in this matter are not in dispute.

1. Petitioner is an education services commission established pursuant to *N.J.S.A.* 18A:6-51 to -70, and is currently contracted to provide educational services on behalf of several school districts in Monmouth and Ocean counties. Since its founding in 1979, the petitioner has included general administrative expenses in their budget. In April 2004, the respondent, for the first time, issued a non-compliance order because the petitioner had charged administrative expenses to Chapter 193 funding.

2. Respondent maintains a list of organizations that provide educational services under *N.J.S.A.* 18:46A-1 to -17 (Chapter 192), which provides auxiliary services to all pupils in the State, in both public and nonpublic schools, and *N.J.S.A.* 18A:46-19.1 to -19.9 (Chapter 193), all of which are subject to periodic compliance monitoring by Respondent pursuant to *N.J.A.C.* 6A:14-9.1.

3. Petitioner is currently under contract to provide Chapter 192 and Chapter 193 services to nonpublic school students in Belmar, Borough of Freehold, Highlands, and Eatontown. Petitioner provides these services to several other districts including, but not limited to, Asbury Park, Atlantic Highlands, Freehold Regional, Hazlet, Henry

Hudson Regional, Holmdel, Howell, Jackson, Manasquan, Keyport, Little Silver, Long Branch, Manalapan-Englishtown Regional, Marlboro, Matawan-Aberdeen Regional, Middletown, Monmouth Regional, Neptune, Ocean, Point Pleasant Beach, Red Bank Borough, Red Bank Regional, Shore Regional, Shrewsbury, Spring Lake, Toms River Regional, Wall, and West Long Branch.

4. On January 13, 2004, respondent conducted its periodic monitoring of the Chapter 192 and Chapter 193 programs provided in Belmar.

5. The Belmar monitoring resulted in a noncompliance finding because petitioner was charging administration expenses under Chapter 193 funding.

6. On May 5, 2004, petitioner contested the findings that Chapter 193 does not authorize a charge for administration.

7. Petitioner charges certain costs for administering Chapter 193 services toward support services for general program administration, as defined in *The Uniform Minimum Chart of Accounts for New Jersey Public Schools* and classified under function code 230.

8. In 2003-2004, Petitioner classified approximately 6.48% (\$163,400) of its total Chapter 193 expenditures of \$2,504,871 as code 230 expenses. This amount included \$29,200 for Supplementary Instruction, \$61,600 for Examination and Classification, and \$71,600 for Corrective Speech.

9. Petitioner expended \$590,060 worth of Supplementary Instruction services throughout all of its contracted districts in 2003-2004, of which about 4.94% (\$29,200) was charged as administration.

10. Petitioner expended \$1,111,017 worth of Examination and Classification services throughout all of its contracted districts in 2003-2004, of which about 5.54% (\$1,600) was charged for administration.

11. Petitioner expended \$803,794 worth of Corrective Speech services throughout all of its contracted districts in 2003-2004, of which about 8.9% (\$71,600) was charged as administration.

12. For the 2003-2004 school year, Belmar received \$113,280 from respondent for the provision of Chapter 193 services, \$87,457.50 of which was expended by Petitioner.

13. In 2003-2004, petitioner classified approximately 5.82% (\$82,192.92) of its total Chapter 192 expenditures as code 230 expenses. This amount included \$64,182.92 for Compensatory Education, \$3,750 for English as a Second Language, \$1,500 for Home Instruction, and \$12,800 for Transportation.

14. Petitioner expended \$1,052,374 worth of Compensatory Education services throughout all of its contracted districts in 2003-2004, of which about 6.09% (\$64,142.92) was charged as administration.

15. Petitioner expended \$68,668 worth of English as a Second Language services throughout all of its contracted districts in 2003-2004, of which about 5.46% (\$3,750) was charged as administration.

16. Petitioner expended \$65,926.56 worth of Home Instruction services throughout all of its contracted districts in 2003-2004, of which about 2.27% (\$1,500) was charged as administration.

17. For the 2003-2004 school year, Belmar received \$96,516 from respondent for the provision of Chapter 192 services, all of which was expended by petitioner.

18. At the time of the January 13, 2004, monitoring of Belmar, respondent's monitoring procedures did not require service providers to submit detailed information regarding their Chapter 192 and Chapter 193 expenses.

19. For the 2003-2004 school year, the Belmar, Borough of Freehold, Highlands, and Eatontown school districts were monitored and issued monitoring reports indicating petitioner was noncompliant with Chapter 193 for charging administration fees.

20. Respondent's January 13, 2004, monitoring of Belmar was the first instance in which petitioner was found noncompliant with Chapter 193 due to charging administration fees.

21. On September 12, 1998, Petitioner and Belmar entered a 10-year Instructional Services Agreement for Chapters 192/193 (Agreement).

22. The Agreement, with regard to Chapter 193 services, indicates the petitioner will provide all services required pursuant to *N.J.S.A. 18:46A-19.1 –19.9* and the rules and regulations governing these services to nonpublic schools.

The preceding information is **FOUND** as fact.

CONCLUSION OF LAW

The facts involving this motion are not in dispute. Therefore, pursuant to *N.J.A.C. 1:12.5(b)* and *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for Summary Decision.

Local school districts must furnish Chapters 192/193 services to nonpublic schools located within their boundaries, either by performing such services themselves or

by contracting with public or private agencies to do so. *Essex County Educ. Services Comm'n v. NJDOE*, 93 N.J.A.R.2d (EDU) 522, 523. Chapter 192 specifies that no more than 6% of the aid received by any district pursuant to this act shall be used by such district for administration of the act, and no more than 18% of such aid shall be used to rent facilities needed to implement the provisions of this act. N.J.S.A. 18A:46A-8. Chapter 193 does not contain a corresponding subsection regarding the use of funds for administration costs.

The sole issue to be determined in this matter is whether administrative expenses can be charged for Chapter 193 (remedial services) funding. The petitioner asserts that it was not the intent of the legislature to require the public school districts or its agents to subsidize these services by not permitting petitioner to draw down reasonable administrative costs. In the present case, petitioner charged approximately 6.5% under Chapter 193 for administrative costs. Respondent argues that since (Chapter 193) does not authorize a charge for administration, the petitioner must adjust the contract and submit an amended copy to the district and county office for approval.

N.J.S.A. 18A:6-51 to -70 provides for the establishment and operation of educational services commissions. Educational Services Commission is defined as:

An agency established or to be established in one or more counties for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education. N.J.S.A. 18A:6-51(a).

The amended provisions distinguish between program or service expenses and commission expenses, but allow funds generated by programs and services to be used interchangeably to pay either of these expense categories. N.J.S.A. 18A:6-51(e) and (j) respectively define commission expenses and program or service expenses as follows:

(e) "Commission expenses" means those funds devoted to or required for the regular or ordinary operating expenses of the commission, including

administrative, maintenance and salary expenses, and purchase or rental of real and personal property necessary for the operation of the commission, but excluding program or service expenses.

(j) "Program or service expenses" means those funds devoted to or required for the provision of a program or service by the commission, including but not limited to the administrative, maintenance and salary expenses and the purchase or rental of real or personal property necessary for the provision of the program or service.

Although these expenses are distinguished, they both allow for funds devoted to or required for administrative expenses.

N.J.S.A. 18A:6-52(a) describes the petition process necessary to establish a commission. A report shall be attached to such petition setting forth the kind or kinds of educational and administrative services and programs which are deemed to be needed and proposed to be provided, an estimate of the cost of providing such services and programs, a method of financing the expenditures of such commission, including a detailed budget which projects anticipated costs and identifies anticipated sources of revenue until such can be financed under its first regularly adopted budget, and any other data or information deemed pertinent. Thereafter, the State Board shall determine whether there is a need for such a commission and whether its operation is feasible.

N.J.S.A. 18A:6-63 authorizes an educational services commission to decide what services it will offer and then determine the costs of providing such services as follows:

- a. The representative assembly shall from time to time determine what services and programs shall be provided by the commission, subject to approval of and pursuant to rules of the State Board of Education. It shall determine the fee to be charged for providing each service and program, and enter into contracts with school districts, whether member districts of the commission or not, to provide any or all such services and programs.
- b. Commissions may enter into contracts with other public and private agencies for the provision of approved services and programs to participating public school districts and nonpublic schools. These

contractual arrangements shall conform to rules and regulations of the State Board of Education and be approved by the county superintendent or superintendents, as the case may be.

As part of the petitioning process, a report must be prepared setting forth the kind of educational and administrative services and programs needed, and the cost of providing those services and programs. The State Board not only determines the need for programs, but also reviews the proposed administrative services to be rendered. Furthermore, the law requires the inclusion of a detailed budget that must indicate anticipated costs and sources of revenue until the commission can be financed under its first regularly adopted budget. Therefore, the language of the statute clearly acknowledges administrative costs are part of a properly prepared budget for commissions. Finally, under the statutory scheme, the State Board of Education must approve all fees the representative assembly proposes for both the programs and administrative services.

A close reading of the Statute and Code provisions governing educational services commissions and Chapters 192/193 services allow administrative costs to be recoverable expenses. Statutes should be read in *pari materia* when the statutes in question were enacted during the same session or went into effect at the same time; all the more so when the sections are part of the same act. *Wuethrich v. Delia*, 134 N.J. Super. 400, 411 (Law Div. 1975), *aff'd.*, 155 N.J. Super. 324 (App. Div. 1978), cert. denied, 77 N.J. 486 (1978); *Ceva v. Twp. of River Vale*, 119 N.J. Super. 593, 604 (App. Div. 1972), *aff'd.*, 62 N.J. 245 (1973). Where statutes in some apparent conflict relate to the same subject matter, it is the duty of the court to construe them together as a unitary and harmonious whole insofar as that may be possible in order that each may be fully effective. *Boyle v. Riti*, 175 N.J. Super. 158, 165 (App. Div. 1980). Finally, in construing a statute, courts must consider “not only the particular statute in question, but also the entire legislative scheme of which it is a part.” *New Jersey Transit Corp. v. Borough of Somerville*, 139 N.J. 582, 590 (1995).

A statute should be interpreted in a way that gives effect to all its provisions and does not render any language inoperative, superfluous, void, or insignificant. *G.S. v.*

Dept. of Human Services, DYFS, 157 N.J. 161, 172 (1999). Reviewing courts should give considerable weight to an agency's interpretation of a statute the agency is charged with enforcing, but Courts are not bound by an agency interpretation of a strictly legal issue, when that interpretation is inaccurate or contrary to legislative objectives. *Mayflower Securities Co., Inc. v. Bureau of Securities in Division of Community Affairs of Dept. of Law and Public Safety*, 64 N.J. 85, 93 (1973). See *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562-63 (1978). Therefore, interpretation of the statute herein should harmonize any conflicting provision and assure no language is rendered inoperative, superfluous, void, or insignificant.

Shortly after the enactment of Chapter 192/193 legislation, the Attorney General issued an opinion letter to the Commissioner of Education regarding whether an Educational Services Commission could, by separate contract, relinquish its responsibilities for provision of these educational services to a private profit-making organization. *Attorney General Formal Opinion No. 1* (1981). That opinion indicates that “to properly determine the matter, it was necessary to consider two provisions of the school law: the first governing educational services commissions and the second structuring the provision of certain remedial and auxiliary educational services to pupils in both public and non-public schools.” The Attorney General also stated that nothing in the statute authorizing creation of commissions indicated that the commissions could contract with private agencies for performance of instructional services. *Attorney General Formal Opinion No. 1, supra*, 6 (1981). Therefore, a departure from a legislative scheme is not to be inferred from mere silence

Essex County Educ. Services Comm'n, 93 N.J.A.R. 2d (EDU) 522, 525, found the commission had to return unused Chapter 192/193 funds just as any school board must, and that all costs expended are recoverable. Moreover, both the formal opinion of the Attorney General and *Essex County Educ. Services Comm'n*, indicate these provisions must not be read in isolation, but together to properly determine what the legislature intended. Construing the provisions of both governing statutes, administrative costs are expenses for which the commission is entitled to collect. They are inextricably a part of

providing these remedial and auxiliary services to local school districts. Although Chapter 193 is silent on administrative costs, the statutes governing commissions and interpretative case law provide for collection of "all costs."

Airwork Service Div., Div. of Pacific Airmotive Corp. v. Director, Div. of Taxation, 97 N.J. 290, 296 (N.J. 1984) addressed a similar situation in which the legislative intent was not clear from the statute. The New Jersey Supreme Court ruled that:

We note that courts have acknowledged that the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts." *Automatic Merchandising Council v. Glaser*, 127 N.J. Super. 413, 420 (App. Div. 1974) (interpreting Sales and Use Tax Act); see *Malone v. Fender*, 80 N.J. 129 (1979). Nevertheless, the court will consider this factor only when it is not satisfied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. See *Fedders Corp. v. Director, Div. of Taxation*, 96 N.J. 376 (1984) (language, purpose, and policy of "indebtedness" clause in New Jersey Corporation Business Tax Act evidenced legislative intent to exclude bona fide debt owed to affiliated corporation, notwithstanding contrary administrative interpretation that was itself confirmed by administrative rule and longstanding, uniform agency practice); *Mobay Corp. v. Director, Div. of Taxation*, 96 N.J. 407 (1984) (same). *Airwork Service Div., Div. of Pacific Airmotive Corp. v. Director, Div. of Taxation*, 97 N.J. 290, 296 (1984)

Therefore, in the absence of clear legislative intent regarding this issue, the fact that these expenses were paid over an approximate twenty-five year period without legislative interference is evidence of conformity with legislative intent.

To conclude that the omission of specific language in Chapter 193 would prevent the commissions from calculating administrative costs to determine the costs of providing remedial services would result in a departure from the legislative scheme. This would

result in the commissions absorbing administrative costs, requiring them to expend monies in excess of state aid that the Attorney General expressly stated districts are not required to pay. Just as silence in the legislative scheme could not infer commissions could contract with private profit making organizations to provide services, silence in Chapter 193 cannot infer the commissions cannot include administrative costs in calculating the cost of providing remedial services. Thus, the petitioner properly included administrative costs in calculating the costs of providing these services.

Although Chapter 193 was enacted more than 25 years ago, this is a case of first impression. The Department of Education (DOE) has never challenged the commission's practice of including administrative costs in its estimates of costs when providing remedial educational services, since the commission was founded in 1979. Despite the respondent's statements that it did not know the commission included administrative expenses, the statutes require approval by the State Board of Education of submitted plans from the commissions. To avoid an appearance of engaging in rule-making, the time to question whether administrative costs were included in these plans would have been when the plans were submitted or within a reasonable time after enactment of the statutes in question.

The question raised is whether the denial of Chapter 193 benefits constitutes an example of impermissible rulemaking. The New Jersey Administrative Procedure Act (APA) defines an administrative rule as an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." *N.J.S.A. 52:14B-2(e)*. In determining whether an agency's action constitutes an administrative rule, certain factors must be assessed. These factors, enunciated by the State Supreme Court in *Metromedia, Inc. v. Director of the Div. of Taxation*, 97 N.J. 313, 331-32 (1984), are whether the action:

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a

narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

These factors can, either singly or in combination, determine whether the agency action must be executed through rulemaking. *Metromedia, supra*, 97 N.J. at 332; see *Woodland Private Study Group v. Department of Env'tl. Protection*, 109 N.J. 62 (1987).

I **FIND** that the respondent's denial of reimbursement for administrative expenses for Chapter 193 services satisfies each of the *Metromedia* criteria to constitute an administrative rule. (1) It is intended to cover all school districts in the state that render these services; (2) it is intended to be applied generally and uniformly to all similarly situated persons; (3) it was designed to operate prospectively; (4) it prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statute, which is silent on the subject; (5) it reflects an administrative policy not previously expressed in any official or explicit agency determination, adjudication or rule, and is contrary to twenty-five years of existing policy; (6) and it reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. I therefore **CONCLUDE** that the respondent's denial of reimbursement for Chapter 193 services constitute an administrative rule pursuant to the New Jersey Administrative Procedure Act (APA), specifically N.J.S.A. 52:14B-2(e), and should have been promulgated as an administrative rule.

Although administrative agencies have wide discretion in choosing the procedures best suited to their regulatory aims, this discretion is not unbounded. *Crema v. Department of Env'tl. Protection*, 94 N.J. 286, 299 (1983); *St. Barnabas*

v. Hospital Rate Setting Comm'n, 250 N.J. Super. 132, 142 (App. Div. 1991); see N.J.S.A. 52:14B-2(b), (c), (e). "When the agency is concerned with 'broad policy issues' that affect the public-at-large or an entire field of endeavor or important areas of social concern, or the contemplated action is intended to have wide application and prospective effect, rulemaking becomes the suitable mode of proceeding." [*11] *Crema, supra*, 94 N.J. at 299; *St. Barnabas, supra*, 250 N.J. Super. at 142-43. Hence, even when an agency is given statutory discretion, the manner in which this discretion is exercised may be controlled by the requirements of the APA.

Moreover, the impact of this decision will impact not only the petitioner herein, but every other district and Educational Service Commission providing remedial services throughout the state.

CONCLUSION

Since N.J.S.A.18A:6-51(e) and (j), expressly allows for administrative expenses for commissions, and Chapter 192 specifically allows limits administrative expenses for auxiliary services, as well as the fact that administrative expenses were paid over an approximate twenty-five year period without legislative interference is evidence of conformity with legislative intent, I **FIND** that the legislature intended that administrative expenses can be charged for Chapter 193 (remedial services) funding.

I further **CONCLUDE** that the legislature intended to have some limitation on the amount of administrative expenses to be charged. However, the record is scant as to what limitation should be imposed. The only standard provided to this tribunal is reflected in N.J.S.A. 18A:46A-8, which states that, "No more than 6% of the aid received by any district pursuant to this act shall be used by such district for administration of the act." In the absence of any other alternatives, I **FIND** that the 6% limitation be applied to Chapter 193 expenses.

I also **FIND** that the respondent's rejection of the administrative expenses after twenty-five years represents a new policy or rule that was not properly promulgated according to the APA. I further recommend that the respondent formulate new regulations to clarify the limitation and reimbursement issue as to Chapter 193 administrative expenses.

DECISION AND ORDER

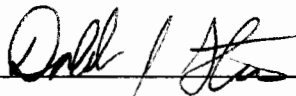
Based upon the foregoing, it is hereby **ORDERED** that the respondent's decision to deny reimbursement or administrative expenses for Chapter 193 services is **REVERSED**. It is also recommended that the respondent formulate new regulations to clarify the limitation and reimbursement issues as to Chapter 193 administrative expenses.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

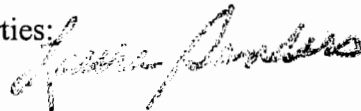
7-20-05
DATE


DONALD J. STEIN, ALJ

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

7-21-05
DATE

Mailed to Parties:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 25 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt

I.B., on behalf of minor child, M.A., III, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP : DECISION

OF BELLEVILLE, ESSEX COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that her nephew, M.A. is not eligible for a free education in the Belleville School District. A family court order granted petitioner joint custody, along with M.A.'s mother, in July 2004; the order gave petitioner residential custody. Subsequent to the custody order, M.A. was enrolled at Belleville High School in September 2004. Respondent Board contended that it had determined that M.A. was not entitled to attend Belleville schools pursuant to *N.J.S.A.* 18A:38-1, and sought tuition for the period of M.A.'s ineligible attendance.

The ALJ found, *inter alia*, that: M.A. was lawfully residing in Belleville by virtue of a joint custody order of the Superior Court, but was residing with I.B. solely because of his difficulties in the Newark School District; and I.B.'s actions in enrolling M.A. in Belleville Schools "were in violation of *N.J.S.A.* 18A:38-1." The ALJ concluded that M.A. was not domiciled in Belleville; was not an affidavit student; was not entitled to a free education in Belleville Schools; and ordered the petitioner to pay respondent \$8,464.27 in tuition costs for the period of M.A.'s ineligible attendance.

The Commissioner rejects the recommended decision of the ALJ, finding that the petitioner's claim should have been analyzed under *N.J.S.A.* 18A:38-2, which provides that any nonresident person over five and under twenty who is placed in the home of a resident in the school district by court order is entitled to a free education in the district. Inasmuch as it is not in the purview of the Commissioner to disturb an Order of the Superior Court, any challenge to the Order must be directed to that Court. The Commissioner orders respondent to continue to admit M.A. to its schools as long as there is no change in the Superior Court Order that would alter his entitlement.

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 24, 2005

OAL DKT. NO. EDU 1447-05
 AGENCY DKT. NO. 437-12/04

I.B., on behalf of minor child, M.A., III,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF BELLEVILLE, ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions¹ and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.

Upon careful and independent review of the record in this matter, for the reasons detailed below, the Commissioner rejects the recommended decision of the Administrative Law Judge (ALJ).

Initially, the Commissioner finds that the ALJ applied the incorrect statute to arrive at her conclusion that petitioner did not meet her burden of proving that M.A. was entitled to a free education in the district. The Petition of Appeal in this matter, filed on December 17, 2004, clearly evidences that petitioner's *sole* claim of M.A.'s entitlement to attend the District's schools is predicated on a July 15, 2004 Order of the Honorable Hector E. Desoto, J.S.C.,

¹ On September 20, 2005, Charles P. Cohen, Esq. filed exceptions to the Initial Decision on behalf of petitioner, I.B. In that at all times during the course of these proceedings petitioner was *pro se*, Mr. Cohen was advised that he was required to file a letter entering his representation of I.B. before his exception submission could be considered. Such representation letter was received on September 22, 2005.

Superior Court of New Jersey, Chancery Division, Family Part, Essex Vicinage, granting her residential custody of M.A. Indeed, there is nothing in the petition or accompanying documents to suggest that petitioner's allegation before the Commissioner was that either the "domicile" or "affidavit student" portions of *N.J.S.A.* 18A:38-1 were satisfied. As such, the Commissioner finds and determines that petitioner's claim should have been analyzed under *N.J.S.A.* 18A:38-2, and its implementing regulation, *N.J.A.C.* 6A:22-3.2(e), rather than *N.J.S.A.* 18A:38-1 as was done by the ALJ in her decision. In this regard, it is noted that *N.J.S.A.* 18A:38-2 specifically provides that:

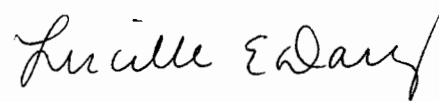
Public schools shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is resident in the district, by order of a court of competent jurisdiction of this state***.

It is unambiguously apparent, pursuant to this provision, that M.A., who was placed in the home of I.B., an undisputed domiciliary of Belleville, by Order of Superior Court is entitled to a free public education in that District. Inasmuch as it is not within the jurisdictional purview of the Commissioner of Education "to vacate, modify or otherwise disturb an Order of the Court", any challenge to this Order by the Board or attestation of petitioner's noncompliance therewith must be directed to Superior Court. (*See D.W., on behalf of minor child, V.D.V. v. Board of Education of the Township of Bass River, Burlington County and Larry A. Mathis, Superintendent and D.D.V. v. Board of Education of the Township of Bass River, Burlington County and Larry A. Mathis, Superintendent*, decided by the Commissioner January 29, 2003, #35-03L)

Accordingly, the Commissioner directs that M.A. is entitled to a free public education in the Belleville school district pursuant to *N.J.S.A.* 18A:38-2. The Board is, therefore,

ordered to continue to admit him to its schools as long as there is no change in the Superior Court Order that would alter his entitlement.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/24/05

Date of Mailing: 10/24/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1447-05

AGENCY DKT. NO. 437-12/04

I. B. O/B/O M.A., III,

Petitioner,

BOARD OF EDUCATION OF THE TOWNSHIP

OF BELLEVILLE, ESSEX COUNTY,

Respondent.

I. B., petitioner, *pro se*

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: April 30, 2005

Decided: September 6, 2005

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, I. B., (I.B. or Boyce) challenges the action of the respondent, Belleville Board of Education (respondent or District) that denied residency status to her nephew, M.A. As a result of the December 14, 2004 denial, M.A. was found ineligible to attend the District High School on tuition free basis. On December 17, 2004, petitioner filed a petition of appeal and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on January 31, 2005. A hearing was held on April 5, 2005

surveillance notes are set forth in R-1. He was assisted by Investigator Rodriguez who testified herein. Their the notes provide that over various school day mornings, Morgan observed the Boyce household at 59 B___ Street and the N. 9th Street address, A.M.'s address.

On October 27, 2004, Morgan observed a vehicle, License plate number PYF-63F with two females leave the Boyce household. M.A. was not in the vehicle but did report to school that day on time. The next day, he observed a vehicle, New Jersey plate number JKL-56F leave ___ N. 9th Street at 6:45 a.m. The vehicle was occupied by an adult female and one male student. On November 10, Morgan saw M.A. leave his mother's address, N. 9th Street, in a vehicle with plate number JKL-56F. Morgan followed the car to the high school parking lot, gym entrance.

On November 18th, he observed vehicle bearing N.J. plates PYF-63F leave B___ Street with one adult female and one young female at 7:05 hours. M.A. was not in the car but was present at school on that day. The next day he went to ___ N. 9th Street at 6:45 a.m. where he saw an adult and M.A. leave the residence at 7:07. M.A. was dropped off at the high school.

On November 22 and 23, Investigator Rodriguez observed 59 B___ Street at 6:40 a.m. Morgan observed the mother's address, N. 9th Street where he saw M.A. leave at 7:09 a.m. Rodriguez saw a vehicle leave Beech Street with two females. The next day, Morgan was at ___ N. 9th. Street and Investigator Rodriguez was at the 59 B___ Street address. M.A. left the N. 9th Street address.

On January 6 and 7, 2005, M.A. was absent from school. Morgan checked the 59 B___ Street address and was told by Boyce's husband that M.A. was not there.

On February 3, 2005, Morgan monitored 59 B___ Street from 3:45 p.m. to 5:15., M.A. did not return to residence from school. At 5:28 p.m. Morgan called the Newark address and M.A. answered the phone. (R-1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1447-05

AGENCY DKT. NO. 437-12/04

I. B. O/B/O M.A., III,
Petitioner,
BOARD OF EDUCATION OF THE TOWNSHIP
OF BELLEVILLE, ESSEX COUNTY,
Respondent.

I. B., petitioner, *pro se*

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: April 30, 2005

Decided: September 6, 2005

BEFORE **IRENE JONES, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, I. B., (I.B. or Boyce) challenges the action of the respondent, Belleville Board of Education (respondent or District) that denied residency status to her nephew, M.A. As a result of the December 14, 2004 denial, M.A. was found ineligible to attend the District High School on tuition free basis. On December 17, 2004, petitioner filed a petition of appeal and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on January 31, 2005. A hearing was held on April 5, 2005

and posthearing summations were submitted on April 28, 2005. Due to the voluminous caseload of the undersigned, Orders of Extensions were granted which extended the time for the issuance of the instant decision until September 12, 2005.

FACTS

Based on the record, I **FIND** the following **FACTS**:

M.A., is the son of A.M. and the nephew of I.B. On July 15, 2004, I.B. and A.M. appeared before the Honorable Hector De Soto, J.S.C. where they secured a joint custody order for M.A. The Order gave I.B. residential custody. At that time, M.A. was seventeen years old and enrolled at Barringer High School in Newark, N.J. I.B. resided in Belleville with her spouse and their two children.

The Township of Belleville employs Bruce Morgan (Morgan) and Iris Rodriguez (Rodriguez) as investigators who, among other things, investigate the domicile of returning Belleville students and newly enrolled students. In the summer of 2004, Morgan recalls receiving a phone call from Boyce. Boyce did not identify herself, however the telephone caller I.D. provided her name. Boyce inquired as to whether she could pay tuition. Morgan told her no. She wanted to know how her out-of-district nephew could attend the District School. Boyce then explained that her nephew was not doing well in the Newark school district and that she didn't want him at Barringer High School. Morgan told her that she needs to have custody of her nephew, however, he cautioned that "custody" cases were closely monitored by the District as 95% of the "custody" cases proved to be illegal students.

On September 8, 2004, Boyce and A.M. enrolled M.A. in Belleville High School. Morgan told them that they would be monitored. Boyce then produced the custody court order. (R-6).

Investigator Morgan monitored the Boyce household on some thirty three (33) occasions, commencing on October 27, 2004 and ending on March 3, 2005. His

surveillance notes are set forth in R-1. He was assisted by Investigator Rodriguez who testified herein. Their the notes provide that over various school day mornings, Morgan observed the Boyce household at 59 B___ Street and the N. 9th Street address, A.M.'s address.

On October 27, 2004, Morgan observed a vehicle, License plate number PYF-63F with two females leave the Boyce household. M.A. was not in the vehicle but did report to school that day on time. The next day, he observed a vehicle, New Jersey plate number JKL-56F leave ___ N. 9th Street at 6:45 a.m. The vehicle was occupied by an adult female and one male student. On November 10, Morgan saw M.A. leave his mother's address, N. 9th Street, in a vehicle with plate number JKL-56F. Morgan followed the car to the high school parking lot, gym entrance.

On November 18th, he observed vehicle bearing N.J. plates PYF-63F leave B___ Street with one adult female and one young female at 7:05 hours. M.A. was not in the car but was present at school on that day. The next day he went to ___ N. 9th Street at 6:45 a.m. where he saw an adult and M.A. leave the residence at 7:07. M.A. was dropped off at the high school.

On November 22 and 23, Investigator Rodriguez observed 59 B___ Street at 6:40 a.m. Morgan observed the mother's address, N. 9th Street where he saw M.A. leave at 7:09 a.m. Rodriguez saw a vehicle leave Beech Street with two females. The next day, Morgan was at ___ N. 9th. Street and Investigator Rodriguez was at the 59 B___ Street address. M.A. left the N. 9th Street address.

On January 6 and 7, 2005, M.A. was absent from school. Morgan checked the 59 B___ Street address and was told by Boyce's husband that M.A. was not there.

On February 3, 2005, Morgan monitored 59 B___ Street from 3:45 p.m. to 5:15., M.A. did not return to residence from school. At 5:28 p.m. Morgan called the Newark address and M.A. answered the phone. (R-1).

Currently, Joseph Kramer is the District's Curriculum Director. He was formerly the Acting Superintendent from September 2004 to February 2005. Kramer recalls that he spoke to Boyce and A.M. on December 8, 2004 about M.A. attending school in the District. He told them that M.A. was ineligible to attend the District High School. Boyce explained that she had joint custody and produced the Custody Order from the family court. He concludes that the sole reason why M.A. was living with his aunt was due to his difficulties in the Newark School District. Kramer told Boyce and A.M. that if M.A. were to leave the District at that time, no tuition costs would be assessed.

R-5 set forth the District's tuition as of March 21, 2005. It provides that the tuition fee is \$46.51 per day and as of March 21, 2005, M.A. had attended school for 121 days for a total of \$5,627.71. (R-5).

I. Boyce testified that she received residential custody of M.A. in July 2004. M.A.'s father was present as well as his mother. She registered M.A. in the District School in September. She obtained custody because M.A.'s mother worked long hours and M.A. was failing in school. He needed help with his school work which she was prepared to do. She observed Investigator Morgan in the front of her home. She questioned him and he told her he was attempting to establish residency.

Boyce concedes that M.A. stays with his mother on weekends and holidays. She admits that R-4 indicates that M.A. left his mother's house on days other than Mondays and Fridays. She supplies with room and board and his mother provides him with his necessities.

Boyce questions why the investigators did not come at night. M.A. eats dinner in her household. Further, he mostly eats breakfast, there, too.

FINDINGS AND CONCLUSION

Pursuant to *N.J.S.A. 18A:38-1*, public schools shall be free to persons over five and under 20 years of age who are domiciled within the school district. An exception to this requirement is set forth in subsection (b) 1 of the statute which provides:

Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn 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.

A child's domicile is normally that of his or her parents. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 1608, 104 L.Ed.2d, 46 (1989); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.* 283 N.J. Super 505, 521-22, 662 A.2d 976 (App. Div. 1995), *certif. denied*, 143 N.J. 325, 670 A.2d 1066 (1996); 25 *Am.Jur2d Domicile* § 42 (1996); *Restatement (Second) Conflict of Laws* §22 (1971). After a divorce or judicial separation, the domicile of the child is that of the parent with whom the child lives. *Roxbury* 283 N.J. Super at 521-23, 662 A.2d 976; 25 *Am.Jur Domicile* § 42. It is well established that one may have many residences but one can only have one domicile.

In the instant matter, the petitioner contends that M.A. was lawfully residing in Bloomfield by virtue of a Joint Custody Order of the Superior Court. While this is true that M.A. could lawfully reside in Bloomfield, I **FIND** that he was not domiciled in

Bloomfield. It is the domicile that entitles M.A. to a free education in Bloomfield, not his residency. The Legislature understood the distinction and clearly intended that domicile and not residence will be the controlling factor for determining whether a student is entitled to a free education in a local school District.

As noted above, under subsection b.(1), a child may reside with another if that person is supporting him *gratis* and sets forth in an affidavit that the child is residing with him or her due to a family or an economic hardship . The fact that a child is not doing well in a particular district, does not constitute a hardship. Further, it must be clearly established that a child is not residing with another for the sole purpose of receiving a free public education within that District. There was no proof presented in the record that Boyce was caring for M.A. *gratis*. Rather, the proofs and testimony, clearly establish that M.A. was residing with Boyce because of his difficulties in the Newark School District.

I have considered the reference letters submitted by Boyce. Most of the letters are neighbors of Boyce and they attest to her fine character. Further, they assert that M.A. has in fact resided with her since September 2004. (P-1 to P-3). Boyce's character is not in dispute. Indeed, her intentions were good. Nevertheless, her actions were in violation of *N.J.S.A. 18A:38-1*.

I therefore, **CONCLUDE** that M.A. was not domiciled in Belleville or an affidavit student, thus he was not entitled to a free education in the District.

Pursuant to *N.J.S.A. 18A:38-1*, tuition shall be assessed for the time of student's ineligible attendance in the District. Here, the proofs indicate that the per diem tuition during the 2004-2005 school year was \$46.51. As of April 30, 2005, tuition costs were \$6,650.39. Presumably, M.A. attended school until the end of the school term, an additional 39 days or \$1,813.88. It is therefore **ORDERED** that the appellant shall pay to the respondent \$8,464.27.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/6/05

DATE



IRENE JONES, ALJ

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

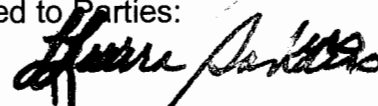
DATE

SEP 8 2005

DATE

sej

Mailed to Parties:



DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 6862-04
AGENCY DKT NO. 261-7/04

NEW JERSEY EDUCATION ASSOCIATION,
ON BEHALF OF ITS AFFILIATES AND MEMBERS,
INCLUDING MELISSA ECHSTEIN,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF
EDUCATION,

RESPONDENT.

:
:
:
:
:
:
:

COMMISSIONER OF EDUCATION

DECISION

The record and settlement of this matter transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present matter, the settlement, pursuant to *N.J.A.C. 1:1-19.1* (c) and (d), is deemed to be the final decision in the case, and it is accordingly dismissed.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05

Date of Mailing: 10/25/05

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Allison Colsey Eck
Deputy Attorney General

NEW JERSEY EDUCATION	:	BEFORE THE OFFICE OF
ASSOCIATION on behalf of its	:	ADMINISTRATIVE LAW
Affiliates and the Members	:	
they represent, including	:	
MELISSA ECKSTEIN, MICHAEL	:	
RYAN and WENDY OSBBORNE,	:	
	:	OAL Docket No. EDUOT 06862
Petitioner,	:	
	:	
v.	:	
	:	STIPULATION OF SETTLEMENT
NEW JERSEY DEPARTMENT OF	:	
EDUCATION,	:	
	:	
Respondent.	:	

WHEREAS, petitioner, New Jersey Education Association ("NJEA") on behalf of its Affiliates and the Members they represent, including Melissa Eckstein, Michael Ryan and Wendy Osborne, and respondent, New Jersey Department of Education ("Department"), have mutually agreed to settle the above-captioned matter, with Selikoff and Cohen, P.A., (Keith Waldman, Esq., appearing) on behalf of NJEA, and with Peter C. Harvey, Attorney General of New Jersey, (Allison Colsey Eck, Deputy Attorney General appearing) on behalf of the Department; and

WHEREAS, this matter arose from NJEA's challenge to the Department's revised regulations which were adopted on December 18,

1/11/9/27/5

2003, and effective on January 20, 2004. 36 N.J.R. 469 (Jan. 20, 2004); and

WHEREAS, NJEA specifically challenged the regulatory provisions governing educational services certifications including N.J.A.C. 6A:9-13.1(e), N.J.A.C. 6A:9-13.3(d), N.J.A.C. 6A:9-13.5(e), N.J.A.C. 6A:9-13.6(f), N.J.A.C. 6A:9-13.7(d), N.J.A.C. 6A:9-13.8(e), N.J.A.C. 6A:9-13.9(i), N.J.A.C. 6A:9-13.10(e), N.J.A.C. 6A:9-13.13(d), N.J.A.C. 6A:9-13.14(e) and N.J.A.C. 6A:9-13.15(e), claiming that the Department did not provide the same notice regarding the regulatory change to applicants attending colleges out-of-state that it provided to applicants attending in-state colleges; and

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this matter in the public interest; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

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

1. The following individuals, who were enrolled in, and matriculated in, a graduate program of study to receive a student personnel services endorsement at the time the Department's regulations governing the school personnel services endorsement were changed on December 18, 2003, effective on January 20, 2004, shall be permitted to submit their application and credentials for

1/W 9/27/5

a student personnel services endorsement to the Department for review pursuant to the regulations existing on January 19, 2004 as set forth in former N.J.A.C. 6:11:

- a. Lily Basantis
- b. Ronda Brown
- c. Tina Dietrich
- d. Michael Ryan
- e. Graham Hall
- f. Betsy Kirkbride
- g. Jeremiah Bodner
- h. Sherrie Davis
- i. Melissa Eckstein
- j. Lauren Small
- k. Michael Egan
- l. Bonnie Sprigman
- m. Mollie Huntsinger

2. The applicants listed in paragraph 1 who have not met the requirements for the award of a student personnel services endorsement, but have submitted their credentials for a review and evaluation pursuant to the terms of this settlement agreement, shall receive a written evaluation from the Department and will have until January 20, 2009 to complete the requirements set forth in the written evaluation.

3. The applicants listed in paragraph 1 must submit their application, including all required documentation and fees for their student personnel services endorsement, and/or their credentials for review and evaluation to the Department no later than October 31, 2005. Applications received after October 31, 2005, will not be subject to the terms of this agreement and will be subject to review pursuant to the Department's current licensing regulations at 6A:9.

T/W 9/27/15

4. Upon receipt of the information from the applicants listed in paragraph 1, above, on or before October 31, 2005, the Department shall issue student personnel services endorsements pursuant to the regulations existing on January 19, 2004, and/or issue written evaluations to applicants no later than November 30, 2005.

5. Upon execution of this stipulation of settlement, NJEA will withdraw its appeal of the provisions of N.J.A.C. 6A:9-13.1(e), N.J.A.C. 6A:9-13.3(d), N.J.A.C. 6A:9-13.5(e), N.J.A.C. 6A:9-13.6(f), N.J.A.C. 6A:9-13.7(d), N.J.A.C. 6A:9-13.8(e), N.J.A.C. 6A:9-13.9(i), N.J.A.C. 6A:9-13.10(e), N.J.A.C. 6A:9-13.13(d), N.J.A.C. 6A:9-13.14(e) and N.J.A.C. 6A:9-13.15(e), captioned as New Jersey Education Association on behalf of its Affiliates and the Members they represent, including Melissa Eckstein, Michael Ryan and Wendy Osborne, OAL Dkt. NO. EDUOT 06862, as well as its challenge to the notice the Department provided to out-of-state colleges and universities as compared to the notice provided to in-state colleges and universities concerning the changes to the professional licensure and standards adopted on December 18, 2003, effective January 20, 2004.

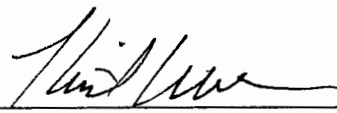
6. NJEA will not challenge the sufficiency of the notice of the regulatory changes provided by the Department for any regulatory provision adopted by the State Board on December 18, 2003, effective January 20, 2004.

11/1/04

7. NJEA does not concede that the allegations in the petition in this matter were not justified, nor does the Department admit or concede the truth of the allegations contained in the petition filed in this matter and both parties have entered into this agreement for the purposes of settlement only.

8. The parties agree that this stipulation of settlement fully resolves all issues between them arising from the Department's adoption on December 18, 2003 of its revised professional licensure and standards regulations set forth in N.J.A.C. 6A:9, which were effective on January 20, 2004, that are the subject of this appeal.

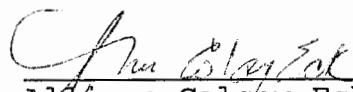
Date 9/27/15



Keith Waldman, Esq.
Attorney for Petitioner,
New Jersey Education
Association

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date: 9/30/05

By: 

Allison Colsey Eck
Deputy Attorney General

OAL DKT. NO. EDU 10041-04
AGENCY DKT. NO. 361-10/04

MARY EDWARDS-ANDREWS, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF : DECISION
CAMDEN, CAMDEN COUNTY, :
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 her 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.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05

Date of Mailing: 10/25/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 10041-04

AGENCY DKT. NO. 361-10/04

MARY EDWARDS-ANDREWS,

Petitioner,

v.

CAMDEN CITY BOARD OF EDUCATION,

Respondent.

Geoffrey B. Gompers, Esq., for petitioner (Geoffrey B. Gompers & Associates,
P.C., attorneys)

Peter J. Cammarano, III, Esq., on behalf of respondent (Genova, Burns &
Vernoia, attorneys)

Record Closed: September 26, 2005

Decided: September 26, 2005

BEFORE ISRAEL D. DUBIN, ALJ:

This matter arises out of petitioner's demand that the decision of respondent Camden City Board of Education transferring her from the position of Principal of the Woodrow Wilson High School to that of Principal of the South Camden Alternative School be reversed and that she be reappointed to her former position. Petitioner has asserted that the Board's action was based on an unlawful and discriminatory plan and resulted in a reduction of her base salary.

Petitioner filed her appeal with the Commissioner on August 13, 2004, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on November 10, 2004. *N.J.S.A.* 52:14F-1 to -13. The matter was subsequently scheduled to be heard on October 6, 7, 11 & 12, 2005. However, by Stipulation of Dismissal dated September 14, 2005, the parties stipulated that the matter should be "dismissed with prejudice."

Based on the foregoing, I find that the parties have amicably resolved their differences and that petitioner no longer wishes to proceed. I therefore conclude that the matter should be and is hereby **DISMISSED**. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2005

DATE

Israel D. Dubin

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

9-29-05

DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

SEP 30 2005

Mailed to Parties:

Laure Sanders
DIRECTOR AND
ADMINISTRATIVE LAW JUDGE

DATE

IDD/mamf

OFFICE OF ADMINISTRATIVE LAW

GEOFFREY B. GOMPERS & ASSOCIATES, PC
By: Geoffrey B. Gompers, Esquire
778 Riverton Road
Moorestown, NJ 08057
(856) 663-2566
Attorney for Petitioner

DR. MARY EDWARDS-ANDREWS,

Petitioner,

v.

CAMDEN CITY BOARD OF EDUCATION,

Respondent.

: OAL Docket No.: EDUOA 10041-2004S

: Agency Ref. No.: 361-10/04

: Transmitting Agency:

: Department of Education

: **STIPULATION OF DISMISSAL**

It is hereby stipulated that the dispute between the parties in the above matter is dismissed with prejudice.

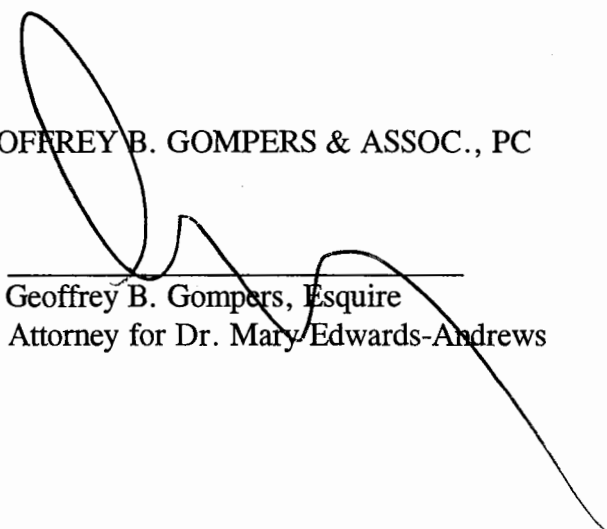
GENOVA BURNS & VERNIOIA

By:


Peter J. Cammarano, Esquire
Attorney for Camden County
Board of Education

GEOFFREY B. GOMPERS & ASSOC., PC

By:


Geoffrey B. Gompers, Esquire
Attorney for Dr. Mary Edwards-Andrews

Date: September 14, 2005

FILED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2005 SEP 22 A 10:14

OAL DKT. NO. EDU 07386-05
AGENCY DKT. NO. 129-5/05

IN THE MATTER OF THE TENURE :
HEARING OF GARRY HOWARD, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF ROSELLE, UNION COUNTY. :

The record of this matter, the parties' proposed Consent Order of Withdrawal, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs that, under the circumstances of this matter, the Board may properly be permitted to withdraw the tenure charges certified against respondent so that they may, should the Board deem it appropriate, subsequently be re-filed in accordance with applicable procedural law. In so holding, the Commissioner stresses that she construes the parties' representatives' consent to the "Form of Order" as consent to its substantive content as well; should either party deem it otherwise, the Commissioner's acceptance of the proposed withdrawal will become null and void.

Accordingly, subject to the proviso set forth above, the Initial Decision of the OAL approving the Consent Order of Withdrawal is adopted as the final decision in this matter.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05

Date of Mailing: 10/25/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND
ORDER OF WITHDRAWAL

OAL DKT. NO. EDU 07386-05
AGENCY DKT. NO.129-5/05

BOROUGH OF ROSELLE, UNION COUNTY

Petitioner,

v.

GARY HOWARD,

Respondent.

Allan C. Roth, Esq., for petitioner

(Law offices of Allan C. Roth, attorneys)

Louis P. Bucceri, Esq., for respondent

(Bucceri and Pincus, attorneys)

Record Closed: September 1, 2005

Decided: September 13 , 2005

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 in June 2005 as a result of the

certification of tenure charges by the School District of Roselle, Union County, against the respondent, Gary Howard, a tenured custodian. Hearings were scheduled to begin in the latter part of September 2005. However, in advance of the scheduled hearing dates and at the request of both counsel, the dates were adjourned.

Thereafter, an agreement was reached whereby the School District of Roselle would withdraw the tenure charges without prejudice to its opportunity to refile the same. In turn, respondent was to be reinstated to his position with full salary, retroactive to the date of his suspension without pay.

Attached hereto is a "Consent Order of Withdrawal" which contains the background circumstances and refers to procedural defects which precipitated the withdrawal and the interests of judicial economy and preservation of public funds which it will serve.

I have reviewed the proposed Withdrawal Order and I am satisfied that it is consistent with law; in particular, the reservation by the School District of the right to refile the tenure charges which may include some or all of the allegations contained in the original petition.

Accordingly, the Consent Order of Withdrawal hereby is approved and will be attached to this Initial Decision and Order of Withdrawal.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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 13, 2005
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9-14-05
DATE

M. Kathleen Dunne
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 15 2005
DATE
nd

Laure Sanders
**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**
OFFICE OF ADMINISTRATIVE LAW

AUG 26 2005

	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION OF NEW JERSEY
	:	
	:	OAL Docket No. EDUTH-07386-2005N
In the Matter of the Tenure	:	
Hearing of Garry Howard,	:	Agency Ref. No. 129-5/05
School District of the	:	
Borough of Roselle, Union	:	
County	:	
	:	CONSENT ORDER
	:	OF WITHDRAWAL
	:	

THIS MATTER having been opened to the Office of Administrative Law, before the Hon. Stephen G. Weiss, ALJ, by the Petitioner, Borough of Roselle Board of Education, by its attorney Allan C. Roth, Esq., appearing, and Respondent, Garry Howard, appearing by his attorney Louis P. Bucceri, Esq., on Petitioner's application to have this matter withdrawn without prejudice pursuant to N.J.A.C. 6A:3-5.6, and

WHEREAS, this matter arises out of tenure charges alleging unbecoming conduct, inefficiency and other just cause against a tenured custodial employee of Petitioner, and

WHEREAS, Respondent has denied these charges, and

WHEREAS, Respondent has filed a motion to dismiss the charges due to procedural defects, and

WHEREAS, established case law requires that any dismissal based on Respondent's procedural motion would be without prejudice to the re-filing of the charges by Petitioner, and

WHEREAS, the Administrative Law Judge is satisfied that, due to procedural defects which may be fatal to the Petitioner's charges in their current form and in the interest of judicial economy and preservation of public funds, the Petitioner should be permitted to withdraw its charges without prejudice pursuant to N.J.A.C. 6A:3-5.6, with leave to re-file the Petition pursuant to the requirements of N.J.A.C. 6A:3-5.1, et seq., and

WHEREAS Respondent consents to the entry of this order since it provides him the same relief that he would receive if his motion was successful, it is

On this 13th day of September, 2005;

ORDERED that due to the claims of procedural defects which may be fatal to the Tenure Charge Petition in its current form and in the interest of judicial economy and preservation of public funds, the Petitioner is permitted to withdraw its Petition without prejudice pursuant to N.J.A.C. 6A:3-5.6, with the right to re-file tenure charges against Respondent pursuant to the requirements of N.J.A.C. 6A:3-5.1, et seq., including charges which arise out of some or all of the allegations contained in the current Petition, and

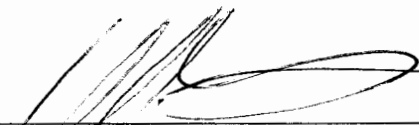
IT IS FURTHER ORDERED that Petitioner shall reinstate Respondent to full salaried status, retroactive to the date of his suspension without pay pursuant to N.J.S.A. 18A:6-14. All monies due shall be paid to Respondent forthwith;

IT IS FURTHER ORDERED that this initial decision and Order is filed with the Commissioner of Education for consideration. This recommended initial decision and Order may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. If the Commissioner 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.

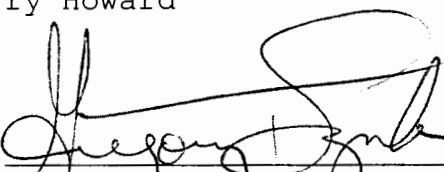

Stephen G. Weiss, A.L.J.

Form of Order consented to by:

Petitioner
Roselle Board of Education

By: 
Allan C. Roth, Esq.

Respondent
Garry Howard

By: 
Gregory T. Syrek, Esq.

OAL DKT. NO. EDU 2864-05
 AGENCY DKT. NO. 27-1/05

TERRANE <u>JOHNSON</u> ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE MONMOUTH	:	DECISION
REGIONAL HIGH SCHOOL DISTRICT,	:	
MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner observes that the Assistant Superintendent for Business/B.S. signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Assistant Superintendent for Business/B.S. to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/05

Date of Mailing: 10/25/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2864-05

AGENCY DKT. NO. 27-1/05

TERRANE JOHNSON,

Petitioner,

v.

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

Respondent.

John Jay Perrone, Esq., for petitioner

Martin M. Barger, Esq. for respondent (Reussille, Mausner, Carotenuto, Barger, Kenny
& Steel, attorneys)

Record Closed: September 28, 2005

Decided: September 29, 2005

BEFORE DONALD J. STEIN, ALJ:

This matter was transmitted to the Office of Administrative Law on May 11, 2005, 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 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**:

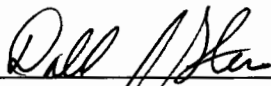
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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*.

September 29, 2005
DATE


DONALD J. STEIN, ALJ

Receipt Acknowledged:

1D-4-05
DATE


DEPARTMENT OF EDUCATION 

Mailed to Parties:

OCT 6 2005
DATE


OFFICE OF ADMINISTRATIVE LAW

/bdt

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

J-1

MONMOUTH REGIONAL HIGH SCHOOL
ONE NORMAN J FIELD WAY
TINTON FALLS, NJ 07724
(732) 542-1170 FAX(732) 542-5815

JAMES W. CLEARY,
ASSISTANT SUPERINTENDENT FOR BUSINESS
BOARD SECRETARY

September 28, 2005

**AGREEMENT BETWEEN MONMOUTH REGIONAL HIGH SCHOOL BOARD
OF EDUCATION AND MS. TERRAINE JOHNSON**

The Monmouth Regional High School Board of Education will agree to pay Ms. Terraine Johnson loss wages equal to \$10,066.00 and will take out the necessary federal, state, social security and unemployment tax; along with pension obligations for this total dollar amount. The Board will further agree to credit Ms. Johnson for the sick days earned during this period of absence.

If Ms. Johnson wants to buy back pension time, she will be responsible for any additional cost beyond the four (4) percent that we will withdraw from the \$10,066.00. The Board of Education will adjust Ms. Johnson's salary for the 2005/2006 school year to the rate of \$12.50/hr.; retro back to September 01st, 2005, with a one (1) dollar additional hourly rate when she is riding the school bus as an aide.

Any attorney fees incurred by Ms. Johnson in this matter will be her responsibility.

This should put closure to the pending legal matters between Monmouth Regional High School Board of Education and Ms. Johnson.

Agreed: Terraine Johnson James W. Cleary
Ms. Terraine Johnson James W. Cleary
Assistant Superintendent for Business/B.S.

Dated: 9-28-05 9/28/05

2005 SEP 29 A 10:56
OFFICE OF ADMIN L&M

MONMOUTH REGIONAL HIGH SCHOOL
ONE NORMAN J FIELD WAY
TINTON FALLS, NJ 07724
(732) 542-1170 FAX(732) 542-5815

JAMES W. CLEARY,
ASSISTANT SUPERINTENDENT FOR BUSINESS
BOARD SECRETARY

September 28, 2005

AGREEMENT BETWEEN MONMOUTH REGIONAL HIGH SCHOOL BOARD
OF EDUCATION AND MS. TERRAINE JOHNSON

The Monmouth Regional High School Board of Education will agree to pay Ms. Terraine Johnson loss wages equal to \$10,066.00 and will take out the necessary federal, state, social security and unemployment tax; along with pension obligations for this total dollar amount. The Board will further agree to credit Ms. Johnson for the sick days earned during this period of absence.

If Ms. Johnson wants to buy back pension time, she will be responsible for any additional cost beyond the four (4) percent that we will withdraw from the \$10,066.00. The Board of Education will adjust Ms. Johnson's salary for the 2005/2006 school year to the rate of \$12.50/hr.; retro back to September 01st, 2005, with a one (1) dollar additional hourly rate when she is riding the school bus as an aide.

Any attorney fees incurred by Ms. Johnson in this matter will be her responsibility.

This should put closure to the pending legal matters between Monmouth Regional High School Board of Education and Ms. Johnson.

Agreed: Terraine Johnson James W. Cleary
Ms. Terraine Johnson James W. Cleary
Assistant Superintendent for Business/B.S

Dated: 9-28-05 9/28/05

REUSSILLE, MAUSNER, CAROTENUTO, BARGER, KENNY & STEEL, L.L.C.

(FOUNDED IN 1861 BY JOHN S. APPLGATE)

COUNSELLORS - AT - LAW

P. O. BOX 580

RED BANK, NEW JERSEY 07701

MARTIN M. BARGER (N.J. & N.Y.)
PETER W. KENNY (N.J. & N.Y.)
DONALD B. STEEL
RONALD T. CATELLI (N.J. & TN.)
MILTON A. MAUSNER
SAMUEL CAROTENUTO
WHITNEY CROWELL
OF COUNSEL
LEON REUSSILLE, JR. (1917-1980)



RED BANK PROFESSIONAL PLAZA

RED BANK, NJ 07701
365 BROAD STREET
(732) 741-1800
FAX: (732) 758-9724

LAKEWOOD, NJ 08701
718-A BUCKINGHAM DRIVE
(732) 364-4900
FAX: (732) 363-3798

WHITING, NJ 08759
15-A WHITING SHOPPING CENTER
P.O. BOX 137
(732) 350-3200
FAX: (732) 350-3731

September 28, 2005

via fax 1-609-588-3730 & first class
Honorable Donald J. Stein, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road - P.O.Box 049
Mercerville, New Jersey 08625-0049

**RE: Terrane Johnson v. Monmouth Regional High School
District, Monmouth County
OAL Docket No. EDUOA 02864-2005S
Agency Ref. No. 27/1/05**

OFFICE OF ADMINISTRATIVE LAW

2005 SEP 29 A 10:49

Dear Judge Stein and Mr. Perrone:

Enclosed herewith find fully executed Agreement between Monmouth Regional High School Board of Education and Terrane Johnson.

Please confirm that the prehearing conference scheduled for Friday, September 30th at 3:00 p.m. is cancelled.

Respectfully,

MARTIN M. BARGER

MMB:le:5
Enclosure

cc: John Jay Perrone, Esquire - via fax 732-389-4719 & first class

REUSSILLE, MAUSNER, CAROTENUTO, BARGER, KENNY & STEEL, L.L.C.

(FOUNDED IN 1861 BY JOHN S. APPELGATE)

COUNSELLORS - AT - LAW

P. O. BOX 580

RED BANK, NEW JERSEY 07701

MARTIN M. BARGER (N.J. & N.Y.)
PETER W. KENNY (N.J. & N.Y.)
DONALD S. STEEL
RONALD T. CATELLI (N.J. & TN)
MILTON A. MAUSNER
SAMUEL CAROTENUTO
WHITNEY CROWELL
OF COUNSEL
LEON REUSSILLE, JR. (1917-1980)



RED BANK PROFESSIONAL PLAZA

RED BANK, NJ 07701
365 BROAD STREET
(732) 741-1800
FAX: (732) 758-8724

LAKEWOOD, NJ 08701
718-A BUCKINGHAM DRIVE
(732) 364-4900
FAX: (732) 363-3798

WHITING, NJ 08759
15-A WHITING SHOPPING CENTER
P.O. BOX 137
(732) 350-3200
FAX: (732) 350-3731

September 28, 2005

via fax 1-609-588-3730 & first class
Honorable Donald J. Stein, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road - P.O.Box 049
Mercerville, New Jersey 08625-0049

**RE: Terrane Johnson v. Monmouth Regional High School
District, Monmouth County
OAL Docket No. EDUOA 02864-2005S
Agency Ref. No. 27/1/05**

Dear Judge Stein and Mr. Perrone:

Enclosed herewith find fully executed Agreement between Monmouth Regional High School Board of Education and Terrane Johnson.

Please confirm that the prehearing conference scheduled for Friday, September 30th at 3:00 p.m. is cancelled.

Respectfully,

MARTIN M. BARGER

MMB:lc:5
Enclosure

cc: John Jay Perrone, Esquire - via fax 732-389-4719 & first class

2005 SEP 29 A 10:56
OFFICE OF ADMINISTRATIVE LAW

Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, LLC

(founded in 1861 by John S. Applegate)

Counsellors - at - Law

Leon Reussille, Jr. (1917-1980)

Milton A. Mausner
Samuel Carotenuto
Whitney Crowell
OF COUNSELMartin M. Barger (N.J. & N.Y.)
Donald B. Steel
Peter W. Kenny (N.J. & N.Y.)
Ronald T. Catelli (N.J. & TN.)P. O. BOX 580
RED BANK, NEW JERSEY 07701

(732) 741-1800

FAX NUMBER
(732) 758-9724Red Bank Office
365 Broad Street
(732) 741-1800
fax: (732) 758-9724Lakewood Office
718-A Buckingham Drive
(732) 364-4900
fax: (732) 363-3798Whiting Office
388 Whiting Shopping Center
(732) 350-3200
fax: (732) 350-3731**FAX TRANSMITTAL PAGE**

PLEASE DELIVER THE FOLLOWING PAGE(S) TO:

NAME: Beth

FIRM: Hon. Donald J. Stein, A.L.J.

FAX NUMBER DIALED: 1-609-588-6574

FROM: MARTIN M. BARGER, ESQ.

Total number of pages faxed including this page: 3 DATE: 09/29/05 TIME 10:56 AM

IF YOU DO NOT RECEIVE ALL OF THE PAGES, OR IF YOU HAVE DIFFICULTY WITH
THE TRANSMISSION, PLEASE CALL LINDA AT (732) 741-1800 EXT. 223 or FAX (732)
758-9724.**CONFIDENTIALITY NOTE:**

The documents accompanying this telecopy transmission contain information from MARTIN M. BARGER, ESQ., which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named in this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited, and that the documents should not be reproduced and should be returned to this attorney immediately. In this regard, if you received this telecopy in error, please notify me by telephone immediately so that we can arrange for the return of the faxed documents to us at no cost to you.

COMMENTS: Beth: Pursuant to our telephone conversation of this date, enclosed find copy of the letter I mentioned to you concerning the Terraine Johnson v. Monmouth Regional matter. Linda

OAL DKT. NO. EDU 8078-05
AGENCY DKT. NO. 259-10/05

J.D., on behalf of her minor child, L.S., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EASTERN : DECISION ON MOTION
CAMDEN COUNTY REGIONAL SCHOOL
DISTRICT, CAMDEN COUNTY, :
DR. HAROLD MELLEBY, SUPERINTENDENT, :
AND RONALD W. SAHLI, SOLICITOR. :
RESPONDENTS. :
_____ :

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on October 14, 2005, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982) 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.

The Commissioner has, therefore, determined to adopt the recommended Order of the ALJ and deny petitioner's request for emergent relief. Moreover, after reviewing the audiocassette tape of the hearing, the Commissioner is compelled to comment on the apparent

misunderstanding of the parties that the law requires Eastern Camden County Regional School District (District) to enroll L.S. pending a decision in this case. This is not a residency dispute under *N.J.S.A. 18A:38-1 et seq.* Accordingly, there is no basis to conclude that L.S. is entitled to attend school in the District during the pendency of this matter.¹

In conclusion, the Commissioner has determined to adopt the recommended Order of the ALJ for the reasons expressed therein and petitioner's request for emergent relief is, therefore, denied. This matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05

¹ It appears that L.S. has been attending school in the District since October 12, 2005. Thus, L.S. *may* have been included in the October 15 student count submitted to the Department of Education by the District in support of its State-aid request.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 8078-05

AGENCY DKT. NO. 259-10/05

J.D. o/b/o Minor Child L.S.,
Petitioners,

v.

**BOARD OF EDUCATION OF
THE EASTERN CAMDEN COUNTY
REGIONAL SCHOOL DISTRICT,
CAMDEN COUNTY,
DR. HAROLD MELLEBY,
SUPERINTENDENT, AND
RONALD W. SAHLI, SOLICITOR,**
Respondents.

J.D. on behalf of L.S., petitioners, *pro se*

Ronald W. Sahli, Esq., for respondents

BEFORE DONALD J. STEIN, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 3, 2005, petitioners filed an application for emergent relief with the New Jersey Department of Education, Division of Controversies and Disputes. The application requested that L.S. be permitted to attend school in respondent's district free of charge, as a non-

resident student under the Student Privilege provision of the district's by-laws, pursuant to an oral agreement. The respondent (District) denies any oral agreement exists, and further denies that the petitioner is eligible to attend school in the District.

On October 4, 2005, these matters were transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On October 14, 2005, the emergent relief was heard in the OAL, Trenton (Hamilton Township). At the conclusion of the hearing, the petitioner was explained the legal issues involved, and he requested one additional day to research the issue. On October 18, 2005, petitioner submitted a detailed brief with exhibits. On October 21, 2005, respondents' brief, as well as a response from the petitioner, was filed.

STATEMENT OF FACTS

Some of the facts are undisputed. Petitioner was a resident of the district during the times L.S. attended Eastern High School. On July 8, 2005, petitioners called the district and discussed this matter with a secretary. The contents of this conversation are in dispute and will be discussed below. On July 9, 2005, petitioners signed a lease to move into Haddonfield. On July 10, 2005, petitioners sent the district a letter requesting permission for their daughter L.S. to complete her senior year at Eastern High School. The letter further stated:

Please let me know if it is possible for [L.S] to finish her final year of High School at Eastern and, if possible, what steps we need to take in order to facilitate the process (R-1).

The same letter further stated that "Our living situation has forced us to move out of the school district effective July 31, 2005."

Shortly thereafter, the district denied petitioners' request, because the school's by-laws require that the student be a resident of the district and attend school as of October 15, 2005 (P-2). On August 17, 2005, petitioners appealed to the Eastern Regional School District, and the appeal was denied.

The preceding information is undisputed and is thus **FOUND AS FACT**.

At issue is what was said during the July 8, 2005, telephone conference between the petitioner and a secretary for the district. Petitioner wrote in his initial petition:

Once the petitioner signed a lease to move out of the district, the petitioner would then notify the senior high school principal of their move and make a written request for Senior Privilege (P-1).

Petitioner further testified during the hearing that he was told to send a letter to the district. After a lengthy discussion as to this issue, petitioner later testified that he was told that L.S. would be allowed to attend Eastern High School. Petitioner wrote in his brief that the promise made to him was:

If you enter into a lease on July 9, 2005 to move into a home located out of Eastern High School district on August 1, 2005, you will be meet [sic] all eligibility requirements to have tuition waived for a non-resident Senior. (P-2)

Petitioner then alleges that he relied upon this promise and signed a new lease.

This issue is significant because the crux of the petitioner's argument is that he was made a promise by the district that L.S. could attend the district and, in reliance thereof, the petitioner and his family moved out of the district.

Based on the fact that his initial pleadings and testimony merely state that a written request must be made for Senior Privilege, and that petitioner's letter sent the day after this phone call confirms that a process must be followed and completed, I **FIND** that no express promise was made to the petitioner.

CONCLUSIONS OF LAW

A party seeking emergent relief must satisfy the standards in *Crowe v. DeGioia*, 90 N.J. 126 (1982), which requires the movant to establish:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The petitioner has a substantial likelihood of prevailing on the merits of the underlying claim; and
3. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all three prongs of the *Crowe* test.

IRREPARABLE HARM

Although petitioner may face a difficult transition to attend another school away from her friends, and not be able to take the specialized classes offered in her prior school, she will be attending high school in a well established school district. It should further be noted that the petitioner is seeking to attend an out-of-district school through the policy of "senior privilege." A privilege may be withheld in the interest of maintaining an orderly and efficient school system. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County, State Board of Education* decision dated April 17, 1996, citing *Camden City Board of Education v. NJSIAA*, Docket #A-2802-91T2 (App. Div. 1992); *Burnside et al. v. NJSIAA*, 1984 S.L.D. 1695 (App. Div. 1984), *cert. denied* 101 N.J. 236 (1985). The determination of whether or not a student may attend is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm. The denial of a public high school of her choosing, as opposed to attending a high school in the district in which she resides, creates no irreparable harm.

SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS

Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. *Thomas v. Bd. of Ed. of Morris Tp.*, 89 N.J. Super. 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Ed.*, 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Bd. of Ed.*, *supra*, 60 N.J. Super. at 294. Obviously, the district has a clear and distinct policy to require tuition payment for out-of-district students to attend their high school.

The petitioners have also argued that the doctrine of promissory estoppel bars the respondent from denying them attendance at their high school. There are four elements to the doctrine of promissory estoppel: 1) a clear and definite promise, 2) made with the expectation that the promisee will rely upon it, 3) reasonable reliance upon the promise, 4) which results in definite and substantial detriment. *Malaker Corp. Stockholders Protective Committee v. First Jersey Nat'l Bank*, 163 N.J. Super. 463, 479, 395 A.2d 222 (App. Div. 1978), *Lobiondo v. O'Callaghan*, 357 N.J. Super. 488, 499 (N.J. Super. Ct. 2003). I have already determined that no clear and definite promise was ever made to the petitioners. It should further be noted that the petitioner admits that he was notified the week of July 11, 2005, of the October 15, 2005, requirement to be living in the district. Since petitioners had signed the lease only few days before becoming aware of the denial, the petitioners may have been able to cancel the lease. It does not appear as though there was any detrimental reliance, since the petitioner stated that his living conditions required him to move. Thus, the doctrine of promissory estoppel is not applicable in this case.

Therefore, I **FIND** it unlikely that the petitioners would have prevailed on the merits.

WILL PETITIONER SUFFER GREATER HARM THAN THE RESPONDENT IF THE REQUESTED RELIEF IS NOT GRANTED?

This appears to be a more difficult question. The petitioners have alleged that their daughter will face a difficult transition to another school, be away from her friends, and not be able to take specialized classes offered in her prior school. The district alleges that they are not required to provide a free and appropriate education to the petitioner, since they no longer reside in the district. I am unable at this time to determine if the petitioners would prevail on this argument.

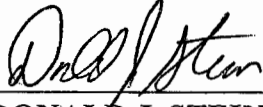
In conclusion, I **FIND** that since *N.J.A.C. 6A:14-2.7(m) 1* and *N.J.A.C. 1:6A-12.1* is written in the conjunctive and the petitioners have failed to satisfy all three requirements, I **CONCLUDE** that the petitioners have failed to establish grounds for the granting of emergency relief.

DECISION AND ORDER

Based on the foregoing, petitioner's motion for emergent relief is **DENIED**. The matter will be scheduled for a plenary hearing on an expedited basis, should the parties wish to so proceed.

This order on the 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*.

10-24-2005
DATE


DONALD J. STEIN, ALJ

/bdt

LIST OF EXHIBITS

For petitioner:

P-1 Petition

P-2 Nonresident Senior Policy of the District

For respondent:

R-1 Petitioner's letter dated July 8, 2005

JAMES F. TAYLOR, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF HARDYSTON, SUSSEX COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner — a former principal terminated through a reduction in force (RIF) in 1996 — contends that the terms of respondent's 2004 offer of reemployment were deliberately unacceptable so as to circumvent petitioner's tenure and seniority rights; he seeks reinstatement to the position of principal or appointment to the position of assistant superintendent, retroactive to July 1, 2004, with annual salary and emoluments consistent with the statewide salary ranges for those positions. Respondent filed a motion for summary decision, alleging that the petition was barred by the 90-day limitation of *N.J.A.C.* 6A:3-1.3(d).

The ALJ found, *inter alia*, that: the matter was ripe for summary decision as there are no genuine issues of material fact; the letter dated July 15, 2004 provided adequate notice to petitioner that the Board did not intend to alter the terms of the reemployment contract; the 90-day period therefore began on July 15, 2004, and ended on October 13, 2004, making the petitioner's October 20, 2004 filing untimely; petitioner's claims to tenure and seniority rights for two other positions — assistant superintendent for curriculum and instruction, and supervisor of curriculum and instruction — are also time barred; and there are no compelling or exceptional circumstances to warrant relaxation or waiver of the 90-day rule. The Initial Decision of the OAL granted the respondent's motion for summary decision, and dismissed the petition.

The Commissioner adopts the ALJ's decision, and dismisses the petition. In so determining, the Commissioner notes her concurrence with the ALJ's reasoning except for the ALJ's reliance on *Drapczuk v. Board of Education of the Township of Winfield, Union County*, as the Commissioner rejected the Initial Decision in that matter, holding that the underlying issue was not whether a letter constituted "sufficient notice" in accord with *Kaprow, supra*, but whether the Board did, in fact, make a lawful determination of nonrenewal as required by *N.J.S.A.* 18A:17-20.1.

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

October 27, 2005

OAL DKT. NO. EDU 1049-05
 AGENCY DKT. NO. 366-10/04

JAMES F. TAYLOR,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	DECISION
OF HARDYSTON, SUSSEX COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the administrative law judge's (ALJ's) determination to grant the Hardyston Township Board of Education's (Board's) motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C. 1:1-12.5(b)* and *Contini, supra*. In this regard, with respect to petitioner's claim to the principal's position at Hardyston Middle School, the Commissioner agrees with the ALJ's conclusion that the Board's letter of July 15, 2004 provided final and adequate notice to petitioner that the Board did not intend to alter the terms of the re-employment contract offered to him so as to trigger the 90-day rule for filing an appeal to the Commissioner set forth at *N.J.A.C. 6A:3-1.3(d)*. Since the within petition was filed on October 20, 2004, after the 90-day deadline, the Commissioner concurs that petitioner's appeal petition was untimely filed.

In so determining, however, the Commissioner notes that the ALJ in this matter relied, in part, on the ALJ's conclusion in the matter of *Drapczuk v. Board of Education of the*

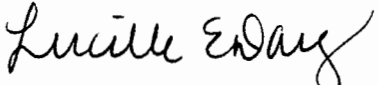
In that petitioner did not file his appeal within 90 days from the Board's July 15, 2004 notification, the Commissioner finds that his appeal is time-barred.

Likewise, the Commissioner concurs that petitioner had actual knowledge of a possible claim to the position of Assistant Superintendent for Curriculum and Instruction no later than January 5, 2004, and to the position of Supervisor of Curriculum and Instruction — by his own admission — “no earlier than May 2004.” In that the petition in this matter was not filed until October 20, 2004, petitioner clearly filed his claims for these positions after the 90-day period set forth at *N.J.A.C. 6A:3-1.3(d)*.

Moreover, the Commissioner does not find that the factual circumstances set forth in petitioner's pleadings constitute grounds for relaxation of the 90-day rule. No constitutional issues are involved in petitioner's claims, nor does the petition present issues of significant public interest beyond the parties. On the contrary, the Commissioner herein determines — as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood*, 1990 *S.L.D.* 663, 673 — that the greater public interest lies with the enforcement of the 90-day rule and the dismissal of petitioner's appeal as untimely.

Accordingly, with the exception of the reliance on the *Drapczuk* decision noted above, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05

* 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.*

Township of Winfield, Union County, decided by the Commissioner May 20, 2005, in which the ALJ concluded that Drapczuk's petition was untimely because he did not file his appeal within 90 days of receipt of a letter from the president and vice-president informing him that the board did not intend to renew his contract. However, the Commissioner in *Drapczuk* rejected the ALJ's conclusion, finding, instead, that petitioner's appeal *was* timely filed. The Commissioner reasoned that, notwithstanding petitioner's receipt of an April 24, 2001 letter from the president and vice-president of the board informing him that the board did not intend to renew his contract, the earliest date that petitioner could have asserted a viable claim that his chief school administrator's contract was renewed by operation of *N.J.S.A.* 18A:17-20.1 was July 1, 2001 because the board could have acted at any time prior to and including June 30, 2001 to correct any alleged deficiencies in its notification or determination of nonrenewal. (The Commissioner emphasized in that matter that the underlying issue was not whether the April 24 letter constituted "sufficient notice" in accord with *Kaprow, supra*, but whether the board did, in fact, make a lawful determination of nonrenewal as required by *N.J.S.A.* 18A:17-20.1.) *Drapczuk*, slip op. at 2-3. The State Board affirmed the Commissioner's decision in *Drapczuk* on October 19, 2005.

Notwithstanding the Commissioner's rejection of the ALJ's misplaced reliance on *Drapczuk* in this matter, the Commissioner agrees with the ALJ's analysis and ultimate conclusion that petitioner in this instance received adequate and final notice of the Board's determination that it did not intend to alter terms of the reemployment contract it was offering to him in its letter dated July 15, 2004, and that such notice was consistent with the Supreme Court's determination in *Kaprow, supra*, which established that the 90-day period begins when a petitioner learns of facts that would enable him to file a timely claim. *Kaprow, supra*, at 588-89.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 1049-05

AGENCY DKT. NO. 366-10/04

JAMES F. TAYLOR,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF HARDYSTON,

SUSSEX COUNTY,

Respondent.

Jason P. Gratt, Esq., for petitioner (Courter, Kobert & Cohen, attorneys)

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 5, 2005

Decided: September 13, 2005

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

Procedural History

On October 20, 2004, petitioner, James F. Taylor, filed a Verified Petition with the Commissioner of Education alleging that he should be granted reinstatement to the position of principal of the Hardyston Elementary School or, in the alternative, appointment to the position of assistant superintendent, retroactive to July 1, 2004. He sought an annual salary and emoluments consistent with the statewide salary ranges for those positions. On November 12, 2004, respondent filed its answer, denying certain of the allegations and asserting among other affirmative defenses that petitioner's action was barred for failure to file within applicable time limitations. On January 5, 2005, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The case was assigned to the undersigned on January 24, 2005, and a telephone prehearing conference was scheduled for March 14, 2005. The conference was adjourned to April 8, 2005, to allow petitioner the opportunity to retain other counsel due to a conflict of interest. During the prehearing conference the issues were isolated and respondent discussed filing a motion for summary decision on the issue of whether petitioner's claim was time barred. The hearing was scheduled for November 14 and 15, 2005, at the Office of Administrative Law. By letter dated April 22, 2005, petitioner clarified that he sought reinstatement to the vacant principal position or appointment to any one of various other positions that he was wrongfully denied pursuant to his tenure and seniority rights.

On June 6, 2005, respondent moved for summary decision, alleging that the petition was barred by the 90-day limitation of *N.J.A.C. 6A:3-1.3(d)*. On June 20, 2005, petitioner filed a response, and on June 27, 2005, respondent filed its reply. Thereafter, in a conference call on July 20, 2005, I advised counsel to clarify whether there was also a dispute as to two other positions, assistant superintendent for curriculum and instruction and supervisor of curriculum and instruction, and, if so, when petitioner became aware of them. Counsel submitted additional memoranda on those

issues. The following constitutes my determination on respondent's motion for summary decision.

Issue

At issue is whether petitioner is barred from pursuing this appeal pursuant to *N.J.A.C. 6A:3-1.3(i)* (the 90-day rule),¹ and whether the 90-day limitation period should be relaxed pursuant to *N.J.A.C. 6A:3-1.16*.

Facts

It is clear from a review of the certification of counsel for respondent and the attachments thereto, as well as the petition, that the facts necessary for determination of the motion are essentially undisputed. They may be summarized as follows:

1. James Taylor began employment with the Hardyston Board of Education in August 1989 and received tenure as principal in August 1992. In November 1995 the Board voted to abolish the position of principal as part of a reduction in force, effective in June 1996.
2. On January 14, 2003, the Board voted to establish the position of assistant superintendent for curriculum and instruction. The Board employed an individual in this position from July 1, 2003, through May 2004.
3. On May 3, 2004, the Board notified petitioner that the principal position that he had held previously had been reestablished, offered him the position and requested a response by May 14, 2004. On May 10, 2004, petitioner notified the Board of his interest in the position and requested a

¹ Effective April 4, 2005, *N.J.A.C. 6A:3-1.3* was amended and rewritten. See 36 *N.J.R.* 5032(a), 37 *N.J.R.* 105(b). *N.J.A.C. 6A:3-1.3(d)* was recodified as *N.J.A.C. 6A:3-1.3(i)*.

copy of the contract for the position. The parties then entered into negotiations relating to petitioner's return to the position.

4. The Board memorialized its offer in a letter dated June 16, 2004, and requested a response by June 23, 2004. The Board then forwarded a proposed contract to petitioner's attorney for review.
5. On July 9, 2004, petitioner's attorney requested revisions to the terms of the contract. Specifically, petitioner believed the salary was unacceptably low. On July 15, 2004, however, the Board faxed a letter to petitioner's former attorney, stating, "The Board is unwilling to consider any changes to the proposed [contract]." The letter further requested petitioner's answer to these terms by July 16, 2004.
6. It was conceded that a fax of the letter was received at counsel's office on July 15, 2004, but not reviewed by him until the following day. In fact, by letter of July 16, 2004, petitioner's prior counsel acknowledged receipt of the letter and indicated that he believed the Board's position was "arbitrary, capricious and might be considered an attempt to avoid Mr. Taylor's tenure rights."
7. The Board did not receive an answer from petitioner by July 16, 2004, as requested. (In fact, the Board heard nothing further from petitioner until his Verified Petition filed in this matter.) As a result, on July 26, 2004, the Board sent a letter to petitioner's attorney stating that since it had not received any answer from petitioner regarding the position, "The Board will construe this as a rejection of the offer." On October 20, 2004, the Board was served with a copy of the Verified Petition.
8. Petitioner admits that he became aware of the existence of the position of assistant superintendent for curriculum and instruction when he saw an employment advertisement for it in a newspaper dated January 19, 2003.

One year later, on January 5, 2004, petitioner sent a letter to the Board stating that he had knowledge of the new position and the Board's employment of a new administrator. The letter further requested that the Board "[enter] into negotiations with me for my letter of resignation as the tenured principal in that district and avoid litigation over your present administrative structure." Petitioner, however, maintains that the Board never actually notified him of the availability of the assistant superintendent position.

9. Petitioner admits that he became aware of the existence of the position of supervisor of curriculum and instruction "no earlier than May 2004."

Discussion

Summary Decision

N.J.A.C. 1:1-12.5(b) provides that summary decision should be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to the guidelines for summary judgment under New Jersey Court Rule 4:46-2(c).² The OAL's standard for summary decision is as set forth by the New Jersey Supreme Court.

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a

² R. 4:46-2(c) provides, in part:

The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

hearing] or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 533 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). The Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. When determining whether a genuine issue of material fact exists, “the court [should] be guided by the same evidentiary standard of proof . . . that would apply” at a hearing. *Ibid.* This weighing differs from the weighing the judge would perform after a hearing in that, “[o]n a motion for summary [decision] the court must grant all the favorable inferences to the non-movant.” *Id.* at 536.

It is clear that the standard for summary decision has been met in the instant matter. As stated in *N.J.A.C. 1:1-12.5(b)*, the requirement imposed on a party opposing the motion is to submit an affidavit setting forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary proceeding. Thus, one must not only show that there is a genuine factual issue, but also that such issue can only be determined in an evidentiary proceeding.

In the instant matter, as will be discussed below, there are no genuine issues of material fact, and even granting petitioner all favorable inferences, there is no doubt that the facts necessary to a resolution are undisputed in any meaningful manner.

The 90-Day Rule

a) The Principal Position

The threshold issue in this matter is whether petitioner’s claim for the principal position was timely filed.

The New Jersey Administrative Code provides that a petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of *N.J.A.C. 6A:3-1.4*. See *N.J.A.C. 6A:3-1.3*. In addition to serving the petition upon each respondent, the petition 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.

[N.J.A.C. 6A:3-1.3(i) (emphasis added).]

Although this provision does not address what circumstances constitute “adequate notice,” the New Jersey Supreme Court has offered guidance, stating that “[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate,” *Kaprow v. Berkeley Township Bd. of Educ.*, 131 N.J. 572, 587 (1993). Specifically, the 90-day limitation period for commencing an action begins to run when the “plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action.” *Id.* at 587 (citing *Burd v. New Jersey Tel. Co.*, 76 N.J. 284, 291 (1978)). Therefore, the 90-day period begins when a petitioner learns of facts that would enable him to file a timely claim. *Id.* at 588-89.

In *Kaprow*, the New Jersey Supreme Court held that an unofficial and informal note sent from the board secretary to the petitioner stating that two positions had been created and filled was sufficient to trigger the start of the 90-day period against his assertion of tenure rights. *Id.* at 587. The Court explained that the time limitation provides “a measure of repose, an essential element in the proper and efficient administration of school law.” *Id.* at 582. Further, “[t]he limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days.” *Ibid.*

Moreover, the 90-day requirement has been strictly followed and applied almost without exception. For example, a petition filed only two days after the 90-day period has been dismissed as untimely. See *Dreher v. Jersey City Bd. of Educ.*, 1987 S.L.D. 1706, *aff'd*, St. Bd., 1988 S.L.D. 2439, *rev'd*, App. Div. A-6120-82 (Feb. 28, 1958) (reversed for further fact-finding to determine if Dreher was a ten- or twelve-month

employee, which did not affect the 90-day limitation holding). In fact, regardless of whether the board complies with statutory, administrative or regulatory requirements, the petitioner is required to file the petition no later than 90 days after receipt of notice of the final decision. *Portee v. Newark Bd. of Educ.*, 94 N.J.A.R.2d (EDU) 381, 383.

The State Board of Education has since clarified the importance of the petitioner either receiving notice of the final decision or “knowing of facts that enabled [the petitioner] to file a timely claim.” *Eisenberg v. Fort Lee Bd. of Educ.*, St. Bd. of Educ. (Nov. 5, 2003) <<http://www.nj.gov/njded/legal>>. In *Eisenberg*, the petitioner received “final” notice on April 3, 2001, that the board decided not to renew his employment contract. Eisenberg requested a statement of reasons for his non-renewal, which he received on May 1, 2001. On May 10, 2001, Eisenberg requested a meeting with the board to discuss his non-renewal, and a public meeting was held on July 2, 2001. On July 3, 2001, Eisenberg received a letter stating “final determination regarding your employment status,” which indicated that the board upheld its decision to not renew his contract. On September 29, 2001, Eisenberg filed his petition of appeal with the Commissioner challenging the board’s action.

The board in *Eisenberg* contended that the final action in that matter took place on April 3, 2001, and, therefore, the 90-day limitation period started to run at that point, forcing the petition to be dismissed as untimely. The administrative law judge (ALJ) disagreed and determined that the 90-day limitation period began on July 3, 2001, when Eisenberg received the “final determination regarding [his] employment status.” On appeal, the Commissioner reversed the ALJ’s decision, agreeing with the board that the “Superintendent’s letter of April 3, 2001, had alerted Eisenberg to the existence of facts that might equate in law with a cause of action.” Eisenberg then appealed to the State Board of Education, which reversed the Commissioner’s decision, holding that, in this particular set of circumstances, the final notice took place on July 3, 2001.

The State Board distinguished the matter, noting that Eisenberg did not learn of pertinent information until just prior to the meeting on July 2, 2001. This new information alerted him to the existence of an allegation not known to him until late June

and, therefore, “[t]he petitioner could not have made the same allegations prior to his becoming aware of such information.” Accordingly, the July 3, 2001, decision had to be the final decision amenable to review, making Eisenberg’s petition timely.

The instant matter is not controlled by *Eisenberg* because petitioner first learned of facts alerting him to a cause of action through the letter dated July 15, 2004. That letter stated, “The Board is unwilling to consider any changes to the proposed [contract].” Petitioner did not subsequently learn of any new information that would allow him to assert different claims from those he could have asserted after receiving that letter. Therefore, the instant matter is distinguishable from *Eisenberg*.

This conclusion is consistent with *Drapczuk v. Winfield Board of Education*, 2005 N.J. AGEN LEXIS 292 (N.J. AGEN 2005). There, the board sent a letter to the petitioner dated April 24, 2001, informing him that his employment contract would not be renewed when his present contract expired in June 2002. The board, however, did not formally pass a resolution until September 18, 2001. The petitioner argued that the letter dated April 24, 2001, did not constitute action or decision by the board for purposes of the 90-day rule. The board maintained that the April 24 letter was sufficient to trigger the 90-day period. The pivotal question in *Drapczuk*, therefore, was what constitutes a “final order, ruling or other action by the district board of education” necessary under N.J.A.C. 6A:3-1.3(i).

In *Drapczuk* the petitioner conceded that the letter dated April 24, 2001, notified him that he should expect his contract to not be renewed. The petitioner further admitted that he waited for the full board of education to take action on this matter. Accordingly, the administrative law judge in *Drapczuk* found that the letter dated April 24, 2001, provided adequate notice to the petitioner that the board intended not to renew his contract. The judge explained:

Although the directive was not by formal motion or resolution, under *Kaprow* notice without formal action of the Board may be adequate because it was information that the petitioner had a right to know and that the Board had a duty

to communicate. *The Board's resolution on September 18, 2001, was a mere formality that confirmed prior action as described in the letter dated April 24, 2001.*

[*Drapczuk, supra*, 2005 N.J. AGEN LEXIS 292 (N.J. AGEN 2005) (emphasis added).]

In the instant matter, the board argues that the 90-day period began on July 15, 2004, when the board notified petitioner's attorney by letter that the reemployment offer was final by stating, "The board is unwilling to consider any changes to the proposed [contract]." Petitioner, however, contends that this letter fails to apprise him that the Board made its "final" offer or that any vote on his employment was conducted. Instead, petitioner argues that the 90-day period began on July 26, 2004, when the board sent a letter stating that it would construe petitioner's silence as a rejection of the offer.

Having considered the relevant case law, I **FIND** that the letter dated July 15, 2004, provided adequate notice to petitioner that the Board did not intend to alter the terms of the reemployment contract. Although the directive was not by formal motion or resolution, under *Kaprow* notice without formal action of the Board may be adequate because it was information that the petitioner had a right to know and that the Board had a duty to communicate. The Board's letter on July 26, 2004, declaring petitioner's silence a rejection can be considered a mere formality separate from the confirmed prior action contained in the letter dated July 15, 2004.

Petitioner further contends that the Board's letter dated July 15, 2004, did not trigger the 90-day rule because he and the Board still were engaged in negotiations concerning his employment rights. This contention is unpersuasive. First, there is nothing in the record to indicate that any negotiations were ongoing. The Board offered a reemployment contract, petitioner requested changes, and the Board refused to make changes. It is questionable whether this constitutes negotiations.

Furthermore, after the Board rejected petitioner's requested changes he did not continue to engage in "negotiations." If petitioner considered the letter to be a

"negotiation ploy," then he would have countered with further negotiations. Although petitioner commented in his July 16, 2004, letter that the Board's position was "arbitrary" and could be considered an attempt to avoid his tenure rights, similar to events in *Drapczuk* he took no action at all and simply waited for the full board to issue its letter dated July 26, 2004, declaring his silence a rejection of the proposed contract. Even then, petitioner took no action until October 20, 2004, when the Board was served with a copy of the Verified Petition.

Moreover, attempting to resolve a dispute with a board of education through other avenues before filing a petition with the Commissioner does not toll the running of the 90-day rule. See *Wise v. Trenton Bd. of Educ.*, 2000 N.J. AGEN LEXIS 462 (N.J. AGEN 2000). Specifically, the Commissioner had held that "requests to a board [of education] for reconsideration of its final decision do not toll the running of the 90-day rule." *Pacio v. Lakeland Reg'l Sch. Dist. Bd. of Educ.*, 1989 S.L.D. 2060, 2069. Similarly, as I pointed out in a previous case, *M.N. and E.Y. o/b/o K.N. v. Jersey City School District*, EDU 11336-03 (June 17, 2004), *adopted*, Comm'r (July 21, 2004) <<http://lawlibrary.rutgers.edu/oal/search.html>> (citations omitted):

As stated by the New Jersey Supreme Court in *Kaprow, supra*, attempts to resolve a claim through negotiation with the local board of education are irrelevant. Such efforts do not negate the fact of receipt of adequate notice nor do they toll the running of the time limits for filing a petition of appeal.

In fact, . . . there is no competent proof [that the issue was] ever actually under review or would be reversed through negotiation.

Accordingly, petitioner's attempt to change the proposed reemployment contract by asking the Board to change some of its terms is irrelevant and does not toll the running of the 90-day period. Such a request does not negate the fact that the petitioner received adequate final notice through the Board's letter dated July 15, 2004, advising him that the Board was unwilling to change any of the contract terms.

Therefore, the 90-day period began on July 15, 2004, and ended on October 13, 2004. Since petitioner filed the petition on October 20, 2004, after the 90-day deadline, and because the 90-day rule is strictly adhered to, the petition is considered untimely.

(b) Assistant Superintendent for Curriculum and Instruction

With respect to this position the petitioner contends that the burden of proving adequate notice falls on the Board and relies on *Metaxas v. Hoboken Board of Education*, 96 N.J.A.R.2d (EDU) 708. In *Metaxas*, the petitioners' positions were abolished and the board made a number of appointments two months later in public session. The board argued that the petitioners reasonably should have known, or at least investigated the possibility, that these appointments might have affected their tenure rights entitlements.

The petitioners contended that while they may have known of the new appointments, they did not have specific notice that those persons had less seniority than they until three months later. Accordingly, the administrative law judge found that the 90-day period did not begin to run until the petitioners had notice of possible errors in the district's seniority determinations.

The local board argued that such a ruling "essentially rewards petitioners for doing nothing to ascertain their own status and permits them to rely on information conveyed by a local education association officer who had full knowledge of the operative facts in June 1992 but did not so advise petitioners until September." *Metaxas, supra*, 96 N.J.A.R.2d (EDU) at 714.

On review, the Commissioner concurred with, and the State Board of Education affirmed, the ALJ's conclusion that "a district board is 'clearly required' to give a staff member affected by a reduction in force notice of its action appointing non-tenured individuals to positions to which such staff member claims tenure rights." *Id.* at 715.

In *Beshaw v. Board of Education of Borough of Oakland*, 97 N.J.A.R.2d (EDU) 494, the petitioner was notified in April 1995 that the Board would recommend that her employment not be renewed, and in May 1995 the Board officially voted to not renew her employment. In July 1995 the Board posted notice of full-time teaching positions. The petitioner, however, claimed that she never saw the postings due to knee surgery resulting in her incapacity. On September 5, 1995, the principal announced that a new teacher had been hired to teach the courses. The petitioner argued that she did not become aware of a potential claim until she received the curricula for the courses in January 1996, since the Board had never supplied her with the curricula, and, instead, she had to get them from another source. Thus, the petitioner argued that the Board never gave her adequate notice that a cause of action existed. The administrative law judge found:

Petitioner did not know that she may have had a potential cause of action until the new positions were posted and a nontenured teacher was hired to teach the courses. When the nontenured teacher was hired, however, petitioner was on notice of the Board's action. "The final order, ruling, or other action by the Local Board occurred when it appointed nontenured persons to positions to which petitioner claims tenure rights." The 90 days period began on the date of some identifiable action taken by the Board. Indeed, the regulation specifically requires that notice or action by the board triggers the running of the 90 days, not action or knowledge on the part of a claimant.

[*Beshaw, supra*, 97 N.J.A.R.2d (EDU) at 496 (*citing Kaprow v. Berkeley Bd. of Educ.*, 131 N.J. 572, 588 (1993) (emphasis added).]

Accordingly, the ALJ held that the petitioner had notice of the Board's action on September 5, 1995, when the principal announced that a new teacher had been hired and assigned to teach the courses claimed by petitioner. Consequently, the 90-day period began on the date of the Board's official action, not when the petitioner acquired specific knowledge of a cause of action.

The Commissioner disagreed with the initial decision, finding summary decision inappropriate. The Commissioner explained:

Because petitioner could not have reasonably concluded from the job posting and its attendant certification requirement that she may have had a possible claim to the courses at issue, notice cannot automatically be reckoned from the date of appointment of the teacher for those courses in question. Thus, the question becomes when petitioner knew, or reasonably should have known, about a possible claim so that the timeliness of her petitioner may be determined. In this regard, the record includes insufficient facts and further reveals that there exists a fundamental factual dispute which directly impacts upon the threshold issue of timeliness. Specifically, petitioner and the Board offer contradicting accounts with respect to when petitioner first requested a copy of the curricula for the courses in question, a fact which is crucial to the underlying determination of when petitioner knew, or reasonably should have known, that she had a possible claim to teach the courses in question.

[*Id.* at 498-99 (citing *Metaxas, supra*, 96 N.J.A.R.2d (EDU) 708).]

Similarly, in *Meyer v. Board of Education of Wayne*, 1986 S.L.D. 3094, 3098, the State Board of Education observed that “in the absence of actual knowledge, the cause of action accrues only upon notice sufficient to alert the teaching staff member who has been adversely affected”

Although under *Beshaw* a board is required to give a petitioner adequate notice of an official action creating a possible claim of rights, *Beshaw* is distinguishable from the instant matter. In *Beshaw*, the petitioner did not know a claim existed until viewing the curricula of the posted job openings. Here, petitioner had all the facts necessary to alert him that a possible claim existed when he learned that the Board employed another in his claimed position. In fact, petitioner’s letter dated January 5, 2004, revealed that petitioner indeed was aware of a possible claim at that time and, in fact, the letter threatened litigation over the Board’s “present administrative structure.” This

indicates that the petitioner knew a possible claim existed, and needed no additional facts to come to such a conclusion.

Further, the letter alerted the Board to petitioner's knowledge of the possible claim. The limitation period is designed to give boards the security of knowing that administrative decisions cannot be challenged after 90 days. To allow petitioner to bring a claim more than 90 days after the January 5, 2004, letter conflicts with the intent of the 90-day rule providing the Board with the security of knowing that a claim can no longer be brought after a certain time. Otherwise, petitioner could hold such a claim over the Board indefinitely.

Additionally, *Beshaw* supports the argument that the 90-day period does not necessarily begin on the date of a school board's official action. Instead, *Beshaw* stands for the proposition that the 90-day period begins when the petitioner knew, or reasonably should have known, about a possible claim. Thus, under *Beshaw*, a school board is not required to give a petitioner notice to trigger the running of the 90-day period. The time limit begins when the petitioner actually knew, or reasonably should have known, about a possible claim. Here, petitioner had actual knowledge of the possible claim no later than January 5, 2004. Therefore, to be timely, the petition had to be filed by April 5, 2004. The petition here was not filed until October 2004, is untimely under the 90-day rule, and, accordingly, Taylor's claim to this position is dismissed.

(c) Supervisor of Curriculum and Instruction

Petitioner also claims entitlement to the position of supervisor of curriculum and instruction. Petitioner concedes that he became aware of this position "no earlier than May 2004," but contends that respondent never directly notified him of the position.

Respondent asserts that petitioner's claim to the position previously was the subject of an appeal in 1996 in which he sought this same position, (which was in existence at that time), and to which there has been no change. More particularly,

respondent points out that the position has always contained a teaching component (for which petitioner apparently does not have the requisite credentials). Since the same position was the subject of Judge Springer's Initial Decision, OAL Dkt. No. EDU 7070-96, dated December 11, 1997, denying petitioner's claim, which was affirmed by the Commissioner of Education on February 2, 1998, respondent asserts that petitioner is estopped from making this identical claim. Further, respondent contends that despite petitioner's letter of January 5, 2004, which clarified that he had knowledge of the Board's administrative structure and that he believed his tenure and seniority rights were violated, petitioner did not timely challenge the Board's actions or make a claim to any position. In fact, neither the petition in this case nor the prehearing order makes any reference to the position.

Petitioner counters that the current position of supervisor of curriculum and instruction has changed since 1996, that it is now a full-time position, not part time, and no longer contains a teaching component.

In reaching a determination on whether petitioner is barred by the 90-day rule from pursuing this position, I have afforded him all favorable inferences. Thus, I do not rely for my determination on whether the position petitioner appealed from in 1996 is identical to the current position. Nor do I rely on petitioner's January 5, 2004, letter, since I do not know when petitioner alleges this "current" position was created. I am also willing to give petitioner the benefit of the doubt that his current appeal does encompass a claim to this position since it is mentioned in the petition of appeal, *albeit* not in his request for relief.

However, I still must **CONCLUDE** that petitioner is barred from relief from seeking this position pursuant to the 90-day rule. By petitioner's own admission he knew of the position "no earlier than May 2004." Since he then had actual knowledge of the position, for the reasons expressed in my determination in (b) above, his time in which to make a claim began to run at that time. Since petitioner did not file the petition in this matter until October 20, 2004 (approximately five months later), he clearly filed after the 90-day deadline.

Relaxing the 90-Day Rule

Under certain circumstances, pursuant to *N.J.A.C. 6A:3-1.16* the 90-day rule may be relaxed. However, the authority to relax or waive the 90-day rule is rarely invoked and is generally unsuccessful unless “strict adherence would be inappropriate, unnecessary or where injustice would occur.” *DeMaio v. New Providence Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 449, 453 (citing *Gordon v. Passaic Bd. of Educ.*, 1985 S.L.D. 1929, 1931, *aff’d*, A-3294-84 (App. Div. May 27, 1986), *certif. denied*, 105 *N.J.* 534 (1986)).

Thus, certain cases may be excepted from the 90-day rule where they involve:

(1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification.

[*Brunetti v. New Milford*, 68 *N.J.* 576, 586 (1975) (footnotes omitted).]

Nevertheless, relaxation of the 90-day rule occurs only under exceptional circumstances, or if there is a “compelling” reason to do so. See *Kaprow, supra*, 131 *N.J.* at 590 (finding no exceptional circumstances compelling the Commissioner to waive the 90-day limitation); *DeMaio, supra*, 96 *N.J.A.R.2d* (EDU) at 453 (“There are no compelling reasons in the present matter to justify a waiver or relaxation of the 90-day limitations period”); *Bland-Carter v. State-Operated Sch. Dist. of the City of Newark*, OAL Dkt. No. EDU 1505-00, Initial Decision (July 11, 2000), *adopted*, Comm’r (September 11, 2000) <<http://lawlibrary.rutgers.edu/oal/search.html>> (refusing to relax the 90-day rule when petitioner filed outside of the time limitation where genuine personal problems of the petitioner occurred during the first part of the 90-day period and the petitioner returned to work several weeks before the 90th day).

On the other hand, the Appellate Division has held that there is justification for relaxation of the 90-day rule where “the Commissioner’s finding that [a] petitioner was reasonably led to believe that he could continue to informally seek relief and not be concerned about the time limitations for his petition are adequately supported by the record and that strict adherence to the 90-day time limitation . . . would result in individual justice not being served.” *Brown v. Sussex County Vocational Sch. Bd. of Educ.*, No. A-4854-83 (App. Div. April 4, 1985).

In *Bogart v. East Orange Board of Education*, OAL Dkt. No. EDU 6245-82 (Jan. 26, 1983), *adopted*, Comm’r (March 14, 1983), ALJ Weiss stated that the 90-day rule will be relaxed “only where there is some compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves.” ALJ Weiss further held:

Obviously, every time an otherwise meritorious claim is time barred, for whatever reason, there is, in a general sense, an ‘injustice.’ . . . [T]he point to be made is that there will always be an arguably harsh result when the 90-day rule is applied. But the cases which have interpreted and applied the rule teach that this is no reason not to use it. Indeed, if the rule was relaxed simply because the result would be harsh if applied, then the rule might as well be ignored in its entirety on nearly every occasion.

In the instant matter, petitioner cites *Polaha v. Buena Regional School District*, 212 N.J. Super. 628 (App. Div. 1986), to support his contention that even if the petition was filed in an untimely fashion, the 90-day rule should be relaxed because there were “ongoing negotiations involving tenure rights.” In *Polaha*, however, actual ongoing discussions were taking place. Specifically, there was an exchange of correspondence between the petitioner and the board over a three-month period attempting to resolve the dispute. Here, it is highly questionable whether ongoing “discussions” were taking place. The Board offered petitioner a contract, petitioner asked for changes, and the Board refused. The discussions ended there. There are no alleged facts to support a conclusion that there were ongoing exchanges attempting to resolve the dispute. Accordingly, *Polaha* is distinguishable and inapplicable here.

I, therefore, **CONCLUDE** that no compelling or exceptional circumstances exist to warrant relaxation or waiver of the 90-day rule. The Board provided petitioner with adequate notice enabling him to file a timely claim and he has failed to demonstrate that this matter involves any constitutional issue, the review of an administrative determination, or a matter of significant public interest requiring adjudication or clarification beyond that of concern to petitioner himself. Petitioner simply has failed to demonstrate that strict adherence to the 90-day rule would be inappropriate, unnecessary or result in an injustice.

Conclusion

Based upon the above, I **CONCLUDE** that summary decision on the timeliness of the appeal is appropriate. Petitioner has failed to set forth specific facts showing that there is a genuine issue of material fact necessitating a hearing on that issue. I **CONCLUDE** that petitioner's claim was not timely filed pursuant to *N.J.A.C. 6A:3-1.3(i)* and that the circumstances do not warrant relaxation of the 90-day rule pursuant to *N.J.A.C. 6A:3-1.16*.

Order

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED** and petitioner's appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 13, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

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

September 13, 2005
DATE

Mailed to Parties:
Laure Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

SEP 14 2005
DATE

al

SYNOPSIS

The Board sought suspension of the instructional certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 for not providing adequate notice of resignation from her position as a teacher at Chatham High School. Respondent does not oppose suspension of her certificate, but disputes the length and effective date, arguing that the Commissioner should exercise her statutory discretion and determine that the one-year suspension should run from the date of resignation or 60 days thereafter; i.e., mid-September, 2004, or mid-November, 2004, rather than from the date of the Commissioner's final decision in this matter.

The Board submitted that there are no material facts in dispute and the Board is entitled to summary judgment pursuant to *N.J.S.A.* 18A:26-10. Respondent filed no affidavit or certification to detail mitigating circumstances or offer any special reason why the one-year suspension should have begun immediately upon her resignation. Accordingly, the ALJ granted the Board's motion for summary decision, finding: that respondent patently violated the 60 day notice provision of her contract as well as *N.J.S.A.* 18A:26-10; and there was no reason to modify the usual penalty in matters of this sort. Therefore, the ALJ recommended that the petition of appeal be dismissed.

Upon careful and independent review, the Commissioner concurs with the grant of the Board's motion for summary decision, and agrees that respondent violated the 60-day notice requirement and failed to provide any mitigating circumstances as to why a one-year suspension of her certificate should not be applied. Therefore, pursuant to *N.J.S.A.* 18A:26-10, the Commissioner orders that respondent's instructional certificate be suspended for a period of one year commencing from the date of this decision, and forwards the matter to the State Board of Examiners for the purpose of effectuating this order.

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

October 27, 2005

OAL DKT. NO. EDU 3238-05
AGENCY DKT. NO. 416-11/04

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
KELLY WENZEL, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CHATHAMS BOARD OF EDUCATION,	:	DECISION
MORRIS COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of this matter, the Commissioner concurs with the grant of the Board's motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *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)). Moreover, the Commissioner agrees with the ALJ's conclusions that: 1) Ms. Wenzel violated the 60-day notice requirement set forth in both her contract and in *N.J.S.A. 18A:26-10*; and 2) Ms. Wenzel failed to provide any mitigating circumstances as to why the penalty assessed in similar matters, *i.e.*, a suspension of certification for one year from the date of the Commissioner's decision, should not be applied.

Accordingly, the Initial Decision of the Administrative Law Judge finding Kelly Wenzel guilty of unprofessional conduct and suspending her teaching certificate for a period of one year, which period shall commence upon the date of this decision, is adopted for

the reasons expressed therein. A copy of this decision is, therefore, being forwarded to the State Board of Examiners for the purpose of effectuating the within decision and taking such further action, if any, as it deems appropriate.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 03238-05

AGENCY DKT. NO. 416-11/04

**SCHOOL DISTRICT OF THE CHATHAMS BOARD OF EDUCATION,
MORRIS COUNTY,**

Petitioner,

v.

KELLY WENZEL,

Respondent.

Nicholas Celso III, Esq., for petitioner

(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Joseph M. Wenzel, Esq., for respondent

(Lum, Danzis, Drasco & Positan, LLP, attorneys)

Record Closed: September 15, 2005

Decided: September 23, 2005

BEFORE STEPHEN G. WEISS, ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education on March 17, 2005. The petitioner, Board of Education of the School District of the Chathams ("Board"), seeks a determination that the teaching certificate of respondent Wenzel be suspended for a period of one year as a result of her precipitous resignation from employment soon after school started in mid-September 2004. The Board has moved for summary decision.

DISCUSSION

In its motion the Board argues that unquestionably there was unprofessional conduct exhibited by Wenzel, a non-tenured teacher, when she submitted her resignation on or about September 13, 2004, to be effective September 15, 2004, even though her contract with the Board required 60 days written notice of that intent. The Board points out that pursuant to *N.J.S.A. 18A:26-10* where a teaching staff member ceases to perform her duties before the expiration of the term of her employment without the Board's consent, he or she "shall be deemed guilty of unprofessional conduct" and the Commissioner may suspend that person's teaching certificate upon receiving notice thereof for a period not exceeding one year.

In support of its motion the Board submitted the affidavit of James F. O'Neil, Superintendent of Schools. In that affidavit he relates that on or about September 13, 2004, Wenzel tendered her resignation as a teacher of Earth Science, to be effective two days later on September 15, 2004. This, he says is a violation of her contractual obligations and constituted unprofessional conduct since it resulted in a substantial disruption to her students and caused the Board financial harm. More specifically, because of the abrupt notice given by Wenzel (indeed, since September 14, 2004 was a religious holiday the Board effectively had no advance notice) he could not immediately find a replacement teacher with appropriate certification. Thus, other teachers in the employ of the Board had to cover an extra class until a certified replacement could be hired. As a result, the Board was required to provide those teachers with additional pay. O'Neil also points that the person ultimately hired on a full-time basis to replace

respondent was an "alternate route" teacher with no prior background or experience in the field and additional pay had to be given to another teacher to be that person's "mentor".

In a reply memorandum in opposition to the Board's motion for summary decision Wenzel's attorney concedes the material facts; in particular, despite the 60 day notice requirement of her contract and the applicable statute, admittedly Wenzel gave hardly any notice to the Board. However, he argues that the Commissioner should exercise his statutory discretion and determine that the one year suspension (which is not challenged) authorized by *N.J.S.A. 18A:26-10* should run from the date of Wenzel's resignation, or alternatively, 60 days thereafter. Thus, the Commissioner is requested to begin Wenzel's suspension either from the date of receipt of her resignation (September 14 or 15, 2004) or from the 60th day thereafter (November 14 or 15, 2004).

In its brief in support of the motion for summary decision the Board relies upon the decision in *Bd. of Ed. of Penns Grove-Carneys Point Reg. Sch. Dist. v. Leinen*, 94 *N.J.A.R. 2d* (EDU) 405. Counsel points out that under that decision a teaching staff member who seeks relief from the strict language of the statute must demonstrate the existence of mitigating factors to warrant a penalty of less than a year. In reply, counsel for Wenzel emphasizes that his client is not seeking a reduction in the one year time frame. Rather, she is simply seeking an exercise of discretion by the Commissioner to begin running the suspension from mid-September or mid-November, 2004, rather than from the date of any final decision.

In Wenzel's letter of resignation which was attached to the O'Neil affidavit as Exhibit "B" she explained that "circumstances have arisen in my home life that makes it virtually impossible to perform my duties at school" and therefore "it is not fair to the students, their parents, support staff and other teachers that I am unable to properly prepare and execute my lessons and attend to the necessary administrative tasks required to make things run smoothly." She further noted that her decision had been "a very difficult" one for her family and herself.

No sworn affidavit or certification in opposition to the Board's motion was even filed by Wenzel or anyone on her behalf detailing any mitigating circumstances or offering any special reason why the one year suspension should have begun. Her only response was her attorney's memorandum in opposition pointing out the existence of discretion. That is not adequate.

Accordingly, in the absence of any factual dispute the Board's motion for summary decision pursuant to OAL rules should be **GRANTED**. See *N.J.A.C. 1:1-12.5*. By her conduct in resigning on such short notice (effectively just 1 day) Wenzel patently violated both the 60 day notice provision of her contract as well as *N.J.S.A. 18A:26-10*. Since that conduct was unprofessional, and its consequences caused harm, a one year suspension of her teaching certificate (as even she concedes) is appropriate. I see no reason on this record to modify the usual approach in matters of this sort; namely, that the suspension should be for one year and run from the date of the Commissioner's decision.

ORDER

ACCORDINGLY, the Board's motion for summary decision is **GRANTED** and the petition of appeal is **ORDERED DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Acting 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 **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties

September 23, 2005
DATE


STEPHEN G. WEISS, ALJ

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

September 26, 2005
DATE

SEP 27 2005
DATE

nd

Mailed to Parties:


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO EDU 6714-05
(EDU 91-05 ON REMAND)
AGENCY DKT. NO. 438-12/04

IN THE MATTER OF THE TENURE :
HEARING OF GARY WILLIS, :
NORTH HUNTERDON-VOORHEES : COMMISSIONER OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT, : DECISION
HUNTERDON COUNTY. :
_____ :

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

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/27/05

Date of Mailing: 10/27/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6714-05

(On Remand EDU 91-05)

AGENCY DKT. NO. 438-12/04

**IN THE MATTER OF THE TENURE
HEARING OF GARY WILLIS, NORTH
HUNTERDON-VOORHEES REGIONAL
HIGH SCHOOL DISTRICT, HUNTERDON
COUNTY**

Sara J. Simberg, Esq., for petitioner (Riker Danzig Scherer Hyland Perretti, attorneys)

Stephen E. Klausner, Esq., for respondent (Klausner & Hunter, attorneys)

Record Closed: September 10, 2005

Decided: September 26, 2005

BEFORE JOHN SCHUSTER III, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 9, 2005, on remand 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* or for the purposes of modifying the previously submitted Settlement Agreement to satisfy legal requirements. The originally transmitted case bore OAL Docket Number EDU 91-05 and the same agency docket number.

The parties appeared for hearing on April 11, 12, 13 and 14, 2005 and testimony was taken. On the last day they conferred and agreed to a settlement and prepared a Settlement Agreement and Release which was subsequently modified to satisfy legal standards. The revised Settlement Agreement (J-1), which is attached and fully incorporated herein, memorializes the terms of the settlement.

After being placed under oath, the respondent stated he fully understood and voluntarily agreed to be bound by the terms of the settlement and that representation is set forth in the Settlement Agreement.

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

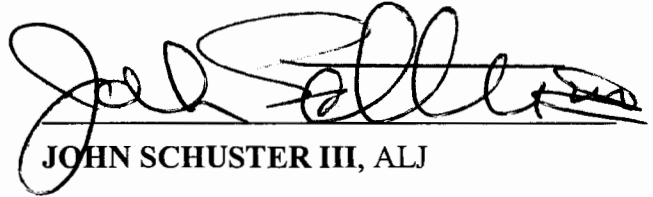
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.
3. The Resolution of the school district attached to the Settlement Agreement authorizes the School Board Secretary to enter into the Agreement on behalf of the district.

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.

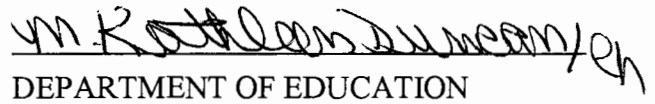
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 26, 2005
DATE


JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

9-29-05
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:


PATRICIA
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

T-1 Emd
8/28/05 JCA

SETTLEMENT AGREEMENT AND RELEASE

The North Hunterdon-Voorhees Regional School District Board of Education (the "District") and Gary Willis ("Willis") (together "Parties") hereby agree to settle the pending matter, subject to the terms and conditions contained herein:

WHEREAS, Willis shall mean in this Agreement himself, his respective heirs, assigns or successors in interest, and every agent or any other representative acting on behalf of Willis; and

WHEREAS, the District filed tenure charges on or about December 15, 2004, resulting in the matter titled In the Matter of the Tenure Charges Against Gary Willis, North Hunterdon-Voorhees Regional High School District Board of Education, Docket No. EDS 891-05 ("Tenure Matter"), and alleging (1) Conduct Unbecoming, consisting of repeated outbursts of anger by Willis, and (2) Insubordination, consisting of failure by Willis to follow the directives of his superiors and District personnel; and

WHEREAS, Willis disputed the charges, the matter was transferred by the Commissioner of Education to the Office of Administrative Law, and a plenary hearing before an Administrative Law Judge was partially conducted; and

WHEREAS, certain circumstances exist justifying the settlement of this matter, including that: (a) trial in this matter is projected to last a minimum of two weeks, requiring the expenditure by the District of large amounts of public, taxpayer funds to the detriment of the students and taxpayers of the North Hunterdon-Voorhees Regional School District ("School District"), (b) in addition to the costs of litigation, the District will be required to further expend taxpayer money starting April 14, 2005, as it must begin paying Willis his full salary again on the 121st day of his suspension, (c) the

District wants to ensure that Willis no longer continues his employment with the District; and (d) Willis no longer desires to continue his employment with the District and instead wishes to find new employment, as he has been unemployed during the course of his suspension; and

WHEREAS, the Parties hereto wish to amicably resolve this matter, in order to avoid the risk, cost and inconvenience of litigation; and

WHEREAS, settlement of this matter will benefit the public interest by (a) ensuring the safety of the students, employees and community members of the School District through the removal of Willis, who the District perceives to be a threat, (b) reducing the amount of public, taxpayer funds that would potentially be spent to achieve removal of Willis from the School District, and (c) precluding the expenditure of public, taxpayer funds by the District starting on the 121st day of Willis' suspension; and

WHEREAS, the Parties address the standards established by the State Board of Education in the matter titled In Re Cardonick, 1990 S.L.D. 842, 846, and justify this Agreement for the above reasons;

NOW, THEREFORE, it is hereby agreed as follows:

1. The Agreement, and every condition and term set forth within, is not effective until approved by the Commissioner of Education. In the event the Agreement is not approved by the Commissioner of Education, the Parties hereby reserve their rights and defenses should the Parties be required to continue the hearing in this matter.
2. Willis shall resign his employment with the District, effective July 31, 2005 or the date upon which Willis commences new employment, whichever occurs

first. As part of this Agreement, Willis' resignation is dependent upon the approval by the Commissioner of Education of this Agreement. Willis' resignation letter shall be signed and received by the District's attorneys within 10 days of the execution of this Agreement and contingent upon the approval of the Commissioner of Education. By resigning, Willis waives any and all rights to tenure, seniority, recall or reinstatement, as well as any of the benefits or emoluments of his employment, except his pension rights, and understands that effective immediately, he is not to report to work or otherwise enter school grounds except to the extent permitted to members of the public.

3. Within thirty days of the approval by the Commissioner of Education of the Agreement, the District shall issue a check to Willis in the gross amount of \$14,384.30, representing back pay from December 15, 2004 through April 13, 2005.
4. Willis shall receive his normal pay from April 14, 2005 through July 31, 2005, or until the date he commences new employment, whichever shall occur first, and shall be paid with the regular payroll checks issued by the District.
5. Willis shall make a good faith effort to secure and begin new employment as soon as possible. If Willis obtains new employment before July 31, 2005, he shall immediately notify the District in writing, including the date his new employment commences.
6. Willis shall receive payment for 28 accrued vacation days, in the gross amount of \$5,163.48. These payments shall be made in three installments,

and issued in conjunction with the regular District payroll cycle. The District shall commence these payments on August 1, 2005 or the date Willis commences new employment, whichever occurs first.

7. In the event Willis is unable to secure new employment by July 31, 2005, or if his new employer has a waiting period for eligibility for health insurance, or does not make family health insurance available to its employees, the District shall provide health insurance for Willis and his family through December 31, 2005, or until the new employer's family health insurance begins, whichever occurs first.
8. In consideration of the payments set forth in paragraphs 2, 3, 5 and 6, Willis agrees that this Agreement constitutes a complete and final Release with respect to all costs, damages, any and all past, present, or future liability, claims, demands, rights and causes of action, guarantees, claims for compensatory or punitive damages, settlements, costs, attorneys' fees, and compensation of any kind or nature whatsoever, whether those claims are known or unknown, suspected or unsuspected, asserted or unasserted, in the past, present, or future, against the District arising out of or in connection with Willis' employment with the District and/or the Tenure Matter.
9. This Agreement is made without admissions of liability or responsibility by the Parties.
10. This Agreement constitutes the full and complete Agreement of the Parties and may not be changed or modified, unless required by the Commissioner of Education. This Agreement is binding upon the Parties and their respective

heirs, assigns or successors in interest. This Agreement shall be governed by and construed in accordance with New Jersey law. This Agreement shall be construed as if it were drafted contemporaneously by both Parties.

11. The Parties agree that this document constitutes their full understanding of the settlement of the Complaint. It is further agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present matter.
12. Both Parties consent to the terms and conditions set forth in this Agreement.
13. The Parties further mutually agree between themselves that the terms and conditions of this Agreement shall be kept confidential by the Parties, to the fullest extent possible. The Parties agree and recognize that tenure charge documents are a matter of public record. The Parties further agree and recognize that the Board may take any action necessary with respect to disclosure of information regarding this tenure matter, including disclosure of this Agreement and disclosure of the reason for Willis' separation from service with the District, to fulfill and fully comport with the requirements of state law and regulations, including New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 et seq.
14. The District and the Plaintiff both verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this

Agreement voluntarily and with full understanding of their rights and the Agreement's its meaning.



Gary Willis

DATE: 8-08-05

NORTH HUNTERDON-VOORHEES
REGIONAL SCHOOL DISTRICT BOARD
OF EDUCATION



Mark Albert
Business Administrator/Board Secretary

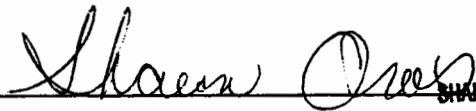
DATE: 8/3/05

STATE OF NEW JERSEY)

SS:
Somerset
COUNTY OF ~~HUNTERDON~~)

I CERTIFY that on 8-1, 2005, Gary Willis personally came before me and acknowledged under oath, to my satisfaction, that this person:

- (a) is named in and personally signed this document; and
- (b) signed, sealed and delivered this document as her act and deed.



Attorney or Notary Public
SHARON ORS
A Notary Public of New Jersey
My Commission Expires 09/04/2005

Superintendents Report

Motion by Kulick and seconded by Schwab to approve the following resolution:

2005 AUG 22 A 10:42

STATE OF NEW YORK
OFFICE OF ADMINISTRATION

RESOLUTION
NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION

Resolved, That the North Hunterdon-Voorhees Regional High School District Board of Education ("the Board") hereby approves the settlement of the matter: In The Matter Of The Tenure Hearing Of Gary Willis, North Hunterdon-Voorhees Regional High School District, Hunterdon County, Agency Dkt. NO. 438-12/04, Docket No. EDU 00091-05, based upon the conditions set forth in the Settlement Agreement and Release to be executed by both parties, and per the order of the Commissioner of Education; and

Resolved, That the Board of Education hereby authorizes and designates Mark D. Albert, Business Administrator/Board Secretary, to sign and execute the Settlement Agreement and Release on its behalf.

Vote: Aye's: Eggert, Flynn, Kulick, Marra, Nicolai, Roosen, Schwab, Walter.

Motion carried.

I Mark D. Albert, Board Secretary/Business Administrator of the North Hunterdon Voorhees Regional High School District certify that the above resolution was adopted at the meeting held on August 2, 2005.

Board Seal



Mark D. Albert, Board Secretary/
Business Administrator

HILDA DORIS SUAREZ, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

: DECISION

STATE-OPERATED SCHOOL :

DISTRICT OF THE CITY OF JERSEY : :

CITY, HUDSON COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner contends that she had acquired tenure, and her “non-reemployment” by the respondent constituted an unlawful termination in violation of tenure rights. Respondent filed a motion for summary decision, seeking dismissal of the petition based on petitioner’s failure to file within the 90-day period prescribed by *N.J.A.C. 6A:3-1.3(i)*. Petitioner maintains that the filing was timely because it was within 90 days of her receipt of a second letter, dated June 24, 2004, from respondent upholding the non-renewal after a hearing that she had requested; petitioner argues that the second letter was the final action that triggered the ninety-day limitation period.

The ALJ found that respondent’s notice to petitioner — by letter dated May 7, 2004, advising her that her contract would not be renewed — was issued in accordance with *N.J.S.A. 18A:27-10*, which requires written notice of non-renewal by May 15. The ALJ therefore concluded that: the petition was not filed within the 90-day limit set forth in *N.J.A.C. 6A:3-1.3(i)*; petitioner has not advanced any argument to relax the prescribed time limit, and there does not appear to be any reason to do so. The ALJ granted respondent’s motion for summary decision and dismissed the petition.

The Commissioner adopts the Initial Decision of the OAL and dismisses the petition for untimeliness, finding that: under the applicable case law, the May 7, 2004 notice triggered the 90 day limitations period; petitioner’s claim of tenure does not change the effect of the 90-day rule; and the notice of non-renewal was not compromised by the fact that it was signed by a district associate superintendent.

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, 2005

393-05

OAL DKT. NO. EDU 11077-04
AGENCY DKT. NO. 287-8/04

HILDA DORIS SUAREZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
	:	DECISION
STATE-OPERATED SCHOOL	:	
DISTRICT OF THE CITY OF JERSEY	:	
CITY, HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions have been independently reviewed. Upon such review, the Commissioner is constrained to adopt the Initial Decision of the administrative law judge (ALJ) dismissing the petition for untimeliness for the following reasons.

Petitioner began working in the respondent district in September 2000. Respondent contends that petitioner worked as a pool substitute during the 2000-2001 school year, while petitioner contends — and respondent does not deny — that she taught biology and pathology during the entire 2000-2001 school year, was evaluated on a regular basis, and “received all the emoluments of a regular teacher including sick leave benefits and medical insurance.” Petitioner alleges that in June 2001 she “completed the requirements of the Alternate Route Program and was issued Provisional Licenses to teach Health & Elementary Education,”

but respondent maintains that it has no copies of such certificate/endorsements in petitioner's personnel file.¹

According to petitioner, in August 2001 "she took Part 1 courses at St. Peter's College, Jersey City leading to the alternate route for full certification." She was "assigned a mentor for the alternate program" in September 2001, and taught in one of respondent's high schools.

Respondent's answer contains contradictory allegations concerning the point at which petitioner commenced a tenurable position. It states in paragraph one of the First Count that petitioner was appointed to a tenurable position in September 2001, but it states in the Second Defense that petitioner was not assigned to a tenurable position until January 4, 2002.

While it is not clear from the record before us what petitioner was teaching during the 2001-2002 school year — nor what, if any, instructional certificate/endorsements she held — the petitioner and respondent agree that during the 2002-2003 school year she taught biology and physical science, and during the 2003-2004 school year she taught science classes and gave home instruction.

Petitioner contends that in January 2004 she "completed the requirements for standard certification for biological sciences and was notified that her certificate would shortly issue." She further contends that by the end of the 2003-2004 school year she held standard certification in health, elementary education, and biological sciences. Respondent professes to have no knowledge of petitioner holding such endorsements by the end of the 2003-2004 school year. In any event, by letter dated May 7, 2004, respondent notified petitioner that her contract would "not be renewed for the 2004-2005 School Year." That determination was upheld after a

¹ The Commissioner notes that if the only credential petitioner held during the 2000-2001 school year was the county substitute certificate issued pursuant to *N.J.A.C. 6:11-4.5(a)*, she should not have been permitted to serve for more than 20 consecutive days in the same position. *N.J.A.C. 6:11-4.5(c)* (Now called "county substitute credential" and recodified at *N.J.A.C. 6A:9-6.5(b)*)

hearing at which petitioner appeared, and the result was communicated to petitioner by letter dated June 24, 2004.

In her first count petitioner maintains that she achieved tenure in September 2003, rendering respondent's action of not rehiring her for the 2004-2005 school year a termination in violation of her alleged tenure rights. In her second count — seemingly by way of alternative argument — she contends that in the 2000-2001 school year, when she “was eligible for a ‘Letter of Eligibility’,” respondent “failed, refused and neglected to offer her a contract,” thereby taking advantage of her “and as a consequence she did not receive a ‘Letter of Eligibility’ and consequently she did not receive her emergency certificate.” This inaction on respondent's part was, according to petitioner, negligent and unlawful.

In its answer, respondent referred to the fact that emergency certificates can only be applied for and issued for certain areas of need as designated by the State.

The petition was filed on August 18, 2004, the answer was filed on September 3, 2004, and the matter was transmitted to the OAL on September 30, 2004. On May 3, 2005, respondent filed a motion to dismiss, alleging that petitioner failed to file her petition within the 90-day period prescribed by *N.J.A.C. 6A:3-1.3(i)*.

There is no dispute about the filing date of the petition, or about the fact that a petition must be filed within 90 days 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 (i)*. Rather, petitioner argues that the May 7, 2004, letter to her from the Jersey City Public School Associate Superintendent advising her that the Superintendent had decided not to renew her contract, was not “notice of a final order, ruling or other action.” According to petitioner, a letter dated June 24, 2004 upholding the

non-renewal after the hearing that she had requested to ascertain the reasons for non-renewal, was the notice of a final action that triggered the ninety-day limitation period. Thus, summary judgment may be employed in this case, since the Commissioner's task is not to find facts, but rather to determine the proper application of the law to the undisputed material facts.

For the reasons set forth in the Initial Decision, the Commissioner must conclude that applicable case law does not support petitioner's position. The ninety-day period commences when a teacher knows or should know that he or she will not be offered a contract for the next year. *Nissman v. Board of Educ. of Long Beach Island*, 272 N.J. Super. 373, 379 (App. Div.) *certif. den.* 137 N.J. 315 (1994). Decisions in cases with fact patterns similar to the present case have established that it is the first notice of non-renewal — not the letter confirming non-renewal after a hearing or review — that triggers the ninety-day limitation period. *See, e.g., Pacio v. Bd. of Ed. of Lakeland Reg'l High School Dist.*, 1989 S.L.D. 2060, 2069 (the first written communication provided to a staff member of an action by the Board initiates the 90-day timeline); *Wise v. Bd. of Ed. of the City of Trenton*, decided by the Commissioner September 11, 2000, *aff'd* State Bd. January 4, 2001 (when a teaching staff member receives notice that his contract will not be renewed is when the 90-day period is initiated). *See also, LeMee v. Bd. of Ed. of the Village of Ridgewood*, 1990 S.L.D. 663, 667, wherein the Commissioner concurred that the day petitioner received notice that her contract was not renewed was the date that the 90-day timeline commenced, notwithstanding the request to appear before the board of education to try to convince that board to change its decision and offer a contract of employment.

The Commissioner does not agree with petitioner's contention in her exceptions that her claim of tenure changes the effect of the ninety-day rule. The rule does not distinguish

between the claims of tenured or non-tenured employees. A petitioner is obliged to initiate his or her challenge to an action once he or she has notice "sufficient to inform [him or her] of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow v. Bd. of Ed. of Berkeley Tp.*, 131 N.J. 572, 587 (1993).

The Commissioner further disagrees with petitioner's assertion that the adequacy of the May 7, 2004 notice of non-renewal was compromised by the fact that it was signed by a district associate superintendent. The notice informed petitioner of the action taken by the superintendent who, in a state-operated district, has the prerogative to make such decisions. *N.J.S.A. 18A:7A-35; N.J.S.A. 18A:7A-38*. Petitioner neither claims that the superintendent lacks such authority, nor offers legal support for the proposition that only the superintendent may issue notice of same.

Accordingly, the Commissioner adopts the ALJ's determination that the petition in this matter must be dismissed for lack of timeliness.

IT IS SO ORDERED²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/28/05

Date of Mailing: 10/31/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11077-04

AGENCY DKT. NO. 287-8/04

HILDA DORIS SUAREZ,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF JERSEY CITY,

HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: August 4, 2005

Decided: September 13, 2005

BEFORE RICHARD McGILL, ALJ:

This matter involves a petition by Hilda Doris Suarez (“petitioner”) in which she alleges that a determination by the State-Operated School District of the City of Jersey City (“respondent” or “School District”) not to renew her contract was in reality an unlawful termination in violation of her tenure rights. In addition to denying that petitioner acquired

tenure, respondent maintains that the petition was not filed within the ninety-day time limit prescribed by *N.J.A.C.* 6A:3-1.3(i). Respondent now moves for summary decision based on failure to comply with the ninety-day time limit.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on August 18, 2004, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on September 3, 2004, and the matter was transmitted to the Office of Administrative Law on October 15, 2004, for determination as a contested case.

On May 3, 2005, respondent filed a motion for summary decision seeking dismissal of the petition. Petitioner's response to the motion was filed on June 14, 2005, and respondent's supplemental submission was received on August 4, 2005.

MOTION FOR SUMMARY DECISION

In support of the motion, respondent contends that petitioner was notified of the non-renewal of her contract by letter dated May 7, 2004, and that the petition was filed more than ninety days after receipt thereof. Moreover, there is no reason for relaxation of the ninety-day time limit.

Petitioner maintains that the letter dated May 7, 2004, was not the final action of the School District. Petitioner requested a disclosure of the reasons for the non-renewal, and she was given a hearing. Thereafter, the School District sent a letter dated June 24, 2004, stating that the decision was to uphold the recommendation of the principal not to renew petitioner's contract. Petitioner maintains that the ninety-day period begins with the letter dated June 24, 2004, and that relative to this date the filing of the petition was timely. Thus, the issue is whether the

ninety-day period in which to file the petition began with receipt of the letter dated May 7, 2004, or the letter dated June 24, 2004.

A. Legal Standard for Summary Decision

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary judgment “is designed to provide a prompt, businesslike and inexpensive method” to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.* at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995).

B. Facts

There is no genuine issue as to any material fact in this matter in relation to the time limit in *N.J.A.C.* 6A:3-1.3(i). The material facts are as follows:

1. Petitioner was employed by respondent as a teacher during the 2003-2004 school year and prior thereto.
2. By letter dated May 7, 2004, Associate Superintendent Flavio Rubano advised petitioner that her contract would not be renewed for the 2004-2005 school year.
3. Petitioner received the letter dated May 7, 2004, no later than May 13, 2004.
4. Petitioner requested a statement of reasons and a hearing. These requests were granted.
5. Thereafter, Associate Superintendent Flavio Rubano sent petitioner a letter dated June 24, 2004, advising her that after consideration of her testimony, documentation and arguments, the decision was made not to renew her contract for the 2004-2005 school year.
6. Petitioner filed her petition with the Commissioner of Education on August 18, 2004.

C. Law and Analysis

The applicable regulation is *N.J.A.C. 6A:3-1.3(i)*, which provides in pertinent part as follows:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The ninety-day limitation period has been upheld by the Supreme Court of New Jersey as “a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes

under the school laws.” *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 N.J. 572, 582 (1993). The Court further stated as follows:

The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. *Ibid.*

Petitioner relies upon *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 N.J. 236 (1974) for the proposition that a school district upon request must disclose to a teacher the reason for nonrenewal of a contract. In this case, petitioner was given a “Donaldson hearing.” In petitioner’s view, the subsequent determination as set forth in the letter dated June 24, 2004, was the final action in this matter. In effect, petitioner argues that the determination set forth in the letter dated May 7, 2004, was not a final action within the meaning of *N.J.A.C. 6A:3-1.3(i)*.

The ninety-day period commences when a teacher “knew or should have known” that he or she was not going to be offered a new contract for the following academic year. *Nissman v. Board of Educ.*, 272 N.J. Super. 373, 379 (App. Div.) *certif. den.*, 137 N.J. 315 (1994). Various school law cases address a situation where a teacher is given written notice of non-renewal of a contract for the following school year and then tries some means other than an appeal to the Commissioner to persuade the local school board to change its determination. The teacher typically contends that subsequent action in regard to the effort to change the determination constitutes the action which commences the ninety-day period. However, the consistent determinations are that the first written notice begins the ninety-day limitations period. *E.g., Pacio v. Lakeland Reg’l High School Dist. Bd. of Educ.*, 1989 S.L.D. 2060.

In this case, the notice of non-renewal was issued in accordance with *N.J.S.A. 18A:27-10*, which provides as follows:

On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either

- a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
- b. A written notice from the chief school administrator that such employment will not be offered.

This section requires written notice that employment will not be offered for the next school year by May 15. Written notice pursuant to this section certainly should alert the non-renewed teacher to the consequences.

The first written notice was the letter dated May 7, 2004, advising petitioner that her contract would not be renewed for the 2004-2005 school year. Petitioner received this letter no later than May 13, 2004. The petition in this matter was filed on August 18, 2004, which was more than ninety days after May 13, 2004. Therefore, I **CONCLUDE** that the petition in this matter was not filed within the ninety-day time limit set forth in *N.J.A.C.* 6A:3-1.3(i).

Rules may be relaxed where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. *N.J.A.C.* 6A:3-1.16. An example would be a compelling public interest. *DeMaio v. New Providence Board of Education*, 96 *N.J.A.R.2d* (EDU) 449, 453. Here, petitioner has not advanced any argument to relax the ninety-day time limit in *N.J.A.C.* 6A:3-1.3(i), and there does not appear to be any reason to do so.

Based upon the above, I **CONCLUDE** that petitioner failed to file her petition within the ninety-day time limit in *N.J.A.C.* 6A:3-1.3(i) and that therefore the petition in this matter should be dismissed.

Accordingly, it is **ORDERED** that:

1. Respondent's motion for summary decision is granted.
2. The petition in this matter is dismissed.

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

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

Sept. 13, 2005
DATE

Rich McGill
RICHARD MCGILL, ALJ

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

9/13/05
DATE

SEP 14 2005
DATE
cml

Mailed to Parties:

Laure Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 1864-04
AGENCY DKT. NO. 459-12/03

M.F.S. and N.S., on behalf of minor child, M.S., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF GREEN, SUSSEX COUNTY, :
RESPONDENT. :
_____ :

The record of this matter, the parties' proposed Stipulation of Settlement, and the 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 and adopts it as the final decision in this matter. In so doing, however, the Commissioner observes that certain terms appear to have been effectuated prior to final agency approval, contrary to *N.J.A.C. 1:1-19.1*. Accordingly, the Commissioner cautions that, in controverted matters transmitted to the OAL, proposed settlements should not include terms requiring effectuation prior to approval by the Commissioner, and that parties act at their peril in effectuating such terms.

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05
Date of Mailing: 11/02/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1864-04

AGENCY DKT. NO. 459-12/03

M.F.S. and N.S. o/b/o

minor child M.S.,

Petitioners,

v.

**BOARD OF EDUCATION OF
GREEN TOWNSHIP, SUSSEX
COUNTY,**

Respondent.

F. William Lavigne, Esq., for petitioners

Mark H. Zitomer, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: September 14, 2005

Decided: September 21, 2005

BEFORE ELINOR R. REINER, ALJ:

On or about December 9, 2003, petitioners, M.F.S. and N.S. on behalf of their minor child, M.S., filed a petition of appeal with the Commissioner of Education, alleging that M.S. was eligible to attend Green Hills School in the District of Green Township

during the school year 2003-2004 and requesting an exception to district policy due to exigent circumstances. On or about January 15, 2004, respondent filed an answer, alleging that petitioners failed to articulate any basis upon which M.S. would be entitled to a free education in the Green Township Public Schools and counterclaiming for tuition costs for the entire period of M.S.'s ineligible attendance during the applicable school years. On February 27, 2004, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The matter was assigned to the undersigned judge on April 5, 2004, and a prehearing conference was scheduled for May 5, 2004. On that date, as well as June 10, 2004, settlement conferences were held with counsel. Another settlement conference scheduled for July 7, 2004 was adjourned at counsel's request, but additional settlement conferences were held between the parties and updates on the progress of settlement were received from counsel.

By letter dated February 17, 2005, counsel for respondent advised the undersigned that the matter had not been resolved, and he would file a motion for summary decision. This was discussed with counsel on February 24, 2005, when the parties confirmed that if they could not reach a settlement, they would file a stipulation of facts and motions for summary decision, and the matter was adjourned to March 8, 2005. On March 8, 2005, during a telephone conference with counsel, dates for the filings were established. On March 31, 2005, counsel for respondent filed its motion for summary decision. No response was received and during a telephone conference with counsel on May 17, 2005, the parties agreed to settle this matter. Although counsel for respondent indicated on August 8, 2005 that he had not yet received the signed stipulation of settlement from petitioners, on August 11, 2005, he acknowledged its receipt and stated that he would forward it to the Board for its approval. On September 14, 2005, the undersigned received the fully executed Stipulation of Settlement, as well

as a Board resolution approving the settlement and authorizing the Board President to execute it on behalf of the Board.

I have reviewed the record and the Stipulation of Settlement and **FIND:**

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 21, 2005
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

9-23-05
DATE

M. K. O'Donnell
DEPARTMENT OF EDUCATION

SEP 28 2005
DATE
al

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Green Township Board of Education

The Board of Education of the Township of Green in the County of Sussex, New Jersey convened in regular meeting of Wednesday, August 17, 2005 at 7:30 pm in the Green Hills School library.

Members present: Dr. Cercone, Mr. Granger, Mr. Mott, Mr. Noll, Mrs. Cooke, Mr. Ippolito and Mr. Graham who arrived at 7:55pm. Mrs. McDonnell and Mr. Wood were absent.

THE FOLLOWING ACTION WAS TAKEN:

TITLE OF RESOLUTION: Resolution of Settlement.

Motion made by Mrs. Cooke, second by Mr. Graham to approved the resolution of settlement.

Resolved that the Board hereby approves the residency settlement in the matter of M.F.S. and N.S. o/b/o minor child M.S. v Green Township Board of Education in accordance with the terms and conditions set forth in the Settlement Agreement between the parties dated July 29, 2005, where the family has agreed to pay the Board \$23,876.47 for the period of their child's ineligible attendance at the Green Hills School, a copy of which shall be included in the permanent minutes of this meeting, and

Be It Further Resolved that the Board President and Board Secretary/Business Administrator are hereby authorized to execute this Agreement on behalf of the Board.

YES: Dr. Cerone, Mr. Graham, Mr. Granger, Mr. Mott, Mr. Noll, Mrs. Cooke and Mr. Ippolito.

NO: None

ABSTAIN: None

MOTION PASSED.

I, Sallyann McCarty, Secretary of the Board of Education of Green Township School District in the County of Sussex, 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 August 17, 2005 has been compared by me with the original minutes as officially recorded in the Board of Education office in the minute book of said Green Township Broad of Education and is a true, complete copy hereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this September 9, 2005.


Sallyann McCarty – Board Secretary

Seal

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; FAX (973) 301-0203
Attorneys for Respondent
Green Township Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2005 SEP 14 P 1:50

M.F.S. and N.S. on behalf of minor child : BEFORE THE COMMISSIONER OF
M.S., : EDUCATION/OFFICE OF
 : ADMINISTRATIVE LAW

Petitioners, : OAL Dkt. No.: EDUOS 01864-2004N
 : Agency Ref. No.: 459-12/03

vs. :
 : **STIPULATION OF SETTLEMENT**

GREEN TOWNSHIP BOARD OF :
EDUCATION, SUSSEX COUNTY, :
 :
Respondent/Counterclaimant. :
_____ :

This Stipulation of Settlement is made by and between the Green Township Board of Education ("Board"), with administrative offices located at 69 Mackerley Road, Greendell, New Jersey 07839 and Michael Sesera, Jr. and Natalie Sesera, 21 Woodfield Road, Andover, New Jersey 07821 ("Petitioners"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, the Petitioners filed a Petition of Appeal with the Commissioner of Education on or about December 8, 2003 against the Board, challenging the Board's decision to disenroll their daughter, M.S., for failing to meeting the residency requirements set forth in N.J.S.A. 18A:38-1 et seq.; and

WHEREAS, on January 14, 2004, the Board filed its answer to the Petition of Appeal with a counterclaim for tuition; and

WHEREAS, M.S. is currently enrolled in the Green Township School District,

pursuant to the stay-put provision of N.J.S.A. 18A:38-1 *et seq.* ; and

WHEREAS, Petitioners and their child are not presently domiciled in Green Township, nor have they been domiciled in Green Township at any time during their child's enrollment in the Green Township Public Schools; at all relevant times herein, Petitioners have lived in Hopatcong, New Jersey; and

WHEREAS, based upon the foregoing facts the Board, filed a motion for summary decision with the Court on or about March 30, 2005; and

WHEREAS, Petitioners did not oppose said motion and through their attorney acknowledged to the Court that the Board's position is legally correct; and

WHEREAS, the Court, in lieu of deciding said motion, instructed the parties to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises and covenants the parties agree as follows:

1. Petitioners will pay the Board back-tuition in the amount of \$23,876.47 in full and complete satisfaction of the alleged amount which is due and owing.
2. This tuition amount will be paid directly to the Board's legal counsel, Marc H. Zitomer, Esq., 10 James Street, Florham Park, New Jersey 07932, with a certified check made payable to the "Green Township Board of Education", by no later than August 31, 2005.
3. Petitioners understand that if they fails to remit the agreed-upon amount by August 31, 2005, the Board will take whatever legal action is necessary to enforce this Agreement and collect the sum set forth herein.
4. Petitioners agree to pay the Board's attorney's fees and costs, in addition to all

collection fees, in the event that the Board must take action to collect the aforesaid sum of money.

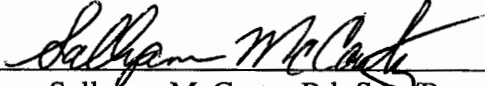
5. Petitioners agree to withdraw M.S. from the Green Township School before August 31, 2005;
6. Petitioners, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to M.S.'s attendance and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement.
7. The Board, in consideration of this Agreement, hereby releases Petitioners from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to M.S.'s attendance in Green Township and subsequent removal/withdrawal from the District, now and forever, except to enforce the terms of this Settlement Agreement. This release does not preclude the Board from instituting any legal action in the future challenging any future enrollment/attendance of Petitioners children or attempts at enrollment in the Green Township School District.
8. Petitioners acknowledge that they have reviewed this Agreement with independent legal counsel and that they enter into it without duress, and of their

own free will and volition. They further acknowledge that they fully understand the terms of this Agreement and the duties and obligations enumerated herein.

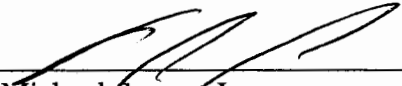
9. The parties, in consideration of this Agreement and in full, final and complete settlement of this matter hereby withdraw, with prejudice, the above-docketed Petition of Appeal and Counterclaim, respectively.
10. Nothing contained in this Agreement should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
11. This Agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
12. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.
13. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives,
do set forth their hands and seal as of the date first above written.

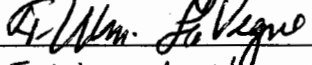
FOR THE GREEN TOWNSHIP BOARD OF EDUCATION:

By:  By: 
Bill Ippolito Board President Sallyann McCarty, Bd. Sec./Bus. Admin.

FOR PETITIONERS:

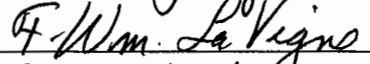

Michael Sesera, Jr.

Sworn and subscribed before me this
29th day of July, 2005


F. Wm. LAVIGNE
ATTORNEY AT LAW
OF N.J.


Natalie Sesera

Sworn and subscribed before me this
11th day of July, 2005


F. Wm. LAVIGNE
ATTORNEY AT LAW
OF NEW JERSEY

IN THE MATTER OF ROSE L. FUNCHES, :
GATEWAY CHARTER SCHOOL BOARD OF : COMMISSIONER OF EDUCATION
TRUSTEES, HUDSON COUNTY. :
_____: DECISION

SYNOPSIS

The School Ethics Commission determined that Gateway Charter School Board of Trustees member Rose Funches committed "multiple, flagrant violations" of the School Ethics Act and the Code of Ethics for School Board Members, encompassing violations of *N.J.S.A.* 18A:12-24(b)-(c), *N.J.S.A.* 18A:12-25(c)3, and *N.J.S.A.* 18A:12-24.1(a), (e) and (g). After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of removal from the Board.

Upon a thorough review of the record, the Commissioner, whose decision is restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurs with the Commission's recommendation. The Commissioner thus orders that Rose Funches be removed, as a school official found to have violated the School Ethics Act, from the Board of Trustees of the Gateway Charter School 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 2, 2005

AGENCY DKT. NO. 260-9/05

IN THE MATTER OF ROSE L. FUNCHES, :
 GATEWAY CHARTER SCHOOL BOARD OF : COMMISSIONER OF EDUCATION
 TRUSTEES, HUDSON COUNTY. : DECISION
 _____:

The record of this matter and the decision of the School Ethics Commission (“Commission”), including the recommended penalty of removal, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon respondent, a member of the Board of Trustees of the Gateway Charter School, based upon the Commission’s finding that she committed “multiple, flagrant violations” of the School Ethics Act and the Code of Ethics for School Board Members, encompassing violations of *N.J.S.A.* 18A:12-24(b)-(c), *N.J.S.A.* 18A:12-25(c)3, and *N.J.S.A.* 18A:12-24.1(a), (e) and (g).

Upon issuance of the decision of the Commission, respondent was provided thirteen days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner’s consideration. No such comments were filed.

Initially, the Commissioner emphasizes 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 herein. Rather, the Commissioner’s jurisdiction is limited to review of the sanction recommended by the Commission following its finding of violation.

In light of that standard, the Commissioner determines to accept, for the reasons expressed in the Commission’s decision, the recommendation that removal is the appropriate penalty in this matter. In so holding, the Commissioner notes that the Commission considered

the facts presented and took aggravating and mitigating circumstances into account, reasonably concluding that its recommended penalty was commensurate with the violations found. Therefore, the Commission's recommendation will not be disturbed.

Accordingly, IT IS ORDERED that Rose L. Funches be removed, as a school official found to have violated the School Ethics Act, from the Board of Trustees of the Gateway Charter School as of the filing date of this decision.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* 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.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

IN THE MATTER OF

BEFORE THE SCHOOL
ETHICS COMMISSION

ROSE L. FUNCHES
GATEWAY CHARTER SCHOOL
BOARD OF TRUSTEES
HUDSON COUNTY

Docket No. C09-05 & C10-05

DECISION

PROCEDURAL HISTORY

This matter arises from two complaints filed by Gregory John Monte, an employee of the Gateway Charter School Board of Trustees (Board), against Rose L. Funches, Vice-President of the Board. The first complaint, C09-05, was filed on March 29, 2005, and alleged that Ms. Funches violated N.J.S.A. 18A:12-25(c)3 and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act when she engaged in certain conduct as noted below. The second complaint, C10-05, was filed on April 8, 2005, and alleged that Ms. Funches violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a) and (e) of the Code of Ethics for School Board Members when she engaged in certain conduct as noted below. Following are the complainant's allegations:

- (1) As Vice-President of the Board, Ms. Funches participated in a closed executive meeting of the Gateway Charter School Board of Trustees (Board), held on March 17, 2005, without public notice in violation of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq.;
- (2) Ms. Funches filed a personal/financial disclosure statement that contained information which she knew to be false;
- (3) Ms. Funches co-signed several checks without Board authorization, which included several checks made out to a company owned by her husband;
- (4) Ms. Funches voted to hire Unique Maintenance to strip and polish floors at the school when her husband and son were employed by the company to do the actual work;
- (5) Ms. Funches voted on bill lists which included payments to a company owned by her husband;
- (6) Ms. Funches recommended that Sheila Ruiz be hired as a clerk to help the secretary of the Board complete the minutes after recommending that the complainant be fired; and
- (7) Ms. Funches voted to approve a contract with HP Contractors when the owner was her close friend.

After receipt of the complaints, the Commission forwarded both complaints to Ms. Funches and notified her that, pursuant to N.J.A.C. 6A:28-6.5(a), she had 20 days to submit an answer under oath to the Commission. Ms. Funches failed to answer either complaint within the 20 day time limit. The Commission then notified her that she had an additional 10 days to answer the complaint and that the complaint was scheduled for the June 28, 2005 meeting. Ms. Funches never submitted an answer to the complaint.

The Commission invited Mr. Monte to attend its June 28, 2005 meeting to present witnesses and testimony, but did not require that he be present. Neither party attended the hearing. At its June 28, 2005 meeting, the Commission consolidated C09-05 and C10-05 and voted to find probable cause to credit allegations one through five that Ms. Funches violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25 of the School Ethics Act (Act), and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act. The Commission also voted to find no probable cause to credit allegations six and seven that Ms. Funches violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(f) and N.J.S.A. 18A:12-24.1(a).

The Commission found that the material facts were not in dispute with respect to the allegations upon which it found probable cause and, therefore, the Commission advised Ms. Funches that it would decide the matter on the basis of written submissions. Ms. Funches was invited to provide a written submission to the Commission by August 30, 2005, and set forth why the Commission should not find her in violation of N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25 of the Act, and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act. Ms. Funches was also told that her written submission should include her position on an appropriate sanction should the Commission determine that the Act was violated. Ms. Funches did not provide a written submission in response to the Commission's probable cause determination.

FACTS

The Commission based its finding of probable cause on the following facts.

At all times relevant to these complaints, Ms. Funches was Vice-President of the Board and co-signed, with the Board President, checks issued by the Board. Ms. Funches' husband owns Professional Maintenance and Carpeting, which is a company that was under contract with the Board from July 26, 2004 through February 13, 2005. Ms. Funches' husband and son were both employed by Unique Maintenance and performed work at the school. At all times relevant to the complaints, complainant was employed by the Board.

(1) March 17, 2005 Closed Executive Meeting

On March 16, 2005, Ms. Funches sent an e-mail to all Board members asking if they were going to attend the closed Board meeting to be held the following evening. The closed executive meeting of the Board was held on March 17, 2005. The public was not provided with any type of notice of the meeting.

(2) Personal/Financial Disclosure Statement

On March 4, 2005, Ms. Funches filed a Personal/Financial Disclosure Statement as required by N.J.S.A. 18A:12-25 and 26. Ms. Funches indicated "N/A" in response to all questions asking for financial information for the previous calendar year. The only section in the form that she completed was the section requesting personal information such as name and address.

(3) Check Signing

Ms. Funches co-signed several checks that were not authorized by the Board, which included several made out to a company owned by her husband, as follows:

1. Ms. Funches co-signed check No. 7087 dated June 5, 2004 in the amount of \$4,375; check No. 7169 dated September 14, 2004 in the amount of \$5,000; and check No. 7241 dated November 11, 2004 for \$3,500, which were all made out to her husband's company, Professional Maintenance and Carpeting;
2. Ms. Funches co-signed the following checks without Board approval: 7104-7127; 3024-3025; 3020-3023; 7128-7165; 7166-7167; 7169-7193; 7208-7240 and 7241-7242; and
3. At the January 10, 2005 Board meeting, the Board authorized 23 checks, but Ms. Funches co-signed 32 checks, thus, 9 checks were not approved by the Board.

(4) Unique Maintenance

At the March 21, 2005 Board meeting, Ms. Funches voted to hire Unique Maintenance to strip and polish the floors at Gateway Charter School. Unique Maintenance is owned by her brother-in-law. Ms. Funches' husband and son are employees of Unique Maintenance and they performed the work that was done at the school. The minutes indicate that Unique Maintenance was the lowest bidder. However, the actual bids show that Unique Maintenance submitted a bid that was approximately \$1,124.00 more than the lowest bid from Capital Contractors, Inc.

(5) Vote on Bill Lists

Ms. Funches voted on bill lists which included payments to her husband's company, Professional Maintenance and Carpeting, during the Board meetings for the months of July 2004, October 2004, December 2004 and January 2005.

ANALYSIS

(1) March 17, 2005 Closed Executive Meeting

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24.1(a) when she participated in a March 17, 2005 closed executive meeting of the Board of which the public had no knowledge. N.J.S.A. 18A:12-24.1(a) provides:

I will uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. Desired changes shall be brought about only through legal and ethical procedures.

The OPMA at N.J.S.A. 10:4-9 requires all public bodies to provide adequate notice of meetings that are held by the public bodies. The Board falls within the definition of "public body" at N.J.S.A. 10:4-8, which, in part, defines the term as meaning "a commission, authority, board... organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function..." Furthermore, N.J.S.A. 18A:36A-6 requires the board of trustees of a charter school to comply with the provisions of the OPMA. "Adequate notice" is also defined, in part, at N.J.S.A. 10:4-8 to mean, "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting..." The March 17, 2005 closed executive meeting of the Board was held without the provision of a 48 hour written advance notice giving the time, date, and location of the meeting. Based on the foregoing, the Commission finds that, by participating in this meeting, Ms. Funches violated N.J.S.A. 18A:12-24.1(a) because she failed to uphold and enforce all laws pertaining to the schools.

(2) Personal/Financial Disclosure Statement

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-25(c)3 when she filed a personal/financial disclosure statement that failed to include information that her husband owned Professional Maintenance and Carpeting, which was under contract with the Board from July 26, 2004 through February 13, 2005. N.J.S.A. 18A:12-25(c)3 provides, in part:

A school official who fails to file a statement or who files a statement containing information which the school official knows to be false shall be subject to reprimand, censure, suspension, or removal pursuant to the procedures established in [N.J.S.A. 18A:12-29]...

Pursuant to N.J.S.A. 18A:12-25(a)2 a school official is required to disclose relatives who are a party to a contract with the school district with which the school official holds office. Ms. Funches' personal/financial disclosure statement for 2004 indicated "N/A" in all of the sections requesting financial information. Specifically, she

indicated that no relative by marriage is employed by the charter school, is party to a contract with the charter school, or receives compensation or has any interest in any business which is a party to a contract with the charter school. Ms. Funches' husband owns Professional Maintenance and Carpeting, which was a party to a contract with the Board from July 26, 2004 through February 13, 2005. Ms. Funches failed to indicate that her husband's company was a party to a contract with the charter school. Thus, she knowingly provided false information on her 2004 personal/financial disclosure statement. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-25 when she filed her 2004 personal/financial disclosure statement without providing information that her husband's company, Professional Maintenance and Carpeting, was a party to a contract with the charter school.

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24.1(g) when she filed a personal/financial disclosure statement that was inaccurate. N.J.S.A. 18A:12-24.1(g) provides:

I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

When Ms. Funches failed to disclose her husband's company's contract with the charter school on her 2004 personal/financial disclosure statement, she did not provide accurate information on the form. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24.1(g) when she did not list her husband's business on her 2004 personal/financial disclosure form.

(3) Check Signing

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24.1(a) and (e), which are set forth above, when she signed certain checks without Board authorization, including several made out to her husband's company. Pursuant to N.J.S.A. 18A:19-1(d), prior to expenditure of Board funds, the Board must approve the expenditure by resolution. The evidence shows that Ms. Funches co-signed several checks that had not been approved at the January 10, 2005 Board meeting. The evidence also shows that Ms. Funches co-signed other checks that were not approved by the Board, including several made out to her husband's company. Based on the foregoing, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24.1(a) and (e), when she signed checks without Board approval in violation of N.J.S.A. 18A:19-1 et seq., and when she failed to recognize that the authority to expend school funds lies with the entire Board.

The Commission also found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(b) when she signed certain checks made out to her husband's company without Board authorization. N.J.S.A. 18A:12-24(b) provides:

No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others; and

Ms. Funches' husband falls within the definition of "member of immediate family," which is defined at N.J.S.A. 18A:12-23 to mean, "the spouse or dependent child of a school official residing in the same household." Ms. Funches co-signed checks made out to her husband's company, Professional Maintenance and Carpeting, without Board approval. She co-signed the checks as part of her duties as Board Vice-President. In doing so, Ms. Funches used her official position as Board Vice-President to secure the unwarranted privilege or advantage of obtaining funds from the Board for her husband without Board approval. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(b).

The Commission also found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she signed certain checks made out to her husband's company without Board authorization. N.J.S.A. 18A:12-24(c) provides:

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

Ms. Funches and her husband have a direct financial involvement in the checks that were made out to Professional Maintenance and Carpeting because the company is owned by her husband. The public could reasonably perceive that her objectivity and independence of judgment would be impaired in that matter. The Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she acted in her official capacity as Board Vice-President in a matter where she had a direct financial involvement that might reasonably be expected to impair her objectivity or independence of judgment.

(4) Unique Maintenance

The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(b), which is set forth above, when, on March 21, 2005, she voted to approve the bid of Unique Maintenance to strip and polish the floors at the school. The Board minutes show that Ms. Funches voted to approve the bid of Unique Maintenance. Her husband and son were employed by Unique Maintenance and they performed the work at the school. The approval of Unique Maintenance was unwarranted because their bid was over \$1,000 more than the lowest bid. This gives the impression that Ms. Funches voted to approve Unique Maintenance because her husband and son were employed by that

company. In N.J.S.A. 18A:12-22(a), the Legislature declared that board members must avoid conduct which is in violation of the public trust or which creates a justifiable impression among the public that such trust is being violated. When Ms. Funches voted to hire a company that employed her husband and son, which was not the lowest bidder, it created a justifiable impression that the public trust was being violated and that the approval of Unique Maintenance was unwarranted. Based on the foregoing, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(b) when she used her official position to secure unwarranted employment for her husband and son.

The Commission also found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(c), which is set forth above, when she voted to approve the bid of Unique Maintenance to strip and polish the floors at the school. Ms. Funches has a direct financial involvement in the employment of her husband. There is no evidence to show that her son was a dependent residing in the same household. However, she has a personal involvement in ensuring the employment of her son. When she voted to approve the bid of Unique Maintenance, she was acting in her official capacity as a Board member on a matter where she has a direct financial involvement that might reasonably be expected to impair her objectivity or independence of judgment and a personal involvement that created a benefit to her. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she voted to hire Unique Maintenance.

(5) Vote on Bill Lists

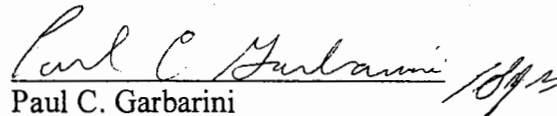
The Commission found probable cause that Ms. Funches violated N.J.S.A. 18A:12-24(c), which is set forth above, when she voted on bill lists that included payments to a company owned by her husband. Board minutes show that Ms. Funches voted on bill lists that included payments to her husband's company at four different Board meetings. As noted above, she has a direct financial involvement in Professional Maintenance and Carpeting because the company is owned by her husband. Therefore, the Commission finds that Ms. Funches violated N.J.S.A. 18A:12-24(c) when she acted in her official capacity as Board Vice-President on a matter in which she had a direct financial involvement that might reasonably be expected to impair her objectivity or independence of judgment.

DECISION

For the reasons discussed above, the Commission finds that Rose L. Funches violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25(c)3 of the Act, and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act. Because of the multiple, flagrant violations of the Act, the Commission recommends that the Commissioner of Education impose a penalty of removal.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was

mailed to the parties, Ms. Funches may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.


Paul C. Garbarini
Chairperson

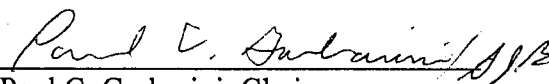
Resolution Adopting Decision – C09-05 & C10-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

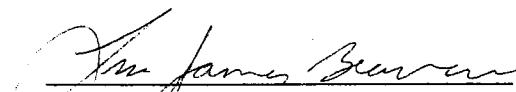
Whereas, at its meeting of September 27, 2005, the Commission found that Rose L. Funches violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-25(c)3 of the School Ethics Act (Act), and N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of removal; and

Whereas, at its meeting of September 27, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.


Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

AGENCY DKT. NO.: 271-10/05

IN THE MATTER OF JANET P. GRAHAM, :
SOUTH BELMAR 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. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the South Belmar Board of Education in May 2004 and, therefore, had until May 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C. 6A:28-1.6(e)*, on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Board member responded that the training dates offered posed conflicts with the probationary period imposed by her new job and that she would make arrangements to attend this year; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A. 18A:12-33* and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* 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's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T05-05
JANET P. GRAHAM,	:	
South Belmar Board of Education	:	DECISION FOR FAILURE
Monmouth County	:	TO ATTEND TRAINING
	:	

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Janet P. Graham was newly elected or appointed in May 2004 to a local school board or charter school board and therefore, had until May 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Janet P. Graham to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Graham responded that she had failed to attend training she started a new position at work and the training dates did not coincide with her new schedule during her probationary period; and

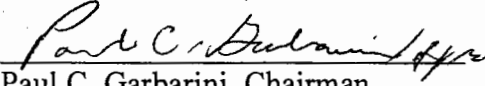
WHEREAS, the Commission notified Ms. Graham that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Graham has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

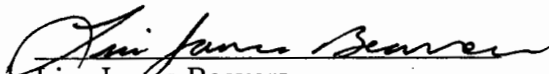
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Janet P. Graham violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 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.

#400-05

MR. AND MRS. T.F.S., on behalf of minor child, :
C.M.S., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF :
SOUTH BRUNSWICK TOWNSHIP, :
MIDDLESEX COUNTY, :
DR. SAMUEL STEWART, SUPERINTENDENT :
OF SCHOOLS AND DEBRA JOHNSON, :
MAYOR, :

DECISION

RESPONDENTS. :

SYNOPSIS

Petitioners, in August 2002, challenged the respondent Board's decision denying their child transportation services to the Crossroads South Middle School; alleged that the walk route designated by the Board is unsafe; and demanded that the Board's decision be reversed as arbitrary, capricious and unreasonable. Four hearings occurred between October 2004 and February 2005, and the record closed on September 2, 2005. Subsequently, respondent submitted that C.M.S. is currently a student at South Brunswick High School, and is now receiving transportation services to and from school.

The ALJ concluded that given the change in circumstances, the issue is an improper subject for judicial review, and should be dismissed as moot. Therefore, the Initial Decision of the OAL recommended dismissal of the petition.

The Commissioner rejects the Initial Decision of the ALJ, finding that under the circumstances, the graduation of C.M.S. from the Crossroads Middle School does not render moot petitioners' action challenging the Board's refusal to bus C.M.S., as the specific action complained about is currently being repeated in regard to petitioners' younger child, J.R.S. The Commissioner notes that petitioners' claim they requested to amend their petition to substitute J.R.S. for C.M.S. prior to the ALJ's decision in this case, but were denied and told to file a new petition. The Commissioner concludes that no reasonable purpose would be served by requiring petitioners to file a new petition when the underlying facts, other than the name of the child, are identical; such an exercise would equate to a needless waste of scarce administrative and adjudicative resources. Accordingly, this matter is remanded to the OAL, where petitioners shall be allowed to submit an amended petition substituting J.R.S. for C.M.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.

OAL DKT. NO. EDU 6674-02
AGENCY DKT. NO. 266-8/02

MR. AND MRS. T.F.S., on behalf of minor child, :
C.M.S., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF :
SOUTH BRUNSWICK TOWNSHIP, :
MIDDLESEX COUNTY, :
DR. SAMUEL STEWART, SUPERINTENDENT :
OF SCHOOLS AND DEBRA JOHNSON, :
MAYOR, :

DECISION

RESPONDENTS. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4. No reply exceptions were submitted.

Petitioners' exceptions vehemently oppose dismissal of this matter as moot by the Administrative Law Judge (ALJ). They assert that the instant Petition of Appeal was instituted over three years ago and now, "after much lengthy delay on the part of the OAL," is being dismissed, "after 4 full days of hearing, an extensive developed record, and final Briefs submitted by both Parties to this matter," solely because C.M.S. has moved on to high school. (Petitioners' Exceptions at 2) This result is particularly egregious, petitioners argue, since they now have a second child, J.R.S., who in September 2005 began attending the same school

previously attended by C.M.S., thereby continuing the same intolerable situation as previously existed as a consequence of the Board's determination here.

Petitioners claim that, prior to the ALJ's decision in this case, they communicated with him and made a "formal" request to amend their petition to substitute J.R.S. for C.M.S. and were refused, notwithstanding that *N.J.A.C.* 1:1-6.2 clearly contemplates free amendment of pleadings. Rather, they report, the ALJ informed them that they would have to file a new petition and begin this whole case anew. (*Id.* at 2-3) Petitioners charge that bringing an entirely new action before the Commissioner on behalf of their second child "when the [second] child is exposed to the same Hazardous Parameters and conditions that existed in the matter with [their first] child" is senseless. (*Id.* at 3) They urge that the ALJ's decision be rejected and that this matter be remanded to the OAL for adjudication on the merits.

Upon careful and independent review of the record in this matter, the Commissioner determines to reject the Initial Decision of the ALJ, finding, instead, that under the circumstances, the graduation of petitioners' child, C.M.S., from the Crossroads South Middle School does not render moot the petitioners' action challenging the Board's refusal to bus their middle school child. In this regard, the Commissioner is mindful that:

An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, the conflict between the parties has become merely hypothetical. See *Black's Law Dictionary* 409 (5th ed. 1979), and *In re Conroy*, 190 *N.J. Super.* 453, 458 (App. Div. 1983)***. (*Barshatky v. Freehold Regional High School District Bd. of Educ.*, 95 *N.J.A.R.* 2d (EDU) 71, 73)

Although it is well-established that the Commissioner does not decide moot issues, (See *Carolyn Henry v. Board of Education of the City of Wildwood, Cape May County*, 1975 *S.L.D.* 1, 3), it is likewise well-established that an issue is not moot where the potential for

recurrence exists. *Galloway Township Board of Education v. Galloway Township Education Association*, 78 N.J. 25. Such is the case here. Notwithstanding C.M.S.'s graduation, as pointed out in petitioners' exceptions, their second child, J.R.S., began attendance at this same middle school in September 2005. As such, it is without question that the specific action of the Board complained about is currently being repeated.

Irrespective of the fact that the record in this matter evidences that the delays in the movement of this appeal — filed in August 2002 — are, in large measure, attributable to petitioners' own dilatoriness, in light of the stage of record development at this point in time and given that all of the underlying facts of this matter, other than the name of the specific child involved, are *identical*, the Commissioner finds and concludes that no reasonable purpose would be served by requiring petitioners to file an entirely new petition but, rather, such an exercise would equate to a needless waste of scarce administrative and adjudicative resources.

Accordingly, the Initial Decision of the OAL dismissing this case as moot is rejected. This matter is remanded to the OAL, where petitioners shall be allowed to submit an amended petition substituting J.R.S. for C.M.S., and this matter shall proceed for a determination on petitioners' underlying claim.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11-02-05

Date of Mailing: 11-03-05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6674-02

AGENCY DKT. NO. 266-8/02

MR. and MRS. T.F.S. o/b/o C.M.S.,

Petitioner,

v.

**BOARD OF EDUCATION OF
SOUTH BRUNSWICK TWP.,
MIDDLESEX COUNTY, DR. SAMUEL
STEWART, SUPERINTENDENT OF
SCHOOLS AND DEBRA JOHNSON, MAYOR**

Respondent.

T.F.S., petitioner, *pro se*

John E. Collins, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: September 2, 2005

Decided: September 22, 2005

BEFORE ISRAEL D. DUBIN, ALJ

Petitioners challenge the South Brunswick Township Board of Education's decision to deny their daughter, C.M.S., transportation services to and from the Crossroads South Middle School. In so doing, they allege that the Board failed to follow recommendations set forth in *The Relative Risks of School Travel*, Special Report 269 of the Transportation Research Board of the National Academies, and designated a walk route between their home in the Regents Square

development and the Middle School that is “obviously and significantly unsafe.” They therefore demand that the Board’s decision be reversed as arbitrary, capricious, and unreasonable.

Petitioners filed their complaint on August 28, 2002, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on October 9, 2002. A lengthy period of discovery, followed by a series of motions, briefs, orders, and one interlocutory appeal ensued and continued through July 2004, when Administrative Law Judge Steven C. Reback retired and the matter was reassigned to me for handling. The matter was subsequently heard on October 13, 2004; December 14 & 15, 2004; and February 9, 2005, and the record was closed upon receipt of petitioners’ final post-hearing submission on September 2, 2005.

A thorough review of the record conducted prior to writing an Initial Decision disclosed that petitioners filed this action shortly before C.M.S. began attending the Crossroads South Middle School as a sixth grade student in September 2002. Since the Middle School is comprised of grades six, seven, and eight, logic dictated that C.M.S. presumably graduated from Crossroads South in June 2005 and began attending South Brunswick High School at approximately the same time the record was closed.

During a conference call conducted on September 12, 2005, petitioner T.F.S. confirmed that his daughter, C.M.S., was in fact attending and receiving transportation services to and from South Brunswick High School.¹ Four days later, on September 16, 2005, I received from counsel for respondent the certification of Jeffrey R. Scott, Assistant Superintendent for Business, in which he stated that “C.M.S., the subject of this proceeding, is now a ninth grade student at South Brunswick High School; she receives daily transportation services based on the distance between her home and the High School.”

Ordinarily, an issue is moot when a decision that is being sought in a particular matter will, when rendered, have no practical effect on the existing controversy. *In re Conroy*, 109 N.J. Super. 453, 458 (App. Div. 1983). In such cases, the issues that have become moot or academic

¹ T.F.S. also indicated that he was no longer demanding the “stipend” or reimbursement for any of the days he or his wife drove C.M.S. to, or drove her home from, the Middle School.

prior to judicial scrutiny” are generally considered to be ... improper subject[s] for judicial review.” *Anderson v. Sills*, 143 N.J. Super. 432, 437 (Ch. Div. 1976). Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed. *Ibid.*

This is just such a case. Since C.M.S. is no longer attending Crossroads South Middle School, the issue of whether she is entitled to transportation services to and from that school is now academic and any decision I render will have no practical effect on the existing controversy. I therefore **CONCLUDE** that given the change in circumstances, the issue is an improper subject for judicial review and should be dismissed as **MOOT**. 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

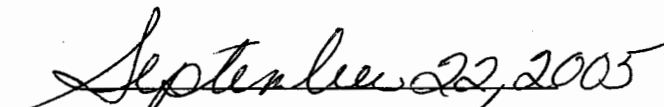
September 22, 2005

DATE



ISRAEL D. DUBIN, ALJ

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

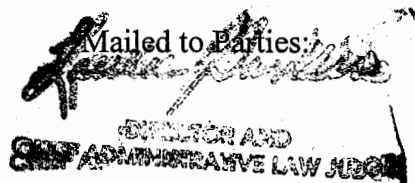


DATE

SEP 28 2005

DATE

IDD/mamf



OFFICE OF ADMINISTRATIVE LAW

AGENCY DKT. NO.: 270-10/05

IN THE MATTER OF MARIA MANLEY, :
 MORRIS PLAINS BOARD OF : COMMISSIONER OF EDUCATION
 EDUCATION, MORRIS COUNTY. : DECISION
 _____:

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Morris Plains Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Board member responded that she did not attend training because she gave birth three months after her election to the Board but was registered for the October 25, 2005 training; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* 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's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T06-05
MARIA R. MANLEY,	:	
Morris Plains Board of Education	:	DECISION FOR FAILURE
Morris County	:	TO ATTEND TRAINING
	:	

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Maria R. Manley was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had until April 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Maria R. Manley to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Manley responded that she did not attend training because she had a baby three months after she was elected to the board, but she is registered for the October 25, 2005 training session; and

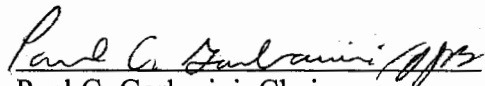
WHEREAS, the Commission notified Ms. Manley that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Manley has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

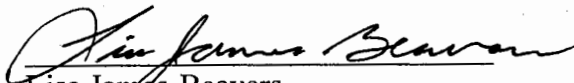
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Maria R. Manely violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 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.

AGENCY DKT. NO.: 266-10/05

IN THE MATTER OF KAREN ROSE, :
 HARMONY BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
 WARREN COUNTY. : DECISION
 _____ :

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Harmony Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C. 6A:28-1.6(e)*, on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member responded that her son was sick on the day of the training session in March 2005 and, because she is a stay-at-home mom, she could not attend the training sessions offered in June 2005; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A. 18A:12-33* and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/02/05

Date of Mailing: 11/03/05

* 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's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T09-05
KAREN ROSE,	:	
Harmony Board of Education	:	DECISION FOR FAILURE
Warren County	:	TO ATTEND TRAINING
	:	

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Karen Rose was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had to until April 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Karen Rose to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Rose responded that her son was sick on the day of the training session in March 2005 and because she is a stay at home mom she could not attend the training sessions offered in June 2005; and

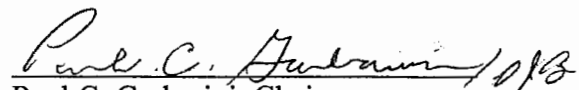
WHEREAS, the Commission notified Ms. Rose that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Rose has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

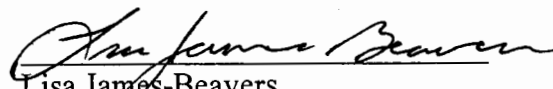
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Karen Rose violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 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.

AGENCY DKT. NO.: 269-10/05

IN THE MATTER OF PHILLIP REPELLA III, :
QUEEN CITY ACADEMY CHARTER SCHOOL : COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, UNION COUNTY. : DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Queen City Academy Charter School Board of Trustees in January 2004 and, therefore, had until January 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C. 6A:28-1.6(e)*, on August 19, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the above-named Board member did not respond to the Commission's Order; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A. 18A:12-33* and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on his behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if he fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if he fails to attend the January 28, 2006 session.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/03/05

* 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.*

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T11-05
PHILLIP REPELLA, III,	:	
Queen City Academy Charter School	:	DECISION FOR FAILURE
Board of Trustees	:	TO ATTEND TRAINING
Union 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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Phillip Repella, III was newly elected or appointed in January 2004 to a local school board or charter school board and therefore, had to until January 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 19, 2005, directing Phillip Repella, III to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Repella did not respond to the Commission's Order; and

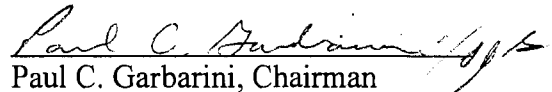
WHEREAS, the Commission notified Mr. Repella that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Mr. Repella has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

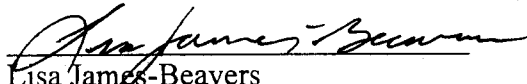
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if he fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Phillip Repella, III violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if he fails to attend the October 25, 2005 training session and removal from the board if he fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 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.

AGENCY DKT. NO.: 267-10/05

IN THE MATTER OF BONNIE SHIMP, :
QUINTON BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
SALEM COUNTY. : DECISION
_____:

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Quinton Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member responded that because she was a board member in 1990 and never received training she called the NJSBA who advised her that since she was on the Board in 1990 that she did not have to attend training, but she is registered for the October 25, 2005 training session; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A.* 18A:12-33 and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/3/05

Date of Mailing: 11/3/05

* 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's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION

v.

**BONNIE SHIMP,
Quinton Board of Education
Salem County**

**BEFORE THE
SCHOOL ETHICS COMMISSION**

DOCKET NO. T07-05

**DECISION FOR FAILURE
TO ATTEND TRAINING**

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Bonnie Shimp was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had until April 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Bonnie Shimp to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Shimp responded that because she was a board member in 1990 and never received training she called the NJSBA who advised her that since she was on the Board in 1990 that she did not have to attend training, but she is registered for the October 25, 2005 training session; and

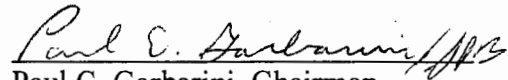
WHEREAS, the Commission notified Ms. Shimp that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Shimp has failed to attend the required training program for the one year allowed since she never received training during her 1990 term on the board; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

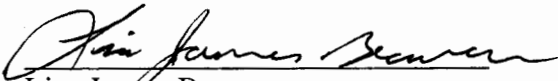
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Bonnie Shimp violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

OAL DKT. NO. EDU 10158-04
AGENCY DKT. NO. 260-7/04

ALFRED <u>SZOLACK</u> ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN	:	DECISION
OF HAMMONTON, ATLANTIC COUNTY,	:	
	:	
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.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/03/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10158-04

AGENCY DKT. NO. 260-7/04

ALFRED SZOLACK,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE TOWN OF HAMMONTON,
ATLANTIC COUNTY,**

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

William S. Donio, Esq., for respondent (Cooper Levenson April Niedelman & Wagenheim, P.A., attorneys)

Record Closed: October 3, 2005

Decided: October 5, 2005

BEFORE **W. TODD MILLER, ALJ:**

This matter was transmitted to the Office of Administrative Law on November 16, 2004, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

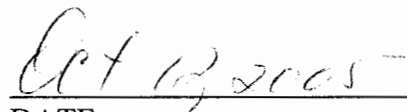
October 5, 2005

DATE



W. TODD MILLER, ALJ

Receipt Acknowledged:



DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW COUNSEL

OCT 13 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED

2005 OCT - 31 A 10:21

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

William S. Donio, Esquire
Cooper Levenson April
Niedelman & Wagenheim, P.A.
1125 Atlantic Avenue – 3rd Floor
Atlantic City, NJ 08401
(609)344-3161
Attorneys for Respondent

ALFRED SZOLACK, an individual,

Petitioner,

v.

BOARD OF EDUCATION OF TOWN OF
HAMMONTON, COUNTY OF
ATLANTIC,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF THE
STATE OF NEW JERSEY

AGENCY DOCKET NO.: 260-7/04

SETTLEMENT AGREEMENT
AND
GENERAL RELEASE

This Settlement Agreement and General Release is made as of the ____ day of _____, 2005 by and among Alfred Szolack, (hereinafter "Petitioner"); and the Hammonton Board of Education, Atlantic County, New Jersey, its successors, predecessors and assigns, (hereinafter the "Board") as follows:

WHEREAS, the Board is a body corporate and politic of the State of New Jersey having statutory responsibilities for the management and administration of the Hammonton School District in Atlantic County, New Jersey; and

WHEREAS, Petitioner was employed by the Board from about March of 1995; and

WHEREAS, Petitioner filed a Petition of Appeal against the Board with the Commissioner of Education, entitled *Alfred Szolack v. Board of Education of Town of Hammonton, County of Atlantic*, Agency Docket Number 260-7/04 and has asserted

claims against the Board in conjunction with the Board's announcement of a reduction in force ("RIF") effective on the first day of the 2004-2005 school year; and

WHEREAS, the parties wish to settle all controversies among and between them, including Petitioners claims in the Petition of Appeal set forth above, and any and all related claims which could have been asserted by Petitioner against the Board; and

WHEREAS, all parties acknowledge that the merits of the controversy are in dispute and that no party admits any liability to any other, but all have reasons to desire a resolution of the matter; and

NOW THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is expressly acknowledged by the parties hereto, the parties agree as follows:

1. **SETTLEMENT.**

(a) Effective the start of the 2005-2006 school year, Petitioner will be hired by the Board to work 2/5 of the time of a regular work week as a Substance Abuse Coordinator ("SAC") and 3/5 of the time of a regular work week as a health/physical education teacher ("H/PE Teacher").

(b) It is presently anticipated that Petitioner's time will be split within the school day as follows:

(i) Petitioner will act in his capacity as an H/PE Teacher during periods one, two, three and eight of the school day.

(ii) During periods four, five six and seven, which represent the student lunch periods, Petitioner will act in his capacity as a SAC.

(iii) Petitioner may be required to rotate his schedule based on the needs of the school.

(iv) Petitioner will also be assigned a homeroom, lunch period, prep period and such other duties and rights of an H/PE Teacher.

(c) The Board recognizes Petitioner's tenure and acknowledges his seniority as an H/PE Teacher in a position of one (1) day a week for his previous nine (9) years of service with the Board.

2. **DISMISSAL OF ACTION.** Petitioner dismisses with prejudice all claims contained in the Petition against the Board relating to his work, seniority, tenure and civil rights.

3. **RELEASE.** In consideration for the consideration provided for in this agreement, Petitioner, personally and for his estate and/or heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Petitioner's employment with the Board. Petitioner specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state

statutes, regulations and/or common law. Petitioner specifically waives, releases and gives up any and all claims including, but not limited to, any potential claim relating to the alleged violation of his tenure and seniority rights under *N.J.S.A. 18A:6-10 et seq.*, *N.J.S.A. 18A:28-5 et seq.*, *N.J.S.A. 18A:28-10 et seq.*, *N.J.S.A. 18A:29-9 et seq.*, and *N.J.A.C. 6:3-5.1 et seq.* This release specifically excludes claims arising under the Workers Compensation Act, *N.J.S.A. 34:15-1 et seq.*, the Teachers Pension and Annuity Fund Act, *N.J.S.A. 18A:66-1 et. seq.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

4. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Petitioner waives his right to file any charge or complaint in his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law. This covenant specifically excludes claims arising under the Workers Compensation Act, *N.J.S.A. 34:15-1 et seq.*, the Teachers Pension and Annuity Fund Act, *N.J.S.A. 18A:66-1 et. seq.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

5. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

6. **NO ADMISSION OF LIABILITY.** It is expressly understood that neither the execution of this Agreement, nor any other action taken by the Board in conjunction with Petitioner's claims or this settlement, constitute admission by the Board of any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by Petitioner as to the merits of his claims or the lack thereof.

7. **ENTIRE AGREEMENT.** This Agreement contains the sole and entire Agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Agreement, they consulted with or had an opportunity to consult with counsel, has had ample time to do so and that no party has relied upon any representation or statement not set forth in this Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

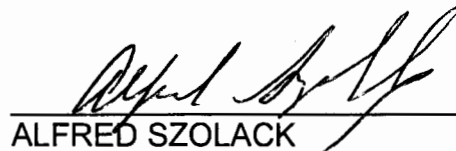
8. **APPROVAL BY COMMISSIONER.** The Parties will seek the Administrative Law Judge's recommendation of and the Commissioner's approval of this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to order the petition of appeal to be withdrawn and dismissed with prejudice. Should the Commissioner fail to approve this Settlement Agreement without modification, the Parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void in

every respect, the Parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for hearing and the Parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

9. **BOARD RESOLUTION.** Attached hereto as Exhibit A is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

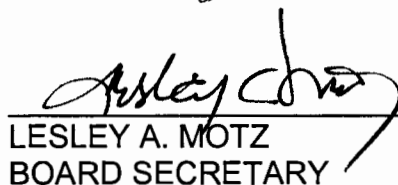
Witnessed or Attested by:



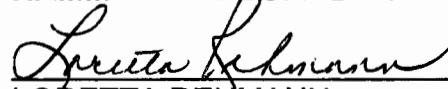


ALFRED SZOLACK

HAMMONTON BOARD OF EDUCATION



LESLEY A. MOTZ
BOARD SECRETARY



LORETTA REHMANN
BOARD PRESIDENT

claims against the Board in conjunction with the Board's announcement of a reduction in force ("RIF") effective on the first day of the 2004-2005 school year; and

WHEREAS, the parties wish to settle all controversies among and between them, including Petitioners claims in the Petition of Appeal set forth above, and any and all related claims which could have been asserted by Petitioner against the Board; and

WHEREAS, all parties acknowledge that the merits of the controversy are in dispute and that no party admits any liability to any other, but all have reasons to desire a resolution of the matter; and

NOW THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is expressly acknowledged by the parties hereto, the parties agree as follows:

1. **SETTLEMENT.**

(a) Effective the start of the 2005-2006 school year, Petitioner will be hired by the Board to work 2/5 of the time of a regular work week as a Substance Abuse Coordinator ("SAC") and 3/5 of the time of a regular work week as a health/physical education teacher ("H/PE Teacher").

(b) It is presently anticipated that Petitioner's time will be split within the school day as follows:

(i) Petitioner will act in his capacity as an H/PE Teacher during periods one, two, three and eight of the school day.

(ii) During periods four, five six and seven, which represent the student lunch periods, Petitioner will act in his capacity as a SAC.

(iii) Petitioner may be required to rotate his schedule based on the needs of the school.

(iv) Petitioner will also be assigned a homeroom, lunch period, prep period and such other duties and rights of an H/PE Teacher.

(c) The Board recognizes Petitioner's tenure and acknowledges his seniority as an H/PE Teacher in a position of one (1) day a week for his previous nine (9) years of service with the Board.

2. **DISMISSAL OF ACTION.** Petitioner dismisses with prejudice all claims contained in the Petition against the Board relating to his work, seniority, tenure and civil rights.

3. **RELEASE.** In consideration for the consideration provided for in this agreement, Petitioner, personally and for his estate and/or heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Petitioner's employment with the Board. Petitioner specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state

statutes, regulations and/or common law. Petitioner specifically waives, releases and gives up any and all claims including, but not limited to, any potential claim relating to the alleged violation of his tenure and seniority rights under *N.J.S.A. 18A:6-10 et seq.*, *N.J.S.A. 18A:28-5 et seq.*, *N.J.S.A. 18A:28-10 et seq.*, *N.J.S.A. 18A:29-9 et seq.*, and *N.J.A.C. 6:3-5.1 et seq.* This release specifically excludes claims arising under the Workers Compensation Act, *N.J.S.A. 34:15-1 et seq.*, the Teachers Pension and Annuity Fund Act, *N.J.S.A. 18A:66-1 et. seq.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

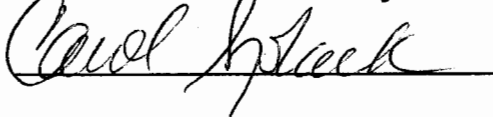
4. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Petitioner waives his right to file any charge or complaint in his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law. This covenant specifically excludes claims arising under the Workers Compensation Act, *N.J.S.A. 34:15-1 et seq.*, the Teachers Pension and Annuity Fund Act, *N.J.S.A. 18A:66-1 et. seq.*, and claims arising from any breach of this agreement. Petitioner is unaware of any factual basis for any such claims at this time.

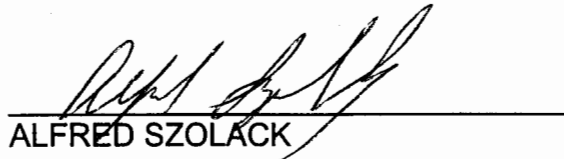
5. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

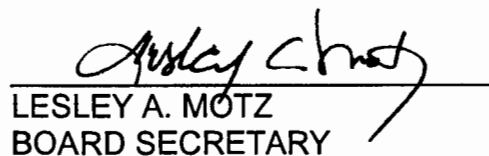
every respect, the Parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for hearing and the Parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

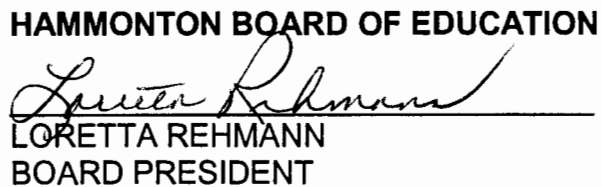
9. **BOARD RESOLUTION.** Attached hereto as Exhibit A is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

Witnessed or Attested by:




ALFRED SZOLACK


LESLEY A. MOTZ
BOARD SECRETARY

HAMMONTON BOARD OF EDUCATION

LORETTA REHMANN
BOARD PRESIDENT

HAMMONTON BOARD OF EDUCATION

School Business Administrator
Board Secretary

609 567 7000
609 561 4420

Approved
Employment/
Non-emergent

Resolution No. 05 8 51R: On a motion made by Mr. Condo and seconded by Dr. Johnson, the Hammonton Board of Education went to a roll call vote to approve the following on a non-emergent basis and as part of a settlement agreement discussed in closed session:

Alfred Szolack - high school 3/5 Health and Physical Education teacher and 2/5 Substance Abuse Coordinator

At the call of the roll, the vote was as follows: Mr. Condo-yes; Mr. Costa-yes; Mr. DiDonato-yes; Mr. Giraldo-yes; Dr. Johnson-yes; Mr. Lyons-no; Mr. Velardi-yes; Mr. Walker-yes; Mr. Weiss-yes; Mrs. Rehmann-yes. Of ten voting members present; nine voted in the affirmative; one in the negative. The motion carried.

RECEIVED
2005 OCT -5 A 11:25
OFFICE OF NEW JERSEY
OFFICE OF ADMIN. LIAISON

SELIKOFF & COHEN, PA

Labor and Employment Lawyers for more than 25 years

S. Selikoff^o
Steven R. Cohen^{o*}
Carol H. Alling
Michael C. Damm^{*}
Keith Waldman^{*}
members NJ bar
^o members DC bar
^{*} members PA bar

September 30, 2005

307 Fellowship Road
Suite 314
Mount Laurel, NJ
08054-1233

t 856-778-6055
f 856-778-6056
selikoff.cohen@verizon.net

Honorable W. Todd Miller, ALJ
Office of Administrative Law
1601 Atlantic Ave., 6th Floor
Atlantic City, NJ 08401

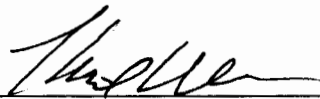
Re: *Alfred Szolack v. Board of Education of the Town of Hammonton, County of Atlantic*
OAL Docket No. EDU 10158-04; Agency Docket No. 260-7/04
► **Enclosure of Settlement Agreement and General Release**
Our File No. 4816

Dear Judge Miller:

I am pleased to enclose two originals of a fully executed Settlement Agreement and General Release in the above matter. The parties respectfully request that you review the Agreement and if it meets with your approval, that you issue an order approving settlement and forward it to the Commissioner of Education for review.

Thank you for your consideration in this matter.

Respectfully yours,
SELIKOFF & COHEN, P.A.

BY: 
KEITH WALDMAN

KW:kaz

Enclosures

c: William S. Donio, Esq.(w/encl.)
Myron Plotkin, NJEA Reg. #6 (w/encl.)
Alfred Szolack (w/encl.)

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

2005 OCT -3 A 10:21

RECEIVED

#406-05

OAL DKT. NO EDU 1165-05
 AGENCY DKT. NO. 441-12/04

IN THE MATTER OF THE TENURE :
 HEARING OF MYRNA SMITH, :
 SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION
 OF IRVINGTON, ESSEX COUNTY. : DECISION
 _____ :

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

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

IT IS SO ORDERED.


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/03/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1165-05

AGENCY DKT. NO. 441-12/04

**IN THE MATTER OF THE TENURE
HEARING OF MYRNA SMITH, SCHOOL
DISTRICT OF THE TOWNSHIP OF
IRVINGTON, ESSEX COUNTY.**

Ronald C. Hunt, Esq., for Petitioner Irvington Board of Education
(Hunt, Hamlin & Ridley, attorneys)

Mary Frances Palisano, Esq., for Respondent Myrna Smith
(Law Offices of Alan I. Zegas, attorneys)

Record Closed: September 15, 2005

Decided: October 11, 2005

BEFORE MARIA MANCINI LA FIANDRA, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 12, 2005, 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*. Hearings were scheduled on May 17, 23, 24 & 31, 2005 at the OAL, 33 Washington Street, Newark, New Jersey.

After numerous settlement discussions, the parties agreed to a settlement and have prepared a Settlement Agreement, which was approved by the Board, indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law, including those criteria which the State Board of Education set forth in *Cardonick v. BOE of Borough of Brooklawn, Camden County*.

Among those criteria is the requirement that the agreement be accompanied by supporting documentation as to the nature of the charges. That documentation is included in the Statement of Evidence in Support of the Charges, Proof of Service and the Certification of Determination with respect to said charges submitted to the Commissioner. Copies of those documents are attached hereto as Exhibit 1.

The circumstances justifying the settlement are set forth in the agreement at ¶ 9. In addition, to those set forth, I note that Respondent has been an exemplary teaching staff member for over 20 years of service to the District and has been the recipient of numerous awards. The charges arose out of a single alleged incident. Weighed against the accomplishments of Respondent throughout her years of service, the public interest is served by retaining such a professional. I do so **FIND**.

By her signature as well as through discussion with counsel, I am persuaded Respondent understands her rights and has entered this agreement knowingly and voluntarily.

I **CONCLUDE**, therefore, 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** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is authorized to make a final decision in this matter. If the Merit System Board 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 11, 2005
DATE

Maria M LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

10-14-05
DATE

M. Kathleen Duncan
MERIT SYSTEM BOARD

Mailed to Parties: James Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 18 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

HUNT, HAMLIN & RIDLEY
60 Park Place, 16th Floor
Newark, New Jersey 07102
(973) 242-4471
Attorneys for Petitioner,
Irvington Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2005 SEP 16 P 2:39

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DOCKET NO.: EDUOR 1165-05
AGENCY DOCKET NO.: 441-12/04

**IN THE MATTER OF THE TENURE
HEARING OF MYRNA SMITH AND
THE IRVINGTON BOARD OF
EDUCATION**

SETTLEMENT AGREEMENT

This settlement agreement (hereinafter "the settlement agreement" or "the proposed agreement") is made and entered into this ____ date of August, 2005, by and between Myrna Smith, Respondent (hereinafter "Ms. Smith" or "Respondent"), and the Irvington Board of Education, Petitioner (hereinafter "Petitioner", "the Board" or "the District"). The parties agree to the terms of this settlement agreement, which shall be presented to the Office of Administrative Law and the Commissioner of Education for approval and for the withdrawal of the Tenure Charges (hereinafter the "tenure charges" or "the charges") filed by Petitioner. The basis for urging the resolution agreed upon is as follows:

1. Ms. Smith is presently an employee of the District and is employed as a teaching staff member by the Board at the Mount Vernon Avenue Elementary School (hereinafter "Mt. Vernon").

2. Ms. Smith is a veteran teaching staff member at Mt. Vernon with over twenty (20) years of service to the District, which represents her entire professional career as an educator.
3. Ms. Smith has been the recipient of numerous awards for her accomplishments as an educator over the years and has consistently obtained "effective," the highest rating possible, on her teaching evaluations.
4. The instant tenure charges arose out of a single incident that allegedly occurred on September 30, 2004, at the Augusta Street Elementary School (hereinafter "Augusta"), which is not where Ms. Smith teaches. At the time of the alleged incident, Ms. Smith was the PTA President of Augusta, which was a volunteer position independent of her teaching position at Mt. Vernon. Ms. Smith's granddaughter was a student at Augusta at the time Ms. Smith served as PTA President. Ms. Smith held the Augusta PTA position for approximately four (4) years.
5. Petitioner alleged that after school hours on September 30, 2004 Respondent was present at Augusta in her capacity as PTA President. At that time, a verbal disagreement ensued between Ms. Smith, the Augusta Principal and the Augusta Social Worker, over the operation of the PTA Toys for Tots Program. In the course of the disagreement, Respondent made personal, derogatory and inflammatory remarks against the Principal and the Social Worker.
6. As a consequence of this confrontation, the Board filed tenure charges against Ms. Smith, alleging that her speech was unbecoming of a teaching staff member, in violation of N.J.S.A. 18A:6-10.

7. Ms. Smith, through her attorneys, responded to the charges, adamantly denying that she engaged in any conduct unbecoming a public employee.
8. Thereafter, the Commissioner of Education transferred the matter to the Office of Administrative Law for a hearing.
9. After reflection, the Board determined that it would be in the public interest to enter into settlement negotiations with Ms. Smith for reasons, including the following: (1) the alleged incident occurred after school hours at Augusta (not Mount Vernon) while Ms. Smith was acting as PTA President of Augusta, which is completely independent and unrelated to Ms. Smith's teaching position at Mt. Vernon; and (2) the circumstances did not affect or relate in any way to the Respondent's ability to teach in the future.
10. Prior to the hearing, the parties conferenced the case with the Honorable Maria LaFiandra, A.L.J. before reaching a resolution of the tenure charges within the parameters of the law.
11. In lieu of Petitioner pursuing tenure charges for conduct unbecoming a teaching staff member, the following resolution has been approved by the District and the Irvington Superintendent of Schools on the Court's record and is jointly proposed by the parties to the Office of Administrative Law and the Commissioner of Education:
 - a. Respondent shall agree to forfeit her salary increment for the 2005-2006 school year;

- b. Respondent shall agree to a 100-day suspension without pay pursuant to N.J.S.A.18A:6-14 (calculated by the loss of net salary for seven (7) pay periods);
- c. Respondent shall relinquish her position as PTA President at Augusta and agrees not to hold a similar office in any school in the District.
- d. Petitioner shall return Respondent to her teaching position at the Mount Vernon Avenue School commencing at the start of the 2005-2006 school year.
- e. Petitioner shall agree to withdraw its tenure charges filed with the Commissioner of Education and urges approval by the Commissioner of the within settlement.

12. It is the belief of all parties that the proposed agreement serves the public interest.

13. By entering into this agreement, Ms. Smith is not admitting liability or guilt regarding any of the factual or legal allegations set forth in the charges or in other related documents.

14. Respondent accepts the terms of this proposed agreement voluntarily, on the advice of competent counsel, with ample time to deliberate and with full knowledge of her right to challenge the charges and require competent proofs from Petitioner on all allegations of unbecoming conduct.

15. If the proposed agreement is approved, it shall constitute the entire agreement between the parties with regard to the matters at issue herein. This settlement agreement may not be utilized by either party in any other proceeding as support

or proof of any contention raised by that party in this proceeding. Neither party is admitting any liability with regard to the allegations set forth in these proceedings.

16. This proposed agreement is subject first to approval by the Irvington Board of Education, then by the Office of Administrative Law, and finally by the Commissioner of Education, before it becomes a legally binding document. The parties agree to produce and execute any documents and to take any acts that may be required to effectuate the terms, conditions and spirit of the proposed agreement.
17. As further consideration for the proposed agreement, the parties agree that following the full execution of the settlement agreement they will keep all terms of this agreement completely confidential. It is expressly understood and agreed that neither the District, Respondent, nor their attorneys or representatives will take any action to publicize the terms or nature of this agreement, except that disclosure is permitted: (1) as necessary with regard to any proceeding for the enforcement of this agreement; (2) as may be required by any court or agency of competent jurisdiction; or (3) as may be required by law.
18. Respondent and the Board are each responsible for payment of their own attorney's fees and costs incurred in this matter.

END OF PAGE

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Agreement effective on the date and year first above written.

Date: 8/29/05

By: Myrna Smith
Myrna Smith

LAW OFFICES OF ALAN L. ZEGAS
Attorneys for the Respondent

Date: 8/29/05

By: Mary Frances Palisano
Mary Frances Palisano, Esq.

**BOARD OF EDUCATION OF THE
IRVINGTON SCHOOL DISTRICT**

Date: 9/14/05

By: [Signature]
School Board President

HUNT, HAMLIN & RIDLEY
Attorneys for the Petitioner

Date: 9/14/05

By: [Signature]
Ronald C. Hunt, Esq.

REGULAR BOARD MEETING
FINANCE (continued)

MAY 18, 2005

ACTION:

Motion by: Ahmed Screven, Seconded by: Norma Carty
Roll Call: Roll; Unanimously approved on a roll call vote

WALK - ON

SETTLEMENT - Gruber V. Irvington Board of Education

RESOLVED, that the Board of Education accepted the recommendation of the Superintendent and approved the settlement in the matter entitled Paul Gruber V. Irvington Board of Education, ESXL11648-00 currently pending in the Superior Court of New Jersey, Essex County.

ACTION:

Motion by: Ahmed Screven, Seconded by: Anna Scott
Roll Call: 7 Ayes, Vann-Dupree, Burgess, Carty, Derisse, Hardy, Scott, Screven, Witherspoon, 1 abstained, Bryant.

SETTLEMENT - Smith V. Irvington Board of Education

RESOLVED, that the Board of Education accepted the recommendation of the Superintendent and approves the settlement in the administrative matter entitled In the Matter of Myrna Smith, Agency No 441-12/04, the details of which are more fully set forth in the Settlement Agreement:

ACTION:

Motion by: Ahmed Screven, Seconded by: Anna Scott
Roll Call: Unanimously approved on roll call vote.

PUBLIC COMMENT:

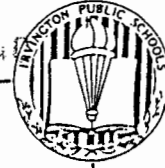
Yolanda English, 184 Union Avenue, Irvington, New Jersey 07111, questioned the board as to why her child's teacher Mr. Beckle, was going to be removed from the classroom? What steps does a principal take to remove a teacher, and as a parent, what could the parent do to prevent it? Ms. English further stated that Mr. Beckle was the only teacher that ever contacted her concerning her child, whether it was good, or bad.

Ms. English further stated that she has twins, and she wanted to know how is it that one twin was recommended to the Union Avenue, Magnet Program, and the other was not? After speaking with the guidance counselor, and principal several times, the principal informed her that she would look into. The principal told her she had to wait awhile, however, the principal never called her back. She wanted to know what she could do to keep her twins together?

IRVINGTON PUBLIC SCHOOLS

Office of the Superintendent

Dr. Ernest H. Smith, Jr.
Superintendent of Schools



1 UNIVERSITY PLACE
IRVINGTON, NEW JERSEY 07111-2486
(973) 399-6800 x2110
(973) 371-6542 Fax

CERTIFICATION OF DETERMINATION

Re: Myrna Smith, Teacher

I hereby certify that the Irvington Board of Education, at a meeting on Wednesday, December 15, 2004, at 5:30 p.m., at 1324 Springfield Avenue, Florence Avenue School, located in the Township of Irvington, New Jersey, upon a vote of the majority of the whole number of members of the Board, made the following determinations:

- a. That there is probable cause to credit evidence in support of charges.
- b. That the charges hereto attached and made a part hereof and evidence in support of the charges is sufficient, if true in fact, to warrant the dismissal of Myrna Smith, a tenured Teacher in the Irvington School District.
- c. That the charges pursuant to which probable cause has been found were of such consequence that said Myrna Smith should be suspended from her employment without pay, effective Thursday, December 16, 2004.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

A handwritten signature in cursive script that reads "Victor R. Demming".

Victor R. Demming
Assistant Superintendent for
Business/Board Secretary

Dated: December 15, 2004

Exhibit 1

RONALD C. HUNT*
RAYMOND L. HAMLIN
TERRY RIDLEY

JEANNET E. PAVEZ
RASHEEDAH R. TERRY
LESTER E. TAYLOR, III*

* ALSO ADMITTED IN PA
♦ ALSO ADMITTED IN MD
■ ALSO ADMITTED IN NY

THE LAW FIRM OF
HUNT, HAMLIN & RIDLEY

COUNSELORS AT LAW
MILITARY PARK BUILDING
60 PARK PLACE, 16TH FLOOR
NEWARK, NEW JERSEY 07102

TELEPHONE: (973) 242-4471
TELEFAX: (973) 242-8295
WEBSITE: www.HuntHamlinRidley.com

OF COUNSEL
CEDRIC ASHLEY*
KECIA M. CLARKE*
CYNTHIA H. HARDAWAY*
VIELKA A. VELAZQUEZ

November 29, 2004

Irvington Board of Education
One University Place
Irvington, New Jersey 07111
Attn : Lorraine Capers

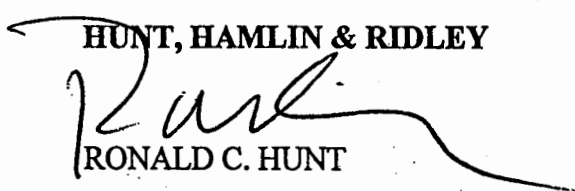
Re: Myrna Smith

Dear Board Member:

Enclosed please find Disciplinary Charges together with a Statement of Evidence relative to the above matter. Kindly review same as well as the response sent by Ms. Smith's attorney which will be available for review at either Dr. Smith or Ms. Davion's office. If there are any questions after your review, please call me directly.

Very truly yours,

HUNT, HAMLIN & RIDLEY


RONALD C. HUNT

Enclosures

DISCIPLINARY CHARGES

Person Bringing Charges: Dr. Ernest Smith, Superintendent of Schools

Address: Irvington Board of Education
Administration Building
1 University Place
Irvington, New Jersey 07111

Charges Brought Against: Myrna Smith

The Respondent, Myrna Smith, Teacher at the Mt. Vernon Avenue School and PTA President for the Augusta Street School, has been charged with conduct unbecoming an employee. Said unbecoming conduct has been demonstrated by the Respondent as follows:

1. Open and public use of profanity in a loud and argumentative manner toward the building Principal, Margaret Wells and Social Worker Jeannette Valentine in the presence of other teachers, employees and students.
2. Respondent's repeated use of racial epithets toward the building Principal, Margaret Wells and Social Worker Jeannette Valentine, referring to same as "white bitches" and "white crackers" in a loud manner in the presence of other teachers employees and students.
3. Respondent's repeated use of derogatory gender bias language toward the building Principal Margaret Wells and Social Worker Jeannette Valentine referring to same as "fucking lesbians" and remarking "I hate that lesbian" in a loud manner and in the presence of other teaching employees and students.
4. Respondent's use of derogatory and threatening language toward the building Principal, Margaret Wells and Social Worker Jeannette Valentine stating in a loud manner "I'm going to crush that lesbian", in the presence of other teachers, employees and students.

5. The Respondent, Myrna Smith, as a teacher and PTA President of the Augusta Street School, has been charged with conduct subversive of discipline and morale of the school district by verbally attacking the building principal which amounts to conduct unbecoming an employee. Said conduct was subversive of discipline and morale of the school district which amounts the unbecoming conduct has been demonstrate by the Respondent's:

- a) Communicating negative, disrespectful and belittling remarks about the building Principal, Margaret Wells and a Social Worker, Jeannette Valentine in the presence of other employees, teachers and students.
- b) Communicating negative, disrespectful and belittling remarks about the building Principal, Margaret Wells and Social Worker, Jeannette Valentine which remarks were designed to belittle and insult the building Principal, Margaret Wells and Social Worker, Jeannette Valentine and included derogatory racial epithets as well as an attack upon said employees perceived sexual orientation in the presence of other employees, teachers and students.
- c) Communicating negative, disrespectful and belittling comments to the building Principal, Margaret Wells and Social Worker, Jeannette Valentine which same statement was designed to insult the building Principal in an effort to negatively impact upon employee morale.

I certify that the foregoing statements are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Victor R. Demming
Victor Demming, Board Secretary

STATEMENT OF EVIDENCE IN SUPPORT OF CHARGES

1. Respondent, Myrna Smith is a Teacher at the Mt. Vernon Avenue School. She also serves as PTA President for the Augusta Street School which conducts monthly meetings at the Augusta Street School Facility, presently located at the St. Leo's Catholic School site.
2. Margaret Wells is the Building School Principal at the Augusta Street School and Jeannette Valentine is a Social Worker at the same school.
3. On Thursday, September 30, 2004 at approximately 3:15 p.m. Myrna Smith come to the Augusta Street School and verbally confronted Mrs. Wells and Ms. Valentine regarding the operation of the "TOYS for TOTS" program.
4. At the time Mrs. Smith spoke in a loud argumentative tone to both Principal Wells and Ms. Valentine in the presence of several other teachers, employees, students.
5. Thereafter at the same date and place, Mrs. Smith was heard to use racial epithets referring to Mrs. Wells and Ms. Valentine as "white bitches" and "white crackers" in the presence of other teachers, employees and students.
6. At the same date and place Mrs. Smith was further heard to reference remarks about Mrs. Wells and Ms. Valentine stating "I hate that lesbian" in the presence of other teachers, employees and students.
7. At the same date and place Mrs. Smith was heard to state "I'm going to crush that fucking lesbian" in the presence of other teachers, employees and students.
8. All of the actions above by the Respondent amount to conduct unbecoming an employee, conduct, subversive of discipline and morale of the school district.
9. Said conduct of respondent has resulted in a negative impact upon the morale of other teaching staff members and Principal Wells' ability to effectively manage the school.

10. The unbecoming conduct of the Respondent, an Irvington Board of Education employee is set forth in the report and statements provided by the Irvington Board of Education. This charge is further supported by the investigation and determination by the Assistant Superintendent for Academic Affairs, Ethel W. Davion, serving in her capacity as Affirmative Action Officer. The allegations were made and certified by the Superintendent under oath and are true to the best of his knowledge.

I certify that the foregoing statements are true. I am aware that if any statements are willfully false, I am subject to punishment.

Dr. Ernest Smith, Superintendent

OAL DKT. NO. EDU 7455-05 :
(EDU 1362-03 ON REMAND) :
AGENCY DKT. NO. 73-3/01 :

JANICE HUNTER, :
PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF :
THE CITY OF IRVINGTON, :
ESSEX COUNTY, :

RESPONDENT. :

The record of this matter, the proposed settlement agreement, as revised on remand, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed.

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

IT IS SO ORDERED.



ACTING COMMISSSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/04/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7455-05

AGENCY DKT. NO. 73-3/01

(Remand OAL Dkt. No. EDU 1362-03)

JANICE HUNTER,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF IRVINGTON,**

Respondent.

Nancy I. Oxfeld, Esq., for Petitioner (Oxfeld & Cohen, PC, attorneys)

Lester E. Taylor, Esq., for Respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: September 16, 2005

Decided: September 21, 2005

BEFORE **MARIA MANCINI LA FIANDRA, ALJ:**

This matter was remanded to the Office of Administrative Law (OAL) from the Department of Education on June 30, 2005, for revision of the Settlement Agreement bearing OAL Dkt. No. EDU 1362-03, Agency Dkt. No. 73-3/02.

Prior to the case being scheduled, counsel for both parties agreed to comply with the Commissioner's determination and have submitted a revised settlement indicating the terms thereof and bearing the signatures of the parties' attorneys in compliance with

the decision of the Commissioner in EDU 1362-03, dated June 7, 2005. The settlement agreement is attached hereto and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

September 21, 2005
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

9-28-05
DATE

Receipt Acknowledged:

M. Kurt [Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties: [Signature]

SEP 29 2005
DATE
jb

[Signature]
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 SEP 16 P 1:26

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOA 07455-2005N
Agency Dkt. No. 73-3/01

JANICE HUNTER,

Petitioner,

-VS-

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

Respondent.

SETTLEMENT AGREEMENT

Janice Hunter, Petitioner in this matter, and the Board of Education of the Township of Irvington, Respondent in this matter, hereby agreed to resolve the issues in this matter upon the following terms:

1. The Respondent agrees that the Petitioner's absences for the following dates:

December 18, 2000

December 19, 2000

December 20, 2000

December 21, 2000

December 22, 2000

shall be changed from days on which Petitioner was charged for an absence due to personal illness to days for which the Petitioner was absent for reasons of workers' compensation pursuant to N.J.S.A. 18A:30-21;

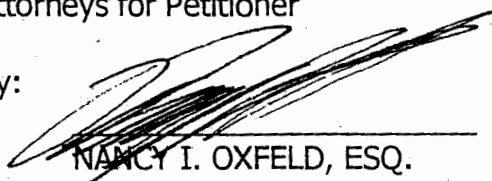
2. The Respondent shall return to the Petitioner's accumulated sick days the five sick days for which she was charged for her absences on the dates set forth in Paragraph 1, which will be available to Petitioner for use in the future as needed;

3. The Petitioner agrees to withdraw with prejudice her petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting any liability with regard to the allegations set forth in these proceedings.

OXFELD COHEN, PC
Attorneys for Petitioner

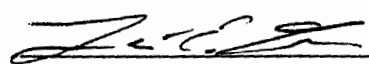
By:


NANCY I. OXFELD, ESQ.

Dated: 9/15/05

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent

By:


LESTER E. TAYLOR, ESQ.

Dated: 9-14-05

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 SEP 16 P 1: 26

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOA 07455-2005N
Agency Dkt. No. 73-3/01

JANICE HUNTER,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF THE TOWNSHIP	:	
OF IRVINGTON, ESSEX COUNTY,	:	
Respondent.	:	

Janice Hunter, Petitioner in this matter, and the Board of Education of the Township of Irvington, Respondent in this matter, hereby agreed to resolve the issues in this matter upon the following terms:

1. The Respondent agrees that the Petitioner's absences for the following dates:

December 18, 2000

December 19, 2000

December 20, 2000

December 21, 2000

December 22, 2000

shall be changed from days on which Petitioner was charged for an absence due to personal illness to days for which the Petitioner was absent for reasons of workers' compensation pursuant to N.J.S.A. 18A:30-21;

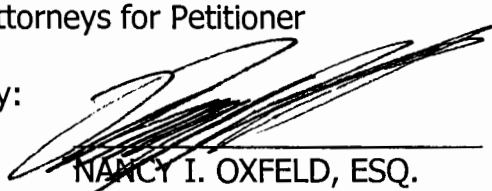
2. The Respondent shall return to the Petitioner's accumulated sick days the five sick days for which she was charged for her absences on the dates set forth in Paragraph 1, which will be available to Petitioner for use in the future as needed;

3. The Petitioner agrees to withdraw with prejudice her petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting any liability with regard to the allegations set forth in these proceedings.

OXFELD COHEN, PC
Attorneys for Petitioner

By:

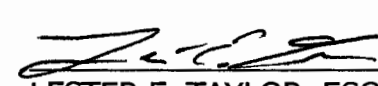

NANCY I. OXFELD, ESQ.

Dated:

9/15/05

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent

By:


LESTER E. TAYLOR, ESQ.

Dated:

9-14-05



State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

November 4, 2005

Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, LLC
50 Commerce Street
Newark, NJ 07102-4003

Susan W. D'Angelo, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
Ten James Street
Florham Park, NJ 07932

Dear Parties:

REXHEP LEKA V. BOARD OF EDUCATION TOWNSHIP OF MONTVILLE, MORRIS COUNTY,
AGENCY DKT. NO. 28-1/00, OAL DKT. NO. EDU 03100-00

We are enclosing a copy of the decision of the Commissioner of Education dated November 3, 2005, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1 et seq.*

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C. 6A:4-1.4(a)*, the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr/rleka

Enclosure

c: Clair Applegate, OAL Library
Jones Addo, State Library

www.nj.gov/education

OAL DKT. NO. EDU 3100-00 :
AGENCY DKT. NO. 28-1/00 :

REXHAP LEKA, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF MONTVILLE,
MORRIS COUNTY, :

DECISION

RESPONDENT. :

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

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

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/05

Date of Mailing: 11/04/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03100-00

AGENCY DKT. NO. 28-1/00

REXHAP LEKA,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF MONTVILLE, MORRIS COUNTY,**

Respondent.

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

Susan W. D'Angelo, Esq., for respondent (Schwartz, Simon, Edelstein, Celso &
Kessler, attorneys)

Record Closed: September 9, 2005

Decided: September 22, 2005

BEFORE LESLIE Z. CELENTANO, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 21, 2000, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F1 to -13*. On August 23, 2002, the matter was placed on inactive status by ALAJ Thomas E. Clancy pending the outcome of a companion worker's compensation matter.

A hearing was scheduled on May 27, 2005. On the date of hearing the parties settled the matter. The attached Settlement Agreement was submitted on September 9, 2005, indicating the terms of agreement which are incorporated herein by reference.

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

New Jersey is an Equal Opportunity Employer

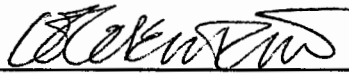
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this 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.

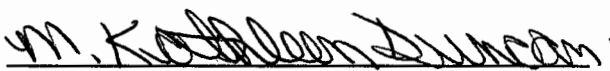
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 22, 2005
DATE


LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

9-28-05
DATE

 /ef
DEPARTMENT OF EDUCATION


Mailed to Parties.

**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

SEP 29 2005
DATE
da

OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement") is made this ____ day of _____, 2005, by and between the **Montville Township Board of Education**, (hereinafter the "Board"), and **Rexhap Leka**, his successors, heirs and assigns (hereinafter "Mr. Leka").

WHEREAS, Mr. Leka is a former employee of the Board, having served as a custodial/maintenance person from February 19, 1998 through December 21, 1999; and

WHEREAS, Mr. Leka alleges he sustained an injury in the course of his employment; and

WHEREAS, Mr. Leka has filed a Petition of Appeal with the Commissioner of Education which was transferred to the Office of Administrative Law and bears Docket Number EDUOA 03100-2000N in which he seeks restoration of his sick day bank and his full salary for one year from the date of his injury; and

WHEREAS, the Board denies all allegations of wrongdoing; and

WHEREAS, the parties are desirous of amicably settling this matter and wish to resolve all disputes among them;

NOW, THEREFORE, in consideration of the promises contained herein and other good and valuable consideration, the parties agree as follows:

1. The Board agrees to remit a one-time, lump sum payment in the amount of \$718.24 (Seven Hundred and Eighteen Dollars and Twenty-Four Cents) to Mr. Leka in accordance with the provisions of this Agreement. Normal payroll and withholding deductions shall be taken from this payment by the Board.

2. In exchange for the above consideration, Mr. Leka shall immediately withdraw with prejudice his claim bearing Docket Number EDUOA-3100-2000N currently pending before

the Office of Administrative Law. Additionally, Mr. Leka, his successors, heirs and assigns, do hereby waive, release and forever discharge any and all claims which he or they may have against the Board, its affiliates, subsidiaries; its past and present officers, agents, employees, Board members, officially and individually, arising out of the employment relationship between Mr. Leka and the Board, including, but not limited to any claims which were or could have been asserted in a lawsuit; claims for attorney's fees, back pay or front pay; claims for emotional distress or pain and suffering; claims involving tax liability stemming from this settlement, and claims arising under any federal, state or local law or ordinance, including, but not limited to: Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, and any other claim for harassment, discrimination or retaliation of any kind, or any other cause of action in any forum of any kind whatsoever.

3. Mr. Leka further waives all rights to continued employment with the Board and agrees that he shall not apply for employment with the Board at any point in the future.

4. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, heirs and assigns.

5. Each party to this Agreement is represented by counsel and represents that it enters into this agreement freely and without duress.

6. Mr. Leka represents that he shall not disclose or discuss this matter and within settlement with any person or entity except that Mr. Leka may disclose this matter and settlement to his spouse, accountant or attorney, if any, and to tax and pension agencies, as required.

7. This Agreement and compliance with this Agreement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter. This Agreement may not be introduced into evidence or used in any other way in any legal or administrative proceeding other than a proceeding seeking enforcement of the terms of this Agreement.

8. This Agreement shall be governed by the laws of the State of New Jersey and any dispute arising out of this Agreement shall be subject to the exclusive jurisdiction of the Courts of the State of New Jersey.

9. If any provision of this Agreement or the application thereof is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions or applications and, to this end, the provisions of this Agreement are declared to be severable.

10. This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

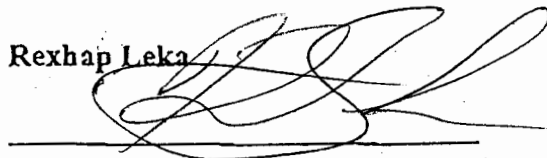
11. This Agreement constitutes the complete understanding and entire agreement of the parties and it cannot be amended, terminated, discharged or waived, except by a suitable writing which the parties shall duly execute.

12. Mr. Leka acknowledges that he was given the opportunity to fully consider this Agreement and has consulted with counsel as part of his review of this Agreement. It is further

understood that this Agreement shall not become effective or enforceable nor shall any of the consideration described in this Agreement be paid or provided by the Board until all parties have signed it, the Board has officially approved it, and Mr. Leka has notified the Commissioner of Education and Office of Administrative Law, in writing, of the withdrawal with prejudice of his aforementioned pending petition.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date written below.

Rexhap Leka



Dated:

7-20-05

Witness/Attest



Dated:

7-26-05

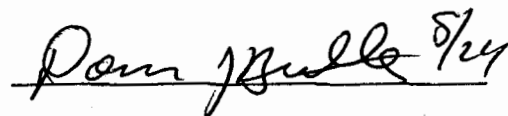
Montville Township Board of Education

By:



Dated:

Witness/Attest



Dated:

*EXTRACT FROM THE MINUTES OF THE MEETING OF THE BOARD OF
EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY, NEW
JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK:*

The board of education of the Township of Montville in the County of Morris, New Jersey, convened in regular session on August 22, 2005 at 8:02 p.m. in the meeting room of the Montville Municipal Building, Montville, NJ.

The following members of the Board of Education were present:

Jon Alin, President

Steven Cohen, Frank Cooney, Michael Duddy, Karl; Feaster, Timothy Lindert, Michael Palma, John Petrozzino (left the meeting at 9:20 p.m.), and Arlene Sullivan.

The following members of the board of education were absent:

None.

The following resolution was offered by Member Petrozzino and seconded by Member Cooney and adopted by the board of education by the following roll call vote:

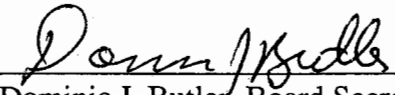
RESOLVED: That the board of education approves the resolution regarding the settlement between the Montville Township Board of Education and Rexhep Leka as indicated in the official minute book..

ROLL CALL AYES: 9 NOES: 0

STATE OF NEW JERSEY
COUNTY OF MORRIS

I, Dominic J. Butler, Secretary of the Board of Education of the Township of Montville 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 August 22, 2005 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Montville 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 extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 26th day of August 2005.

(Board Seal)


Dominic J. Butler, Board Secretary

RESOLUTION

The Montville Township Board of Education hereby approves the Settlement between it and Rexhap Leka, resolving all disputes in connection with the Petition of Appeal filed with the Commissioner of Education bearing Docket Number EDUOA 03100-2000N. The Board authorizes the Board President to execute the Settlement Agreement and authorizes the Business Administrator/Board Secretary to implement the terms of the Settlement Agreement as set forth therein.



State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

November 4, 2005

Michael J. Herbert, Esq.
Herbert, Van Ness, Casci, & Goodell
22 Chambers Street
Princeton, NJ 08542

David Rubin, Esq.
Bridgepointe, 44 Bridge Street
P. O. Box 4579
Metuchen, NJ 08840

Dear Counsel:

I have reviewed the respondent's Motion for Reconsideration, together with Petitioner's Opposition to the Motion and Cross-Motion for Reconsideration, filed in the matter of *Board of Education of the Town of Phillipsburg, Warren County, et al. v. New Jersey State Interscholastic Athletic Association*, Agency Dkt. No. 369-10/03, Commissioner Decision #344-05. I have additionally reviewed the November 1, 2005 letter from respondent's counsel, asking, on behalf of counsel for all parties, that I defer the filing date of my September 26, 2005 decision in the above-captioned matter until the pending motions are resolved.

While I am cognizant of the fact that the schedule originally contemplated for briefing of this matter would allow for further submissions, in light of the parties' concern about the time frame for appeal—and in view of my assessment of the parties' claims on their face as judged against the stated purpose and criteria for reconsideration of Commissioner decisions, *N.J.A.C. 6A:3-1.15(b)*—I have determined that the best course of action under the circumstances is a prompt ruling on the motions.

In support of its motion for reconsideration, respondent (NJSIAA) has argued that my decision: 1) misunderstood the compromise procedure agreed to by the parties, thereby erroneously concluding that the Skyland conference could not participate in the hearing absent formal intervention procedures, notwithstanding that there were ample indications of Skyland's opposition to petitioners' (Phillipsburg) request and its intent to express such opposition at hearing; and 2) erred in concluding that members of

the Special Committee on Leagues and Conferences (SCLC) should not have participated in the Executive Committee review of the SCLC decision, primarily because such participation was not objected to by Phillipsburg apart from passing references, has been customary for over two decades, has been “expressly approved” by the Commissioner in every league and conference decision issued since, poses no conflict because Executive Committee proceedings are conducted *de novo* based on the record developed by the SCLC, and is similar to the process used by the Department of Education and other agencies—such as the State Board of Education Legal Committee—whose members are not precluded from participating in full Board discussions of matters it has considered.¹

In support of its cross-motion, Phillipsburg has argued that reconsideration *is* warranted, but on the following grounds rather than those proffered by NJSIAA: 1) My decision failed to address rejection of NJSIAA’s rule on policy grounds, which is the Commissioner’s right under *N.J.S.A.* 18A:11-5; 2) NJSIAA’s prior waiver to the Moorestown Friends School may have been granted for reasons in addition to religion, but the record shows religion to have, indeed, been *a* factor; and 3) Compelling, unrefuted evidence was overlooked in the decision, such that Phillipsburg should have been found to have prevailed rather than “penalized with [the] additional litigation expense and delay” resulting from the decision’s directive for remand, while NJSIAA and Skyland are rewarded with a “second bite at the apple” based on procedural deficiencies that were their fault rather than petitioners.’

Initially, I note that *N.J.A.C.* 6A:3-1.15 reads in pertinent part:

(b) Any party may make a motion for reconsideration or clarification of the Commissioner’s decision within 10 days of the filing of the Commissioner’s decision.

1. A motion shall be filed with the Commissioner together with proof of service on each other party, shall be briefed in accordance with the directives of the Commissioner, and shall be decided by the Commissioner in accordance with applicable rules of the OAL.

2. A motion for reconsideration shall be considered based upon the following:

i. Claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon

¹ Phillipsburg countered that no reconsideration is warranted on these grounds because: 1) knowledge of Skyland’s general opposition and notice of its intent to make an evidentiary presentation at hearing are not the same thing, so that my decision rightly struck Skyland’s evidence from consideration in light of agreed-upon procedures for NJSIAA hearing; and 2) while the decisions cited by NJSIAA may have resulted from the two-step hearing process used herein and referred to such process in passing, none of them focused on, much less “expressly approved” the active, *ex parte* participation by individual SCLC members in closed-door Executive Committee deliberations on SCLC decisions—which, unlike State Board Legal Committee Reports—are actual decisions from which litigants appeal rather than recommendations to the larger body that will actually make the decision.

which it is based, shall not constitute “mistake” for purposes of this section;

ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;

iii. Newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation or misconduct could not have been previously known; or

iv. Reversal of a prior judgment on which the present matter is based.

3. A motion for clarification shall be considered based upon necessity as specifically demonstrated in the papers submitted with the motion.

(c) The filing of a motion for clarification or reconsideration shall not, in and of itself, relieve the parties from compliance with any judgment or order of the Commissioner.

(d) The filing of a motion for clarification or reconsideration shall not, in and of itself, alter the filing date of the Commissioner’s decision for purposes of appeal.

Public comment on this rule as it was originally proposed, and the agency’s response thereto, are instructive as to the rule’s intent:

11. COMMENT: The grounds and time frame established in the proposed section on motions for reconsideration, N.J.A.C 6A:3-1.15(b), invite relitigation and abuse, causing extra expense to the prevailing party. Any such motions should be required to be filed within 10 days, as provided in court rules, and the grounds of mistake and misrepresentation or other misconduct by an adverse party should be eliminated. Mistakes can be addressed on appeal and misconduct would be known prior to the Commissioner’s decision and could be addressed in that context. If the provision regarding misrepresentation or misconduct is not eliminated, it should be qualified by the condition “newly discovered.” (6) [Bucceri and Pincus, Counselors at Law]

RESPONSE: The department agrees that requests for reconsideration should not be used as a substitute for appeal or a means of prolonging litigation, and that substantive changes to this section are appropriate. However, the department prefers that the Controversies and Disputes chapter proceed on schedule, since no other substantive changes are being recommended. Therefore, the proposed N.J.A.C. 6A:3-1.15 is being recommended for adoption without change, other than correction of a typesetting error in the section title.

However, an amendment to the newly adopted N.J.A.C. 6A:3-1.15 is concurrently being recommended for proposal in the New Jersey Register.***

(32 *N.J.R.* 1177(a), 1178; rule proposed at 31 *N.J.R.* 4173(a))

The actual proposal of the referenced amendment is further instructive:

During the public comment period for the proposed readoption and recodification with amendment of the Controversies and Disputes rules, the Department received a comment to the effect that the proposed subsection on motions for reconsideration, N.J.A.C. 6A:3-1.15(b), invited relitigation and abuse. The commenter suggested that any such motions should be required to be filed within 10 days, as in court rules, and that the grounds of mistake and misrepresentation or other misconduct by an adverse party should be eliminated, or at least delimited, since mistakes could be addressed on appeal and misrepresentation or misconduct would be known, and could be addressed, prior to the Commissioner's decision.

The Department agreed that requests for reconsideration should not be used as a substitute for appeal or as a means of prolonging litigation, and that substantive changes to the referenced section would be appropriate so as to prevent this result. However, the Department preferred that the proposed readoption and recodification with amendment of the Controversies and Disputes chapter proceed as scheduled, since no other changes of a substantive nature were being recommended. Therefore, no change was made to N.J.A.C. 6A:3-1.15 as proposed prior to adoption, and, instead, the present amendment is being proposed to the newly adopted section so as to address the issue identified during the public comment process.

The following summarizes the content of the proposed amendment, noting changes to the existing rules:

N.J.A.C. 6A:3-1.15 Motion for stay, reconsideration or clarification

The proposed amendment would align with court rules the time frame for filing requests for reconsideration, reducing the allowable filing period from 30 days to 10 days. Additionally, it would define the terms "mistake" and "misrepresentation or misconduct," so as to make it clear that disagreement with the outcome of a decision or with the analysis upon which it is based does not constitute "mistake" for purposes of applying for reconsideration, and that any purported misrepresentation or other misconduct of an adverse party must be newly ascertained and unable to have been previously known in order for it to serve as a basis for reconsideration. Finally, the provision on clarification is modified to more clearly require that the specific basis for the request be set forth in the moving papers.

Social Impact

The proposed amendment will clarify the bases on which the Commissioner will accept requests for reconsideration or clarification of decisions in contested cases, so that the nature and purpose of these processes will be more understandable to regulated parties. Such clarification will prevent reconsideration requests from being used in lieu of appeals or as a means of prolonging litigation, thus benefiting all parties to administrative proceedings.

Economic Impact

The proposed amendment will save costs both for litigants and the State, since establishing the limited nature of the reconsideration/clarification process will prevent needless filings and unwarranted extensions of the administrative hearing process.

(32 N.J.R. 1112(a); adopted 32 N.J.R. 2469(a))²

Bearing in mind the clear intent of the controlling rule that reconsideration not be substituted for appeal and thereby prolong litigation, I find that neither the grounds proffered by NJSIAA nor those proffered by Phillipsburg meet the criteria for reconsideration of my prior decision. Certainly, there is no claim of newly discovered evidence, misrepresentation, misconduct, or reversal of precedent; and with respect to the parties' respective claims of error, I find these to constitute—contrary to *N.J.A.C. 6A:3-1.15(b)2i*—disagreement with the decision's various outcomes or with the analyses upon which they are based, rather than "mistakes" in the sense contemplated by rule. Thus, in my view, the objections raised by both NJSIAA and Phillipsburg are more appropriately pursued on timely appeal to the Appellate Division.

² The actual text of the amendment read as follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

(b) Any party may make a motion for reconsideration or clarification of the Commissioner's decision within [30] **10** days of the filing of the Commissioner's decision.

1. A motion shall be filed with the Commissioner together with proof of service on each other party, shall be briefed in accordance with the directives of the Commissioner, and shall be decided by the Commissioner in accordance with applicable rules of the OAL.

2. A motion for reconsideration shall be considered based upon the following:

i. Claim(s) of mistake, **provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;**

ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;

iii. **Newly ascertained misrepresentation** or other misconduct of an adverse party, **where such misrepresentation or misconduct could not have been previously known;** or

iv. Reversal of a prior judgment on which the present matter is based.

In one respect, however, I would take this opportunity to clarify my September 26, 2005 decision. In light of NJSIAA's concerns regarding the broad-based impact of precluding SCLC members from participation in Executive Committee review of SCLC decisions, I stress that the holding of that decision was based upon the unique nature of the special "compromise" proceeding devised by the parties and the Department for NJSIAA (rather than Office of Administrative Law) hearing of this matter, and that it was not intended to reflect upon, or be extended to, NJSIAA proceedings generally; that is a different issue, neither raised nor briefed—nor appropriately decided—in the present context.³

Accordingly, apart from the clarification set forth above, I hereby DENY the parties' motion and cross-motion for reconsideration as based upon claims more properly argued on appeal.⁴

Sincerely,



Lucille E. Davy
Acting Commissioner

VIA FAX AND REGULAR MAIL

c: Addo Jones, State Library

³ SCLC participation in Executive Committee deliberations has not been challenged in prior matters appealed to the Commissioner following hearing in accordance with established NJSIAA procedures.

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to N.J.S.A. 18A:11-3.

412-05SEC

SEC Dkt. No. T04-05
AGENCY DKT. NO.: 272-10/05

IN THE MATTER OF ANA M. BETANCES, :

GUTTENBERG BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

HUDSON COUNTY. : DECISION

_____ :

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Guttenberg Board of Education in April 2004 and, therefore, had until April 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and

times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C. 6A:28-1.6(e)*, on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member responded that she had failed to attend the training due to her son's disabilities, but she was registered for the October 25, 2005 training session; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member had failed to attend board member training within the one year allowed and that such failure constitutes a violation of *N.J.S.A. 18A:12-33*; and

Whereas, the Commission voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was advised of the sanction recommended to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted a response; 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 her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/07/05

Date of Mailing: 11/07/05

* 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's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T04-05
ANA M. BETANCES,	:	
Guttenberg Board of Education	:	DECISION FOR FAILURE
Hudson County	:	TO ATTEND TRAINING
	:	

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Ana M. Betances was newly elected or appointed in April 2004 to a local school board or charter school board and therefore, had until April 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Ana M. Betances to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Betances responded that she had failed to attend training due to her son's disabilities, but she was registered for the October 25, 2005 training session; and

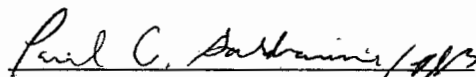
WHEREAS, the Commission notified Ms. Betances that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. Betances has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

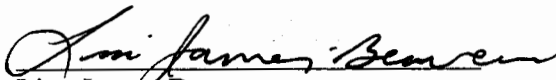
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ana M. Betances violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

415-05SEC

SEC Dkt. No. T03-05
AGENCY DKT. NO.: 273-10/05

IN THE MATTER OF DORA JAMES, :
BEVERLY BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
HUDSON COUNTY. : DECISION
_____ :

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Beverly Board of Education in May 2004 and, therefore, had until May 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and

times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on August 2, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member did not respond to the Order; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member had failed to attend board member training within the one year allowed and such failure constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, the Commission voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session; and

Whereas, on October 4, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted a response; 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 her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if she fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if she fails to attend the January 28, 2006 session.*

Lucille E. Day

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/09/05

Date of Mailing: 11/09/05

* 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's decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T03-05
DORA JAMES,	:	
Beverly Board of Education	:	DECISION FOR FAILURE
Burlington County	:	TO ATTEND TRAINING
	:	

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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Dora James was newly elected or appointed in May 2004 to a local school board or charter school board and therefore, had until May 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 2, 2005, directing Dora James to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. James did not respond to the Order; and

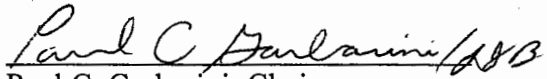
WHEREAS, the Commission notified Ms. James that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Ms. James has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

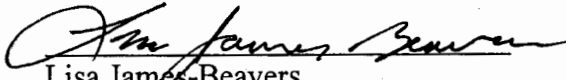
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if she fails to attend the NJSBA's October 25, 2005 training session and removal if she fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Dora James violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if she fails to attend the October 25, 2005 training session and removal from the board if she fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

SEC Dkt. No. T10-05
AGENCY DKT. NO.: 268-10/05

IN THE MATTER OF STEPHEN CANDIO, :
SUSSEX COUNTY CHARTER SCHOOL : COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, SUSSEX COUNTY. : DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A. 18A:12-21 et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A. 18A:12-33* and *N.J.A.C. 6A:28-4.1*; and

Whereas, *N.J.S.A. 18A:12-33* requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was newly elected or appointed to the Sussex County Charter School Board of Trustees in May 2004 and, therefore, had until May 2005 to complete the training requirement; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 6, 2004 and February 10, 2005; and

Whereas, the NJSBA conducted seven training sessions between April 2004 and March 2005 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C. 6A:28-1.6(e)*, on August 22, 2005, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the above-named Board member responded that the schedule for the training sessions conflicted with his prior professional and personal commitments and he is scheduled to attend training on March 4, 2006; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its September 27, 2005 meeting; and

Whereas, at its meeting on September 27, 2005, the Commission found that the above-named Board member's failure to attend board member training from April 2004 until March 2005 constitutes a violation of *N.J.S.A. 18A:12-33* and voted to recommend that the appropriate penalty for the violation is suspension from the board if the above-named Board member fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session; and

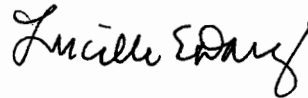
Whereas, on October 17, 2005, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner;¹ and

Whereas, neither the above-named Board member nor anyone on his behalf submitted comments to the Commissioner; and

¹ The October 17, 2005 letter of the Commission explaining the opportunity to submit comments noted Mr. Candio's intention to attend training on December 3, 2005.

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 her own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office if he fails to attend the NJSBA's October 25, 2005 training session and summarily removed from office if he fails to attend the January 28, 2006 session.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/09/05

Date of Mailing: 11/09/05

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.*

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO. T10-05
STEPHEN CANDIO,	:	
Sussex County Charter School	:	DECISION FOR FAILURE
Board of Trustees	:	TO ATTEND TRAINING
Sussex 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 each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Stephen Candio was newly elected or appointed in May 2004 to a local school board or charter school board and therefore, had to until May 2005, to complete the training requirement; 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 December 6, 2004 and February 10, 2005; and

WHEREAS, the NJSBA conducted seven training sessions between April 2004 and March 2005 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 on July 8-10, 2005; and

WHEREAS, the Commission issued an Order on August 22, 2005, directing Stephen Candio to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Candio responded that the schedule for the training sessions conflicted with his prior professional and personal commitments and he is scheduled to attend training on March 4, 2006; and

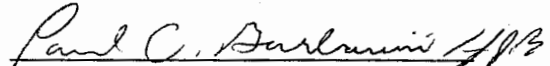
WHEREAS, the Commission notified Mr. Candio that the Commission would discuss this matter at its September 27, 2005 meeting; and

WHEREAS, Mr. Candio has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2004 to March 2005 constitutes a clear violation of N.J.S.A. 18A:12-33; and

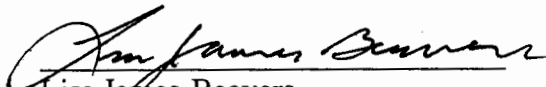
WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board if he fails to attend the NJSBA's October 25, 2005 training session and removal if he fails to attend the January 28, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Stephen Candio violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until January 28, 2006 if he fails to attend the October 25, 2005 training session and removal from the board if he fails to attend the January 28, 2006 session.


Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2005

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

OAL DKT. NO. EDU 4686-04
AGENCY DKT. NO. 106-3/04

BOARD OF EDUCATION OF BERKELEY :
TOWNSHIP, OCEAN COUNTY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF : DECISION
EDUCATION, OFFICE OF FINANCE AND :
BOARD OF EDUCATION OF THE :
TOWNSHIP OF BRICK, OCEAN COUNTY. :

RESPONDENT. :
_____ :

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

IT IS SO ORDERED.

Luille E. Dany

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/10/05

Date of Mailing: 11/10/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT

OAL DKT. NO. EDU 4686-04

AGENCY DKT. NO. 106-3/04

**BOARD OF EDUCATION OF
BERKELEY TOWNSHIP, OCEAN COUNTY**

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION, OFFICE OF FINANCE
AND BOARD OF EDUCATION OF THE
TOWNSHIP OF BRICK, OCEAN COUNTY**

Respondent.

Kevin B. Riordan, Esq., appearing for the petitioner (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Carolyn Grace Labin, Deputy Attorney General, for the respondent, New Jersey State Department of Education, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Ben Montenegro, Esq., appearing for respondent, Brick Township Board of Education, (Wilbert, Montenegro & Thompson, attorneys)

Record Closed – October 18, 2005

Decided – October 20, 2005

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on June 25, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Petitioner challenged the determination by the Department of Education which found petitioner to be the district of residency for the minor child V.D.

A plenary hearing was set for December 22, 2004, at the OAL but was adjourned at the request of Mr. Riordan due to his unavailability. It was rescheduled for February 16 and 17, 2005. On February 11, 2005, the parties advised and represented that they had agreed to a settlement and Mr. Montenegro would draft a settlement incorporating all of the relevant terms. Subsequently, Berkeley challenged/questioned the impact of State aid for the years that Berkeley had paid for V.D.'s tuition. A computation of those fees was eventually resolved to the parties' satisfaction after a peremptory hearing was scheduled for October 17, 2005.

On that date, Deputy Attorney General Labin advised that she was in receipt of the fully executed agreement, which would be delivered to the OAL by October 18, 2005. The hearing was adjourned based upon her representation. Upon receipt of the executed agreement on October 18, 2005. The hearing record closed.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
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 20, 2005
DATE

John R. Futey
JOHN R. FUTEY, ALJ

Receipt Acknowledged:

10-25-05
DATE

M. Kathleen Dunne
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 2005
DATE

Office of Administrative Law
OFFICE OF ADMINISTRATIVE LAW

JRF/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

MONTENEGRO, THOMPSON, MONTENEGRO & GENZ, P.C.

531 Burnt Tavern Road

P.O. Box 1049

Brick, NJ 08724

(732) 295-4500

Attorneys for Brick Township School District

**BERKELEY TOWNSHIP BOARD OF
EDUCATION,**

Plaintiff,

vs.

**NEW JERSEY DEPARTMENT OF
EDUCATION and BRICK TOWNSHIP
BOARD OF EDUCATION,**

Defendants.

**BEFORE THE COMMISSIONER
OF EDUCATION**

Agency Docket No. 106-3/04
OAL Docket No. 04686-2004S

**STIPULATION OF DISMISSAL/
SETTLEMENT AGREEMENT**

THIS AGREEMENT made on this 17th day of October 2005, by
and between:

BERKELEY TOWNSHIP BOARD OF EDUCATION, a body politic duly
organized under the law of the State of New Jersey, with offices
located at 53 Central Parkway, Bayville, New Jersey 08721
(hereinafter "Berkeley")

AND

NEW JERSEY DEPARTMENT OF EDUCATION, an Agency of the State
of New Jersey, with offices located at Riverview Executive
Plaza, Building 100, Route 29, P.O. Box 500, Trenton, New Jersey
08625 (hereinafter "NJDOE")

AND

BRICK TOWNSHIP BOARD OF EDUCATION, a body politic duly
organized under the law of the State of New Jersey, with offices
located at 101 Hendrickson Avenue, Brick, New Jersey 08724
(hereinafter "Brick")

WHEREAS, Berkeley filed a Petition of Appeal pending under Office of Administrative Law, Docket No. 04686-2004S, appealing the NJDOE's rulings as to the domicile of Z.D. and responsibility for the educational costs of her minor child, V.D.;

WHEREAS, without making any admissions of liability or other concessions, and for the purpose of avoiding the expense and distraction of further litigation, Berkeley, NJDOE and Brick desire to resolve their differences amicably and to settle and dispose of the pending litigation.

NOW, THEREFORE, Berkeley, NJDOE and Brick, intending to be legally bound, and in consideration of these promises, hereby agree as follows:

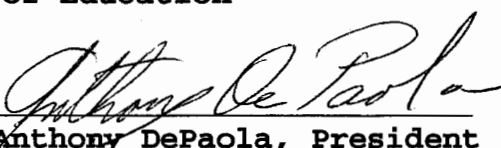
1. Berkeley shall be the District responsible for the education of V.D. from December 2001 through the present. Berkeley shall reimburse Brick the total sum of \$46,376.00, payable on or before October 30, 2005. The \$46,376.00 represents the tuition paid by Brick on behalf of V.D. during the 2001-2002 school year and 2002-2003 school year, less State aid (core curriculum aid and tier two special education funding) received by Brick for having declared V.D. for the 2001-2002 and 2002-2003 school years. The parties recognize that \$23,188.00 of the \$46,376.00 has been paid. The remaining \$23,188.00 shall be made payable to the Trust Account of Montenegro, Thompson, Montenegro & Genz, P.C., provided to the attention of Board Attorney, Nicholas C. Montenegro, Esq., P.O. Box 1049, Brick, NJ 08724.
2. This Settlement Agreement/Stipulation of Dismissal has been negotiated by the parties through counsel of their choice and is voluntarily accepted by the parties.
3. This Settlement Agreement/Stipulation of Dismissal contains the entire agreement between the parties relating to the District of residency and obligation to education V.D. in accord with the Law of the State of New Jersey. There are no other understandings or agreements, verbal or otherwise, in relation thereto,

between the parties except those herein expressly set forth.

4. This Agreement may be executed in one or more counterparts; provided, however, that all properly executed counterparts shall constitute a single valid and enforceable Agreement.
5. This Settlement Agreement/Stipulation of Dismissal shall be construed and interpreted in accordance with the laws of the State of New Jersey.

Berkeley Township Board of Education

Attest: 
Laura Venter, BA/Bd. Sec.

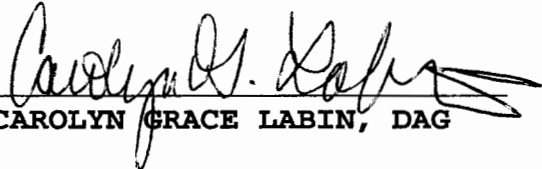
By: 
Anthony DePaola, President

Dated: 10/14/05

**State of New Jersey
Department of Law and Public
Safety**

Attorney for New Jersey
Department of Education

Dated: 10/17/05

By: 
CAROLYN GRACE LABIN, DAG

**Montenegro, Thompson,
Montenegro & Genz, P.C.**
Attorneys for Brick Township
School District

Dated: _____

By: _____
BEN A. MONTENEGRO, ESQ.

4. This Agreement may be executed in one or more counterparts; provided, however, that all properly executed counterparts shall constitute a single valid and enforceable Agreement.
5. This Settlement Agreement/Stipulation of Dismissal shall be construed and interpreted in accordance with the laws of the State of New Jersey.

**Berry, Sahradnik, Kotzas,
Riordan & Benson**
Attorney for Berkeley
Township Board of Education

Dated: _____

By _____
KEVIN B. RIORDAN, ESQ.

State of New Jersey
**Department of Law and Public
Safety**
Attorney for New Jersey
Department of Education

Dated: _____

By _____
CAROLYN GRACE LABIN, DAG

**Montenegro, Thompson,
Montenegro & Genz, P.C.**
Attorneys for Brick Township
School District

Dated: 10/14/05

By 
BEN A. MONTENEGRO, ESQ.

IN THE MATTER OF RUDOLPH MCCULLERS, :

BOARD OF TRUSTEES OF GATEWAY : COMMISSIONER OF EDUCATION

CHARTER SCHOOL, HUDSON COUNTY : DECISION

_____:

SYNOPSIS

The School Ethics Commission determined that Rudolph McCullers, former president of the Gateway Charter School Board of Trustees, violated the School Ethics Act, *N.J.S.A.* 18A:12-24(d), when he violated several provisions of the school laws and other statutes; took action on several occasions without Board approval; and committed other unauthorized acts. The Commission found probable cause that respondent, *inter alia*, failed to provide adequate notice of a closed executive meeting of the Board; signed certain checks without board authorization; knowingly hired an uncertified business administrator; violated public school bidding laws; and failed to carry out various duties as board president, resulting in the school being placed on probation.

After considering the nature of the charges, the Commission recommended a penalty of censure since Mr. McCullers is no longer a member of the Board and censure is the highest penalty that may be imposed on a former board member. Because of the extensive violations of the School Ethics Act, the Commission indicated that they would have recommended a sanction of removal if Mr. McCullers was still on the Board.

Upon review of the record, the Commissioner, whose decision is restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29 (c) and *N.J.A.C.* 6A:3-9.1, concurs with the Commission's recommendation. The Commissioner thus orders that Rudolph McCullers be censured as a school official found to have violated the School Ethics Act.

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

November 9, 2005

SEC Dkt. Nos. C06-05 & C12-05
Agency Dkt. No. 264-9/05

IN THE MATTER OF RUDOLPH MCCULLERS, :

BOARD OF TRUSTEES OF GATEWAY : COMMISSIONER OF EDUCATION

CHARTER SCHOOL, HUDSON COUNTY : DECISION

_____ :

The record in this matter and the decision of the School Ethics Commission (Commission) have been reviewed. Respondent filed no written comments to the Commission's decision. Upon full consideration, the Commissioner is constrained to adopt the recommendation of the Commission that respondent be censured.

Two complaints were consolidated in this matter. An answer to one of them was submitted, but it did not comply with the requirement set forth in *N.J.S.A.* 18A:12-29(b) that answers be given under oath. No answer to the other complaint was presented. Thus, the Commission considered the complaints as unrebutted. Further, because respondent did not file perfected answers, he could not attend the hearings on the two complaints.

The multiple paragraphs in the two complaints alleged that during his tenure as president of the Gateway Charter School Board of Trustees, respondent had: violated several provisions of the school laws and other statutes; taken action on several occasions without Board approval; and committed other *ultra vires* acts. Among the identified violations were the unilateral dismissal, without proper notice, of the complainant as Secretary to the Board, and the hiring of an unqualified replacement; interference in the administration of the school; unauthorized signing of checks, including several to himself; unilateral hiring of contractors; failure to timely file certain financial documents and certifications on behalf of the school.

At a May 24, 2005 hearing the Commission determined that the material facts were not in dispute, and found probable cause to credit the allegations that respondent had violated *N.J.S.A.* 18A:12-24 (b) and (c), and *N.J.S.A.* 18A:12-24.1 (a) through (f). It notified respondent that it would decide the matter on the papers, and invited the respondent to provide a written submission by August 29, 2005, as to why the Commission should not find him in violation of the above referenced statutes, and should not impose a sanction. No written submission was received from respondent.

At a public meeting on September 27, 2005, the Commission found that respondent violated the above-referenced statutes. It recommended that the Commissioner impose the penalty of censure, since respondent was at that point no longer on the Board of Trustees, and since censure is the highest penalty that may be imposed upon a former Board member. The Commission also noted that “[b]ecause of the extensive violations of the Act, the Commission would have recommended a sanction of removal if Mr. McCullers was [sic] still on the Board.” The Commission’s decision was duly adopted by a formal resolution and forwarded to the Commissioner for action on the sanction only, pursuant to *N.J.S.A.* 18A:12-29.

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.

The Commissioner accepts the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons set forth in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. The Commissioner accordingly imposes the penalty of censure.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/09/05

Date of Mailing: 11/09/05

* The Commissioner's decision, limited to the imposition of a penalty only, 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.*

BEFORE THE SCHOOL ETHICS COMMISSION

Docket No. C06-05 & C12-05

DECISION

- (1) As President of the Board, Mr. McCullers participated in a closed executive meeting of the Gateway Charter School Board of Trustees (Board), held on March 17, 2005, without public notice in violation of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq.;
- (2) Mr. McCullers sent an e-mail on March 17, 2005 at 3:13 p.m., which effectively dismissed the complainant from the position of secretary to the Board without Board approval and without a showing of neglect, misbehavior or other offense;
- (3) During the weekend of February 19-21, 2005, Mr. McCullers or his agent, without cause, removed items from the complainant's desk and rearranged his furniture;
- (4) Mr. McCullers went directly to the complainant regarding a scheduling mix-up that occurred at the school;
- (5) On February 25, 2005, Mr. McCullers entered a classroom, intervened in a dispute between two students and told one student with an IEP that he would not be suspended for his actions. He then went on to lecture teachers about student discipline. After that he entered several other classrooms and the cafeteria and lectured students about their bad behavior;

(6) Mr. McCullers signed several checks without Board authorization, which included several checks made out to him;

(7) As Board President, Mr. McCullers continued the employment of a Business Administrator that was not properly hired by Board approval, who did not hold proper certification as required by N.J.A.C. 6A:11-5.1(b)2, and who also served as Treasurer in violation of N.J.S.A. 18A:17-31;

(8) Mr. McCullers hired Professional Maintenance and Carpeting and Frank Ruiz without soliciting bids, and in early February 2005, he hired Unique Maintenance to strip and re-finish the floors in the school without Board approval, prior to a visit by representatives of the bank at which he is employed as Vice President;

(9) As Board President, Mr. McCullers failed to assure the timely filing of the following items:

1. The corrective audit plan for the 2002-2003 audit;
2. The Fiscal Section of the annual report for fiscal year 2003-2004;
3. The 2003-2004 independent audit;
4. The Board resolution approving the fiscal year 2004-2005 budget; and
5. The signed facility lease;

Furthermore, Mr. McCullers failed to provide certifications required by N.J.A.C. 6A:23-2.11(c)3 and 4 at Board meetings from September 2004 until March 2005. Mr. McCullers also failed to assure that all school expenditures were fully itemized, verified, and certified in writing and presented to the full Board for approval. Finally, Mr. McCullers failed to make certain that all funds were expended only by the Treasurer in violation of N.J.S.A. 18A:17-36, N.J.S.A. 18A:19-1 et seq. and N.J.A.C. 6A:23-2.2; and

(10) Mr. McCullers instructed the Board secretary to draw up a spread sheet to keep track of bank employees who were at the school and, when it was misplaced, he instructed the complainant to get another and to make sure all of the instructors signed in.

After receipt of the complaints, the Commission forwarded both complaints to Mr. McCullers and notified him that, pursuant to N.J.A.C. 6A:28-6.5(a), he had 20 days to submit an answer under oath to the Commission. Mr. McCullers failed to answer either complaint within the 20-day time limit. The Commission then notified Mr. McCullers that, pursuant to N.J.A.C. 6A:28-6.5(d), if he did not provide an answer within 10 days of receipt of the notice, each allegation in both of the complaints would be deemed admitted and he would not be permitted to address the Commission. The Commission received a timely answer to C12-05 on May 20, 2005 that was mistakenly labeled as an answer to C06-05. However, the answer was not sworn under oath as required by N.J.S.A. 18A:12-29(b). Therefore, the Commission did not accept the answer and it was not considered when the Commission made its determination regarding these matters. The Commission did not receive an answer to the allegations in C06-05.

The Commission invited the complainant to attend its May 24, 2005 meeting to present witnesses and testimony, but did not require that he be present. The complainant attended the hearing with a witness. However, since the Commission did not have any questions for either him or the witness, they did not appear before the Commission. Since Mr. McCullers did not provide an answer to C06-05, he could not attend the hearing on C06-05. He was invited to the meeting to testify on C12-05, but then he submitted an uncertified answer, which the Commission could not accept pursuant to N.J.S.A. 18A:12-29(b). Therefore, he could not attend the hearing on C12-05. At its May 24, 2005 meeting, the Commission voted to consolidate C06-05 and C12-05 and voted to find probable cause to credit the allegations that Mr. McCullers violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members in the Act.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised Mr. McCullers that it would decide the matter on the basis of written submissions. Mr. McCullers was invited to provide a written submission to the Commission by August 29, 2005, and set forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members. Mr. McCullers was also told that his written submission should include his position on an appropriate sanction should the Commission determine that the Act was violated. Mr. McCullers did not provide a written submission in response to the Commission's probable cause determination.

FACTS

The Commission based its finding of probable cause on the following facts.

At all times relevant to these complaints, Mr. McCullers was President of the Board and employed at North Fork Bank as Vice President. Mr. McCullers resigned from the Board in June 2005. At all times relevant to the complaints, the complainant was employed by the Board as Vice Principal and, at certain times, employed by the Board as Board Secretary.

(1) March 17, 2005 Closed Executive Meeting

On March 14, 2005, Mr. McCullers sent an e-mail to all Board members asking them to review attachments to the e-mail for the executive Board meeting. The closed executive meeting of the Board was held on March 17, 2005. The public was not provided with any type of notice of the meeting.

(2) Complainant's Position as Board Secretary

On March 17, 2005, at 3:13 p.m., prior to the closed executive meeting of the Board held at 7:00 p.m. that same evening, Mr. McCullers sent an e-mail to the Board and the complainant with an enclosed letter to the complainant wherein Mr. McCullers

indicated that he was, "thanking him for his services and resigning him from holding the position of Board Secretary." His e-mail also indicated that it is the duty and responsibility of a Board member to be secretary to the Board and that he was assigning the responsibility to the business administrator. During the March 21, 2005 Board meeting, a Board member raised an objection to the procedure that was followed in the dismissal of the complainant. That Board member noted that the dismissal should have been brought before the Board for a vote and that he believed that Mr. McCullers did not follow the proper procedure.

(3) Mr. Monte's Office

During the weekend of February 19-21, 2005, Mr. McCullers and/or his agent entered the complainant's office and removed items from his desk. The furniture in the office was also completely rearranged during that time. The complainant discovered the changes on Tuesday, February 22, 2005 when he returned to work after President's Day weekend.

(4) Scheduling Problems

During February 2005, instructors from North Fork Bank were scheduled to present financial lessons to the 7th grade students. During the presentations, a scheduling mix up occurred. The chief administrative officer e-mailed an explanation to Mr. McCullers in the early morning on February 28, 2005, which provided details as to why the mix up occurred and provided a solution that she would undertake prior to the final visit of the North Fork Bank instructors. Shortly thereafter, Mr. McCullers contacted the complainant directly and asked him to explain the scheduling mix up that had occurred at the school the previous week. After the conversation with Mr. McCullers, the complainant felt compelled to also provide Mr. McCullers with a written explanation. The chief administrative officer was unaware that Mr. McCullers had contacted the complainant directly.

(5) Attendance at School on February 25, 2005

On February 25, 2005, Mr. McCullers entered the school building to deliver a letter to the chief administrative officer. At that time there was a loud argument going on in a classroom between two students. In the presence of the teacher, Mr. McCullers entered the classroom and intervened in the altercation. He spoke to the students about their behavior and then took one of the students into another room. This student had an Individualized Education Plan (IEP) that included specific requirements for behavior modification. Mr. McCullers asked the student to promise that he would not behave in that manner again and then told the student that he would not be suspended for his actions.

Shortly thereafter, Mr. McCullers went to the main office and spoke to several teachers regarding the lack of student discipline at the school. He noted that more students should be suspended and that if it was not done that he would handle it himself.

He also stated that a particular 7th grade student was probably autistic and needed an autism teacher to help out in the classroom. Mr. McCullers then went into several homerooms to lecture students on their behavior. After that, he went into the cafeteria and gave a speech to the students about their bad behavior.

(6) Check Signing

Mr. McCullers signed several checks that were not authorized by the Board, which included several made out to him, as follows:

1. At the January 10, 2005 Board meeting, the Board authorized 23 checks, but, sometime thereafter, Mr. McCullers signed 32 checks, thus, 9 checks were not approved by the Board;
2. Mr. McCullers signed check numbers 3020-3023, 3025 and 7128-7165, which were not approved by the Board;
3. Mr. McCullers signed check numbers 7208-7242 including a check made out to Mr. McCullers, which were not approved by the Board; and
4. Mr. McCullers signed check numbers 7089 and 7229, which were made out to Mr. McCullers, and were not approved by the Board.

(7) School Business Administrator

Mr. McCullers hired Ali Bangura as school business administrator. At the October 18, 2004 Board meeting, Mr. McCullers admitted that Mr. Bangura was not properly hired and stated that a Board member had said that "we should take on this guy before we lose him and we should be paying him." Mr. McCullers then stated that the Board should vote on whether Mr. Bangura should continue to work. Mr. Bangura does not have proper certification as required by N.J.A.C. 6A:11-5.1(b)2. Mr. Bangura, the school business administrator, also served as Treasurer.

(8) Vendors

Mr. McCullers hired Professional Maintenance and Carpeting, and Frank Ruiz, a maintenance professional, without soliciting bids as required by N.J.S.A. 18A:18A-3(a). Professional Maintenance and Carpeting, which is a firm that is owned by another Board member, was paid \$3,500, and Mr. Ruiz was paid \$12,190. Sometime in early February 2005, Mr. McCullers also hired Unique Maintenance, without Board approval, to strip and re-finish the floors in the school in preparation for the visit to the school of representatives of the bank where Mr. McCullers is employed as Vice President.

(9) Board Member Duties

The following items were not submitted by the due dates as required by statute and regulation:

1. The corrective audit plan for the 2002-2003 audit, which was due by June 30, 2004 as required by N.J.S.A. 18A:23-3, 23-4 and N.J.A.C. 6A:23-2.11;
2. The Fiscal Section of the annual report for fiscal year 2003-2004, which was due by August 1, 2004 as required by N.J.S.A. 18A:36(a)-16(b) and N.J.A.C. 6A:11-2.2;
3. The 2003-2004 independent audit, which was due by November 5, 2004 as required by N.J.S.A. 18A:23 et seq. and N.J.A.C. 6A:231-2.2(i)
4. The Board resolution approving the fiscal year 2004-2005 budget, which was due by March 30, 2004 as required by N.J.A.C. 6A:11-7.1(e); and
5. The signed facility lease, which was due on June 30, 2004.

In his role as Board President, Mr. McCullers failed to provide certifications required by N.J.A.C. 6A:23-2.11(c)3 and 4 at Board meetings from September 2004 until March 2005. He also did not make sure that all school expenditures were fully itemized, verified, and certified in writing and presented to the full Board for approval. Mr. McCullers also did not make certain that all funds were expended only by the Treasurer in violation of N.J.S.A. 18A:17-36, N.J.S.A. 18A:19-1 et seq. and N.J.A.C. 6A:23-2.2.

On September 15, 2004, the Board was notified through correspondence from the Director of the Office of School Funding in the Department of Education (DOE) that it had to submit a corrective action plan to address the above, as well as other issues, where the school was found to be non-compliant with statute and regulations. That correspondence was followed by correspondence on January 7, 2005 notifying the Board that it still had not submitted the corrective action plan and that failure to comply would result in sanctions. Through correspondence dated February 24, 2005, the Board was again notified that failure to submit a corrective action plan would result in sanctions. Finally, in correspondence dated April 15, 2005, the Commissioner placed the school on probationary status as a result of the on-going fiscal problems raised in the previous correspondence and the March 30, 2005 on-site review of the school's fiscal-related activities and academic performance.

(10) Spreadsheet

On February 10 and 11, 2005, Mr. McCullers instructed the school secretary in the main office to draw up a spreadsheet to be used to keep track of North Fork Bank employees who were at the school on those days to provide financial instructions to the 7th grade students. When the spreadsheet was misplaced on February 10, 2005, Mr. McCullers instructed Mr. Monte to get another spreadsheet and told Mr. Monte that it would be his responsibility to make sure that all of the instructors signed in.

ANALYSIS

(1) March 17, 2005 Closed Executive Meeting

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he planned and participated in a closed executive meeting of the Board on March 17, 2005 without providing adequate notice. N.J.S.A. 18A:12-24.1(a) provides:

I will uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. Desired changes shall be brought about only through legal and ethical procedures.

The OPMA at N.J.S.A. 10:4-9 requires all public bodies to provide adequate notice of meetings that are held by the public bodies. The Board falls within the definition of "public body" at N.J.S.A. 10:4-8, which, in part, defines the term as meaning "a commission, authority, board... organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function..." Furthermore, N.J.S.A. 18A:36A-6 requires the board of trustees of a charter school to comply with the provisions of the OPMA. "Adequate notice" is also defined, in part, at N.J.S.A. 10:4-8 to mean, "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting..." The closed executive meeting of the Board that was held on March 17, 2005, was held without the provision of a 48 hour written advance notice giving the time, date, and location in violation of OPMA. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he failed to uphold and enforce all laws pertaining to the schools.

(2) The Complainant's Position as Board Secretary

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he sent an e-mail to all Board members, with a copy to the complainant, on March 17, 2005 just a few hours before the closed executive meeting of the Board, which effectively dismissed the complainant from his position as Board secretary.

As a preliminary matter, the Commission notes that although Mr. McCullers indicated that he was "resigning [the complainant] from his position," he was effectively dismissing the complainant from his position. "Resignation" is defined in the Black's Law Dictionary (Fifth Edition) as a formal renouncement or relinquishment of an office which must be accompanied by an act of relinquishment. At no time did the complainant take any action to relinquish or renounce his position as Board secretary. There was no resignation before Mr. McCullers or the Board to accept. It was Mr. McCullers who initiated the dismissal of the complainant from the position of Board secretary.

N.J.S.A. 18A:17-1 provides, in part, that, "no secretary...of a board of education of any school district shall, during the term for which he was appointed, be dismissed or

reduced in compensation, except for neglect, misbehavior or other offense unless it is otherwise provided in his contract of employment.” When Mr. McCullers dismissed the complainant, it appears that he did not uphold the requirements of N.J.S.A. 18A:17-1 since he did not present any evidence that the complainant should be dismissed because of neglect, misbehavior or other offense. Moreover, in the e-mail and its attachment, rather than allege that the complainant should be dismissed because of neglect, misbehavior or other offense, Mr. McCullers thanked the complainant for his services. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he failed to uphold and enforce all laws pertaining to the schools.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) when he failed to recognize that authority rests with the board of education and acted on the dismissal alone and did not bring the matter before the entire Board. N.J.S.A. 18A:12-24.1(e) provides:

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

In the e-mail and its attachment, Mr. McCullers thanked the complainant for his services, dismissed the complainant from the position of Secretary to the Board and assigned the responsibilities to the business administrator. The Commission notes that Mr. McCullers took it upon himself to dismiss Mr. Monte just hours before a closed executive meeting of the Board. This was not a decision of the Board, rather it was a decision made by Mr. McCullers alone. Furthermore, Mr. McCullers not only dismissed the complainant, but then went on to decide who would replace him. These are all decisions that properly reside with the entire Board. The Commission also notes that when Mr. McCullers made these decisions it was a private action, since no one Board member can decide to dismiss anyone. The private action could have compromised the Board since the complainant was not provided with a Rice¹ notice prior to the closed executive meeting. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) when he failed to recognize that authority rests with the Board and took private action that could have compromised the Board.

(4) Scheduling Problems

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) and (d) when, on February 28, 2005, he directly contacted the complainant by phone and asked him to explain a scheduling mix up that had occurred when instructors from North Fork Bank were presenting a financial lesson to 7th grade students.

¹ “Rice” refers to the case *Rice v. Union City. Reg. H. Sch. Dist. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977) *certif. den.* 76 N.J. 238 (1978), which established the right of employees to have notice when they will be discussed by the Board of Education.

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. McCullers took it upon himself to determine why scheduling problems had occurred at the school. First he went to the chief administrative officer and then he went to the complainant to find a solution to the scheduling problems. In doing so, Mr. McCullers failed to confine his action to policy making and planning. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c).

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.

When the scheduling problems occurred, Mr. McCullers received an e-mail from the chief administrative officer, which provided an explanation as to why the scheduling problem occurred. The e-mail included an administrative solution that the chief administrative officer would undertake to ensure that the scheduling problems would not happen again. Shortly after he received the e-mail, Mr. McCullers phoned the complainant asking for an explanation as to why the scheduling mix up had occurred. Mr. McCullers did not call the chief administrative officer, but took it upon himself to call the complainant without the knowledge of the chief administrative officer. Mr. McCullers became involved in the administration of the schools when he contacted the complainant after he had been given a solution from the chief administrative officer. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(d).

(5) Attendance at School on February 25, 2005

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b) when he intervened in a dispute between two students when he was at the school on February 25, 2005. N.J.S.A. 18A:12-24.1(b) provides:

I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race creed, sex, or social standing.

On February 25, 2005, when Mr. McCullers was at the school, he overheard a dispute between two students and went into the classroom. He intervened in the dispute and spoke with the two students about their behavior. He then took one student aside, who had an IEP that included specific requirements for behavior modification. Without

knowledge of those specific requirements, Mr. McCullers asked the student to promise that he would not engage in that type of behavior again and told him that he would not be suspended for his actions. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b) when he intervened in the behavior modification of a student with an IEP without knowledge of the IEP requirements, thus, failing to maintain a public school that meets the individual needs of all children regardless of their ability.

The Commission also found probable cause that, on February 25, 2005, Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) and (d), which are set forth above. After he intervened in the dispute with the two students, he then went into the main office and lectured teachers about student discipline, and told the teachers that if there were not more student suspensions, he would handle discipline himself. He further gave the teachers his opinion that a specific student was probably autistic and would need an autism teacher to help out in the classroom. He then proceeded to other classrooms and the cafeteria and lectured the students on their bad behavior. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) and (d) when he failed to confine his board action to policy making, planning and appraisal and instead took it upon himself to administer the schools by undertaking conduct that is more the province of a chief administrative officer.

(6) Check Signing

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) and (e), which are set forth above, when he signed certain checks without Board authorization, including several made out to himself. Pursuant to N.J.S.A. 18A:19-1(d), prior to expenditure of Board funds, the Board must approve the expenditure by resolution. McCullers signed checks that had not been approved at the January 10, 2005 Board meeting. Mr. McCullers also signed other checks which were not approved by the Board and were drawn on an account separate from the standard account. Mr. McCullers also signed checks without Board authorization made out to him. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) and (e), when he failed to present certain checks to the Board in violation of N.J.S.A. 18A:19-1 et seq., and when he failed to recognize that the authority to expend school funds lies with the entire Board.

The Commission also found probable cause that Mr. McCullers violated 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;

Mr. McCullers signed checks made out to himself without Board approval. He signed the checks as part of his duties as Board President. In doing so, Mr. McCullers used his official position as Board President to secure the unwarranted privilege or

advantage of obtaining funds from the Board without Board approval. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24(b).

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24(c) when he signed checks made out to himself without Board authorization. N.J.S.A. 18A:12-24(c) provides,

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

Mr. McCullers had a direct financial involvement in the checks that were made out to him. The public could reasonably perceive that his objectivity and independence of judgment would be impaired in that matter. The Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24(c) when he acted in his official capacity as Board President, without Board approval, in a matter where he had a direct financial involvement that might reasonably be expected to impair his objectivity or independence of judgment.

(7) School Business Administrator

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), which is set forth above, when he knowingly hired an uncertified business administrator without Board approval and also had him serve as Board Secretary and Treasurer in violation of N.J.S.A. 18A:17-31. The Board minutes for the October 18, 2004 Board meeting reflect that the Board discussed the hiring of the school business administrator and, during the discussion, it became apparent that the school business administrator was never properly hired by the full Board, but that Mr. McCullers had hired him. The Board minutes also reflect that the school business administrator was not certified. The school business administrator also served as Treasurer for the school in violation of N.J.S.A. 18A:17-31, which provides that the Treasurer cannot be a member or employee of the Board. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), when he failed to uphold and enforce all laws and rules and regulations of the State Board of Education and hired a school business administrator without Board approval and who was not certified.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b) when he hired an uncertified school business administrator without Board approval. The Board had received a request from the Director of the Office for School Funding in the DOE, for a corrective action plan in regards to the fact that the Board hired an uncertified business administrator in violation of N.J.A.C. 6A:11-5.1.

There were two follow up letters that told the Board that they risked sanctions if they failed to provide a corrective action plan to rectify the problem. As a result of the failure to submit a corrective action plan, the school was placed on probationary status. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b), when he jeopardized the educational welfare of the children of the school by failing to ensure that the school business administrator was certified.

(8) Vendors

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), which is set forth above, when he hired Professional Maintenance and Carpeting, which is owned by another Board member, without soliciting bids as required by N.J.S.A. 18A:18A-1 et seq. The Commission notes that Professional Maintenance and Carpeting was paid a total of \$3,500 and N.J.S.A. 18A:18A-3(a) allows a purchasing agent authorized by a Board resolution to award a contract without soliciting bids if the contract sum does not exceed \$17,500. Therefore, the purchasing agent did not have to solicit bids to hire Professional Maintenance and Carpeting. However, the Commission notes that there is no evidence that Mr. McCullers was authorized by a Board resolution to be a purchasing agent. Furthermore, there is no evidence to show that the Board hired Professional Maintenance and Carpeting. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he hired Professional Maintenance and Carpeting.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he hired Frank Ruiz as a maintenance professional at the school without soliciting bids as required by N.J.S.A. 18A:18A-1 et seq. The Commission notes that Mr. Ruiz was paid a total of \$12,190, and N.J.S.A. 18A:18A-3(a) allows a purchasing agent authorized by a Board resolution to award a contract without soliciting bids if the contract sum does not exceed \$17,500. Therefore, the purchasing agent did not have to solicit bids to hire Mr. Ruiz. However, again the Commission notes that there is no evidence that Mr. McCullers was authorized by a Board resolution to be a purchasing agent. Furthermore, there is no evidence that the Board hired Mr. Ruiz. Therefore, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) when he hired Frank Ruiz.

The Commission also found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) and (f), which are set forth above, when, sometime in early February 2005, he hired Unique Maintenance without Board approval to strip and re-finish the floors in preparation for a visit to the school of representatives of North Fork Bank where Mr. McCullers is Vice-President. There was no Board resolution to hire Unique Maintenance for such work. The Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(e) because he failed to recognize that authority rests with the Board when he hired Unique Maintenance without Board approval. The Commission also finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(f) when he used the schools for personal gain by hiring Unique Maintenance to strip and re-finish the floors right before the visit to the school by representatives of North Fork Bank, thus giving the perception that he was

trying to impress the representatives who were from the bank in which he is employed as Vice President.

(9) Board Member Duties

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a) and (b), which are set forth above, when he failed to submit numerous documents to the DOE by the required timeline, failed to provide certifications for several Board meetings, failed to make sure that all school expenditures were fully itemized, verified, and certified in writing and presented to the Board for approval, and failed to make certain that all funds were expended only by the Treasurer in violation of N.J.S.A. 18A:36A-16, N.J.S.A. 18A:17-36, N.J.S.A. 18A:19 et seq. and N.J.A.C. 6A:23-2.2 as indicated in several communications from the DOE. Those communications warned the Board that it needed to address these violations or it would face sanctions. However, the Board did not respond to these many communications. This resulted in the school being placed on probation by the Commissioner. Based on the foregoing, the Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(a), because he did not uphold and enforce all laws and rules and regulations of the State Board of Education. The Commission also finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(b), when he failed to correct many problems identified by the DOE's communications resulting in the school being placed on probation, thus jeopardizing the educational welfare of the children of the school.

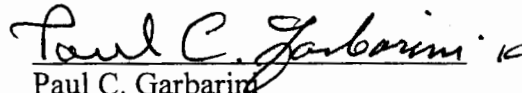
(10) Spreadsheet

The Commission found probable cause that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c), which is set forth above, when he instructed the school secretary to draw up a spread sheet to be used to keep track of North Fork Bank employees who were at the school to provide financial instruction. When the spreadsheet was misplaced, Mr. McCullers instructed the complainant to get another and then told the complainant that it was his responsibility to make sure that all of the instructors signed in. The Commission finds that Mr. McCullers violated N.J.S.A. 18A:12-24.1(c) because he went directly to school employees and instructed them on their duties, thus administering the schools.

DECISION

For the reasons discussed above, the Commission finds that Rudolph McCullers violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members in the Act. The Commission recommends that the Commissioner of Education impose a penalty of censure since Mr. McCullers is no longer a member of the Board and censure is the highest penalty that may be imposed on a former Board member. Because of the extensive violations of the Act, the Commission would have recommended a sanction of removal if Mr. McCullers was still on the Board.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. McCullers 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. Garbarino
Chairperson

Resolution Adopting Decision – C06-05 & C12-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

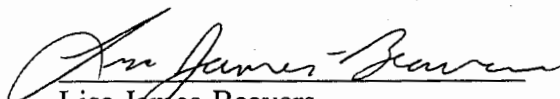
Whereas, at its meeting of September 27, 2005, the Commission found that Rudolph McCullers violated N.J.S.A. 18A:12-24(b) and (c) of the Act and N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (f) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of censure; and

Whereas, at its meeting of September 27, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.


Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 27, 2005.


Lisa James-Beavers
Executive Director

OAL DKT. NO EDU 2995-05
AGENCY DKT. NO. 102-5/05

IN THE MATTER OF THE TENURE :
HEARING OF CORDELIA McKNIGHT :
JOHNSON, SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
BOROUGH OF SAYREVILLE, : DECISION
MIDDLESEX COUNTY. :
_____ :

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *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.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/10/05

Date of Mailing: 11/10/0



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2995-05

AGENCY DKT. NO. 102-5/05

**IN THE MATTER OF THE TENURE
HEARING OF CORDELIA McKNIGHT
JOHNSON, SCHOOL DISTRICT OF THE
BOROUGH OF SAYREVILLE, MIDDLESEX
COUNTY**

Viola S. Lordi, Esq., for petitioner (Wilentz, Goldman & Spitzer, P.A., attorneys)

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

Record Closed: October 19, 2005

Decided: October 21, 2005

BEFORE STEPHANIE M. WAUTERS, ALJ:

This matter was transmitted to the Office of Administrative Law on May 18, 2005 for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 21, 2005
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

10-25-05
DATE

M. Kathleen Duneau/eh
DEPARTMENT OF EDUCATION

OCT 26 2005
DATE

Mailed to Parties:
Laura Sanders
CHIEF AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

WILENTZ, GOLDMAN & SPITZER P.A.
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for the Borough of Sayreville
Board of Education

OFFICE OF ADMINISTRATIVE LAW

2005 OCT 19 P 12:01

-----X
:
:
IN THE MATTER OF THE TENURE :
HEARING OF CORDELIA :
MCKNIGHT-JOHNSON, BOROUGH :
OF SAYREVILLE BOARD OF :
EDUCATION :
:
:
:
:
:
-----X

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY

AGENCY DOCKET NO.: 102-5/05
OAL DOCKET NO.: EDUTH 02995-2005S

STIPULATION OF SETTLEMENT

The Borough of Sayreville Board of Education (sometimes "Board"), with offices at 150 Lincoln Street, Sayreville, New Jersey 08872, and Cordelia McKnight-Johnson, residing at 336 High Street, Perth Amboy, NJ 08861, hereby set forth their full and complete agreement, as follows:

WITNESSETH:

WHEREAS, Ms. McKnight-Johnson is employed as a school counselor for the Board; and

WHEREAS, on April 12, 2005, pursuant to N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6A:3-5.1 et seq., Dr. Frank R. Alfano, Superintendent of the Borough of Sayreville School District, filed with the Board Secretary a Statement of Tenure Charges and Statement of Evidence Under Oath with supporting documents against Ms. McKnight-Johnson, a tenured school counselor at

the Emma L. Arleth Elementary School and the Harry S. Truman Elementary School, alleging incapacity, unbecoming conduct and other just cause due to excessive absenteeism; and

WHEREAS, on April 26, 2005, the Board resolved by majority vote of the whole number of members of the Board as follows: (1) there was probable cause to credit the evidence in support of the Charges; (2) the Charges were sufficient to warrant the dismissal or reduction of salary of Ms. McKnight-Johnson; and (3) the Board Secretary was directed to forthwith notify Ms. McKnight-Johnson of the adoption of the Board's resolution and to forward the Charges to the Commissioner of the Department of Education for a hearing pursuant to N.J.S.A. 18A:6-16, together with a Certificate of Determination, all as is required by N.J.S.A. 18A:6-11; and

WHEREAS, on or about May 13, 2005, Ms. McKnight-Johnson filed an Answer to the Charges before the Commissioner of Education; and

WHEREAS, on May 13, 2005, the Commissioner determined that the Charges, if true, were sufficient to warrant dismissal or a reduction in salary, and transferred the charges against Ms. McKnight-Johnson to the Office of Administrative Law for a hearing; and

WHEREAS, Ms. McKnight-Johnson has been out on an unpaid leave of absence for the 2004-2005 school year; and

WHEREAS, in order to avoid the costs and burdens of a tenure dismissal hearing, the Board and Ms. McKnight-Johnson desire to settle fully and finally all outstanding issues regarding the aforesaid employment relationship and any and all differences between them, including any and all claims which could have been asserted, whether they are presently known or unknown, including any future claim for attorneys' fees or costs; and

WHEREAS, the parties agree that execution of this Stipulation of Settlement ("Stipulation") will constitute a complete and final disposition of any potential claim Ms. McKnight-Johnson could have brought against the Board; and

WHEREAS, Ms. McKnight-Johnson has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which is hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. Settlement Payment. (a) Ms. McKnight-Johnson hereby resigns her employment with the Board effective on ~~January 1, 2006~~ ^{Chf March} Ms. McKnight-Johnson hereby surrenders any tenure rights that she has with the Board upon execution of this Stipulation. Simultaneously with her execution of this Stipulation, Ms. McKnight-Johnson will submit an irrevocable letter of resignation, in the form attached hereto as Exhibit A, for purposes of retirement, effective ~~January 1, 2006~~ ^{Chf March}. The parties' written agreement will not now, nor at any time in the future, be considered by either party to be an unlawful discharge of Ms. McKnight-Johnson or in any way constitute discrimination against Ms. McKnight-Johnson under N.J.S.A. 10:5-1, et seq. Approval of Ms. McKnight-Johnson's resignation by the Board will occur as part of the approval of this entire settlement. It is agreed and understood by all parties that this Stipulation is contingent upon approval of the Board.

(b) Ms. McKnight-Johnson will be suspended with pay through ~~December 31, 2005~~ ^{February 28, 2006} Ms. McKnight-Johnson will receive her current salary less the standard payroll deductions taken for Ms. McKnight-Johnson as an employee of the Board (e.g. taxes, security, pension, etc.) through ~~December 31, 2005~~ ^{February 28, 2006}, provided Viola S. Lordi, Esq. of Wilentz, Goldman & Spitzer P.A. has received from Michael T. Barrett, Esq., counsel for Ms. McKnight-Johnson (1) an executed original of this Stipulation; (2) a signed copy of the non-revocation letter attached hereto as Exhibit B; and (3) Ms. McKnight-Johnson's signed letter of resignation.

(c) The health insurance benefits to which Ms. McKnight-Johnson is currently entitled as an employee of the Board shall be maintained through ^{February 28, 6} ~~December 31, 2005~~, at which time Ms. McKnight-Johnson will be entitled to elect COBRA coverage.

(d) The Board agrees to assist in the preparation of paperwork relating to Ms. McKnight-Johnson's application for disability retirement with the State of New Jersey, Division of Pensions and Benefits.

2. Release. In consideration for the payment and other consideration provided for in this Stipulation, and except as prohibited by law, Ms. McKnight-Johnson, personally and for her estate and/or her heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights, in law or in equity, known and unknown (including, but not limited to, any and all rights to discovery regarding events occurring, or claims arising, prior to the date of this Stipulation) that she may have against the Board and any and all of the Board's officers, board members, agents, representatives, attorneys, and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (hereinafter "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Ms. McKnight-Johnson's employment and/or association with the Board.

Ms. McKnight-Johnson specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or other relationship and/or association with releasees, based upon any act, event, or omission occurring before the effective date of this Stipulation, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, and/or common law (including, but not

limited to, any and all rights to discovery regarding such claims), expressly including, but not limited to, any potential claims (including individual and class action claims) relating to:

Title VII of the Civil Rights Act of 1964, as amended;

Sections 1981 through 1988 of Title 42 of the United States Code, as amended;

The Employee Retirement Income Security Act of 1974, as amended;

The Immigration Reform Control Act, as amended;

The Americans with Disabilities Act of 1990, as amended;

The Age Discrimination in Employment Act of 1967, as amended;

The Fair Labor Standards Act, as amended;

The Occupational Safety and Health Act, as amended;

The Family and Medical Leave Act of 1993;

The Equal Pay Act, as amended;

The New Jersey Law Against Discrimination, as amended;

The New Jersey Minimum Wage Law, as amended;

The New Jersey Wage and Hour Law, as amended;

Equal Pay Law for New Jersey, as amended;

The New Jersey Worker Health and Safety Act, as amended;

The New Jersey Workers' Compensation Act, N.J.S.A. 34:15-7 et seq.;

The New Jersey Family Leave Act, as amended;

The New Jersey Conscientious Employee Protection Act, as amended;

The New Jersey Employer-Employee Relations Act, as amended;

Any anti-retaliation provision of any statute or law including common law;

Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance;

Any provision of any federal or state constitution;

Any public policy, contract, tort, or common law;

Any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages); and

Attorneys' fees, litigation costs, medical bills for physical or psychological treatment (paid or outstanding), and any liens of any nature arising out of the allegations made in connection with Ms. McKnight-Johnson's employment with the Board.

Ms. McKnight-Johnson does not waive, release or give up any claim arising from an intentional act by the Board or any and all of the Board's officers, board members, agents, representatives, attorneys, and employees which unduly obstructs the processing of her application for disability retirement or her appeal of a denial of same.

3. No Claims Permitted/Covenant Not to Sue. Ms. McKnight-Johnson agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court or before any administrative agency relating to her employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Ms. McKnight-Johnson from bringing an action to enforce the Board's obligations as set forth herein. Nothing in this Stipulation is intended to prevent Ms. McKnight-Johnson from contacting a state or federal civil rights agency; however, if Ms. McKnight-Johnson signs this Stipulation, she will not be able to obtain any relief or recovery in connection with any complaint or charge filed with such agency. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Ms. McKnight-Johnson, it shall be dismissed with prejudice upon presentation of this Stipulation, and Ms. McKnight-Johnson shall reimburse the Board for the costs, including attorneys' fees, of defending any such action. Ms. McKnight-Johnson confirms that no such charge, complaint, or action currently exists in any forum or form.

4. No Right To Employment or Re-Employment. Ms. McKnight-Johnson understands and agrees that she has no right to or expectation of employment or re-employment with the Board.

5. Requests for Information. Except as otherwise required by law, the Board will divulge only public record information if a potential employer or other individual or entity contacts the Board seeking information regarding Ms. McKnight-Johnson. Pursuant to N.J.S.A. 47A:1-10, public record information shall include Ms. McKnight-Johnson's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received."

6. Attorneys' Fees. Ms. McKnight-Johnson and her attorney agree that Ms. McKnight-Johnson will bear her own costs and attorneys' fees which she has incurred in connection with the tenure hearing dismissal matter and that no amounts other than the payment to be made pursuant to Paragraph 1 of this Stipulation shall be sought by or owed to Ms. McKnight-Johnson or her attorney in connection with this matter.

7. No Admission of Liability. It is expressly understood that neither the execution of this Stipulation, nor any other action taken by the Board in connection with this Stipulation, constitutes an admission by the Board of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Ms. McKnight-Johnson's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. The parties agree that the Board has entered into this Stipulation in order to avoid the costs of a tenure dismissal hearing, and that the Board specifically denies any legal liability to Ms. McKnight-Johnson or to any other person.

8. Entire Agreement/Sought Assistance of Counsel. This Stipulation contains the sole and entire agreement between the parties hereto, and fully supersedes any and all prior

agreements and understandings pertaining to the subject matter hereof. Ms. McKnight-Johnson represents and acknowledges that, prior to executing this Stipulation, she consulted with her counsel (Bergman & Barrett, by Michael T. Barrett, Esq.), that she had ample time to do so, that she obtained the advice of her counsel prior to making the decision to execute this Stipulation, and that she has not relied upon any representation or statement not set forth in this Stipulation made by any other party thereto, or their counsel or representatives, with regard to the subject matter of this Stipulation. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

9. Severability. The parties agree that if any Court declares any portion of this Stipulation unenforceable, the remaining portions shall be fully enforceable.

10. Counterparts/Applicable Law/Breach. This Stipulation may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction of the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of the State of New Jersey, venued in Middlesex County. The parties further agree that this Stipulation may be specifically enforced in court, may be the subject of an action for breach, and may be used as evidence in a subsequent proceeding in which either of the parties allege a breach of this Stipulation, and that in the event that either party breaches this Stipulation and a subsequent action to enforce the Stipulation is successful, the prevailing party shall be entitled to the attorneys' fees and costs incurred with respect to any such action.

11. Notices. Unless otherwise specified herein, any notices sent in connection with this Stipulation shall be sent as follows:

As to Ms. McKnight-Johnson:

Michael T. Barrett, Esq.
Bergman & Barrett
Nine Tamarack Circle
U.S. Highway 206 North
Skillman, New Jersey 08558

As to the Board:

Viola S. Lordi, Esq.
Wilentz, Goldman & Spitzer P.A.
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095

12. Effective Date. This Stipulation shall not become effective or enforceable until the Board has approved this Stipulation by resolution and Viola S. Lordi, Esq. of Wilentz, Goldman & Spitzer P.A. is in receipt of (1) an executed original of this Stipulation; (2) a signed copy of the non-revocation letter attached hereto as Exhibit B; and (3) Ms. McKnight-Johnson's letter of resignation.

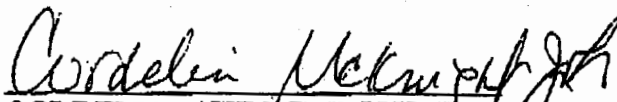
13. Voluntary Agreement. Ms. McKnight-Johnson hereby acknowledges that she is signing this Stipulation voluntarily of her own free will and not under duress or coercion of any kind. She understands and agrees that she knowingly and voluntarily has decided to enter into this Stipulation and release any and all potential claims against the Board and surrender any and all tenure rights that she has with the Board after thoroughly reviewing this Stipulation with her attorney.

14. Board Approval. This Stipulation must be approved by the Board by resolution prior to being effective or final.

15. Commissioner's Approval. Pursuant to N.J.A.C. 6A:3-5.6, this Stipulation is subject to the approval of the Commissioner of Education prior to being effective or final.

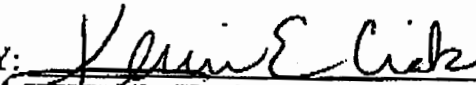
The Board has reviewed this Stipulation and finds it to be in the best interest of the Board and the taxpayers of the Borough of Sayreville because by settling the tenure charges, the Board and the taxpayers of the Borough of Sayreville will be spared the expense and inconvenience of further litigation. Additionally, the Stipulation contains a release and waiver that are in the public interest because they preclude, to the extent permitted by law, any litigation by Ms. McKnight-Johnson against the Board.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS STIPULATION AS FOLLOWS:


CORDELIA MCKNIGHT-JOHNSON

DATED: 8/9/05

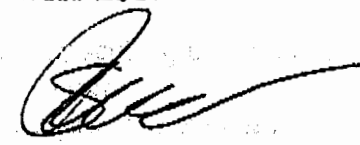
BOROUGH OF SAYREVILLE
BOARD OF EDUCATION

BY: 

KEVIN E. CIAK
Board President

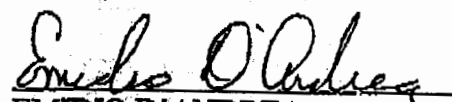
DATED: 10/3/05

WITNESS:


MICHAEL T. BARRETT

DATED: 9-9-05

WITNESS:
BOROUGH OF SAYREVILLE
BOARD OF EDUCATION


EMIDIO D'ANDREA
Business Administrator/Board Secretary

DATED: 10/3/05

EXHIBIT A

Borough of Sayreville Board of Education
150 Lincoln Street
Sayreville, New Jersey 08872

Dear Board of Education:

Please accept my resignation as an employee of the Borough of Sayreville Board of Education effective ~~January~~ 1, 2006. I understand this resignation is irrevocable.

March 1, CMJ

Very truly yours,

Cordelia Mcknight-Johnson

CORDELIA MCKNIGHT-JOHNSON

Dated: 9/9/05
CMJ

I - BUILDING AND GROUNDS

A. No report.

II - FINANCE

A. No report.

III - PERSONNEL (NON-CERTIFIED)

A. No report.

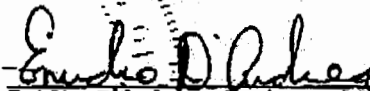
IV - PERSONNEL (CERTIFIED)

- * A. The Board of Education is requested to approve the following resolution:

The Superintendent of Schools recommends that the Board of Education: (1) APPROVE the Stipulation of Settlement and Addendum thereto, previously submitted, in the matter entitled McKnight-Johnson, Cordelia I/M/O Tenure Hearing, Borough of Sayreville School District, Middlesex County, which is pending before the Commissioner of Education, New Jersey Department of Education as Agency Reference Number 102-5/05, and the Office of Administrative Law as Docket Number EDUTH 02995-2005S; (2) APPROVE, retroactively, the suspension with pay of Cordelia McKnight-Johnson, Guidance Counselor at the Arleth and Eisenhower Schools, effective September 1, 2005 through February 28, 2006, prorated, based on a salary of \$73,800 plus a stipend of \$125, for a prorated total of \$44,355; (3) ACCEPT the resignation of Cordelia McKnight-Johnson, effective March 1, 2006; and (4) AUTHORIZE the Board President, School Business Administrator/Board Secretary, and Board Attorney to take any and all necessary and appropriate steps to implement the Stipulation of Settlement and Addendum.

September 30, 2005

* I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND EXACT COPY OF A RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE AT A MEETING HELD ON SEPTEMBER 30, 2005. THE MOTION WAS MADE BY MR. BARONE AND SECONDED BY MR. LEMBO. ROLL CALL VOTE. SIX YES VOTES RECORDED BY MR. BARONE, MRS. BATKO, MR. DIPOALO, MR. LEMBO, MR. MACAGNONE AND MR. CIAK. MESSRS. CLARK, COX AND RITTENHOUSE WERE ABSENT. MOTION CARRIED.



Emidio D'Andrea, Business Administrator/Board Secretary

OAL DKT. NO. EDU 2795-03
AGENCY DKT. NO. 91-3/03

DEBORA PERMITO,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION
MILLVILLE, CUMBERLAND COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

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

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

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/17/05

Date of Mailing: 11/17/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2795-03

AGENCY DKT. NO. 91-3/03

DEBORA PERMITO,

Petitioner,

v.

**BOARD OF EDUCATION OF
THE CITY OF MILLVILLE,
CUMBERLAND COUNTY,**

Respondent.

Ned P. Rogovoy, Esq., for petitioner

Arnold Robinson, Esq., for respondent (Robinson & Andujar, attorneys)

Record Closed: October 25, 2005

Decided: October 25, 2005

BEFORE W. TODD MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 2004, for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

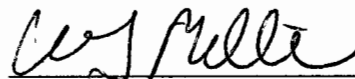
I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

October 25, 2005

DATE



W. TODD MILLER, ALJ

Receipt Acknowledged:

10-27-05

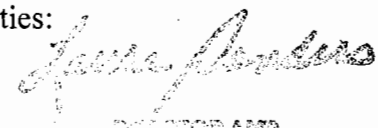
DATE


DEPARTMENT OF EDUCATION

OCT 28 2005

DATE

Mailed to Parties:


OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED

2005 OCT 25 A 9:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856)205-9701
Attorney for Petitioner

DEBORAH PERMITO

Petitioner

v.

MILLVILLE BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY

OAK DKT. NO. EDU 2795-03
AGENCY DKT. NO. 91-3/03

STIPULATION OF SETTLEMENT

The petitioner, Debora Permito, an employee of the Millville Board of Education, represented by Ned P. Rogovoy, Esquire, filed a Petition with the Commissioner of Education on or about March 17, 2003. The Petition requests the reinstatement of 65 sick days docked to the petitioner as a result of her absences. Petitioner alleged that from September of 1999 through November 18, 2002, the days that she was out of the classroom as a result of sickness were related to her exposure to mold allergens found in the classroom:

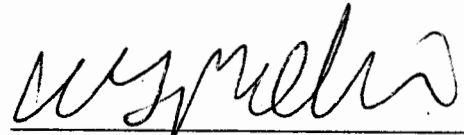
The respondent, Millville Board of Education, represented by Arnold Robinson, Esquire, filed a responsive pleading denying the allegations on or about May 2, 2003 and the matter was joined.

Both parties retained experts and as a result of negotiations and to settle all controversies related to the reinstatement of sick days during the petitioner's entire career up until present, it is agreed as follows:

The respondent, Millville Board of Education, shall place 30 sick days into the petitioner's bank, thus causing her bank of saved sick days to be increased by 30, and she shall use them as the Collective Bargaining Agreement and policies of the respondent permit.

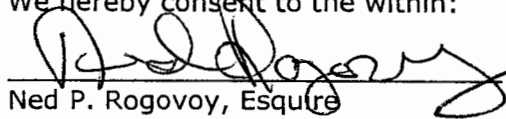
Further, this resolves all issues related to the reinstatement of sick days as and through the date of settlement.

It is expressly understood and agreed that the acceptance of the said resolution is in full accord and satisfaction and in compromise of all disputed claims and that the resolution thereof is not an admission of liability but is made for the purpose of terminating all disputes and litigation between the parties.



W. Todd Miller, ALJ

We hereby consent to the within:



Ned P. Rogovoy, Esquire
Attorney for Petitioner



Arnold Robinson, Esquire
Attorney for Respondent

RECEIVED

2005 OCT 25 A 9:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856)205-9701
Attorney for Petitioner

DEBORAH PERMITO

Petitioner

v.

MILLVILLE BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY

OAK DKT. NO. EDU 2795-03
AGENCY DKT. NO. 91-3/03

STIPULATION OF SETTLEMENT

The petitioner, Debora Permito, an employee of the Millville Board of Education, represented by Ned P. Rogovoy, Esquire, filed a Petition with the Commissioner of Education on or about March 17, 2003. The Petition requests the reinstatement of 65 sick days docked to the petitioner as a result of her absences. Petitioner alleged that from September of 1999 through November 18, 2002, the days that she was out of the classroom as a result of sickness were related to her exposure to mold allergens found in the classroom.

The respondent, Millville Board of Education, represented by Arnold Robinson, Esquire, filed a responsive pleading denying the allegations on or about May 2, 2003 and the matter was joined.

Both parties retained experts and as a result of negotiations and to settle all controversies related to the reinstatement of sick days during the petitioner's entire career up until present, it is agreed as follows:

The respondent, Millville Board of Education, shall place 30 sick days into the petitioner's bank, thus causing her bank of saved sick days to be increased by 30, and she shall use them as the Collective Bargaining Agreement and policies of the respondent permit.

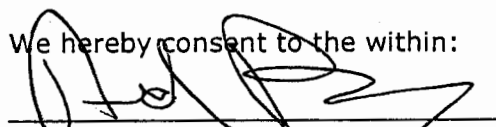
Further, this resolves all issues related to the reinstatement of sick days as and through the date of settlement.

It is expressly understood and agreed that the acceptance of the said resolution is in full accord and satisfaction and in compromise of all disputed claims and that the resolution thereof is not an admission of liability but is made for the purpose of terminating all disputes and litigation between the parties.



W. Todd Miller, ALJ

We hereby consent to the within:


Ned P. Rogovoy, Esquire
Attorney for Petitioner
Arnold Robinson, Esquire
Attorney for Respondent

OAL DKT. NO. EDU 09757-05
AGENCY DKT. NO. 195-8/05

J.C. AND E.C., on behalf of minor child, C.C., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL : DECISION
DISTRICT OF PARSIPPANY-TROY HILLS,
MORRIS COUNTY, :
RESPONDENT. :

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

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/05
Date of Mailing: 11/23/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09757-05

AGENCY DKT. NO. 195-8/05

J.C. AND E.C. ON BEHALF OF MINOR CHILD C.C.,

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF
PARSIPPANY-TROY HILLS, MORRIS COUNTY,**

Respondent.

William F. Mueller, Esq., for petitioners (Clemente, Mueller & Tobia, P.A.,
attorneys)

M.L. Fabian, Esq., for respondent (Dillon, Bitar & Luther, attorneys)

Record Closed: October 21, 2005

Decided: October 25, 2005

BEFORE **THOMAS E. CLANCY, ALAJ:**

This matter was transmitted to the Office of Administrative Law (OAL) on August 26, 2005, 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.

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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

10/25/05

THOMAS E. CLANCY, ALAJ

Thomas E. Clancy

DATE

11-2-05

Mailed to Parties:

**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

M. Kathleen Duncan/ch
Lynn Anders

OCT 26 2005

DATE

da

OFFICE OF ADMINISTRATIVE LAW

William F. Mueller, Esq.
Clemente, Mueller & Tobia, P.A.
218 Ridgedale Avenue
P.O. Box 1296
Morristown, NJ 07962-1296
(973) 455-8008
Attorney for Petitioners

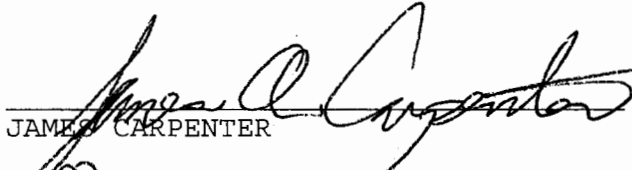
OCT 21 2005
OFFICE OF ADMINISTRATIVE LAW
38 WASHINGTON STREET
NEWARK, NJ 07102

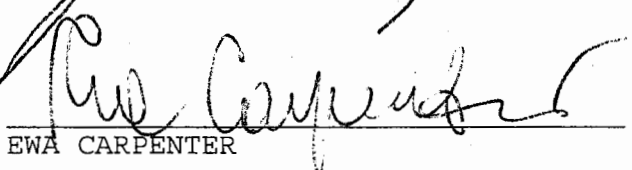
JAMES CARPENTER AND	:	
EWA CARPENTER ON BEHALF	:	
OF THEIR MINOR CHILD,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF
Petitioners,	:	NEW JERSEY
	:	
VS.	:	OAL Docket No. EDVOS 09757-
	:	2005 N
	:	
PARSIPPANY-TROY HILLS	:	AGENCY REF. NO. 195-8/05
BOARD OF EDUCATION,	:	
	:	SETTLEMENT AGREEMENT
Respondent.	:	

PETITIONERS JAMES CARPENTER AND EWA CARPENTER , as Guardians Ad Litem for Cristina Carpenter, and PARSIPPANY-TROY HILLS BOARD OF EDUCATION, through Angelo Giuliana and Joy Passalacqua, having met on August 22, 2005, and all parties having agreed that the matter is settled, it is stipulated as follows:

1. Cristina Carpenter will be advanced to the Eighth Grade at Brooklawn Middle School commencing with the September 2005 class schedule;
2. The Parsippany-Troy Hills Board of Education agrees that Cristina Carpenter will be enrolled in a Basic Skills mathematics class in addition to a regular mathematics class;
3. The parents of Cristina Carpenter hereby agree to provide extra tutoring in the area of mathematics to Cristina Carpenter in order to have her reach the adequate level of Eighth Graders;

4. The parents of Cristina Carpenter will make every effort to ensure that Cristina arrives at the school on time on the school-provided bus transportation or otherwise;
5. The parents of Cristina Carpenter state that she is obtaining the necessary medical help so that she is able to attend school regularly commencing in September;
6. The parents of Cristina Carpenter recognize that attendance at the school is vital and that undue absence or tardiness will be considered a violation of this agreement and subject Cristina to fair and reasonable sanctions by the PARSIPPANY-TROY HILLS BOARD OF EDUCATION, including retention.

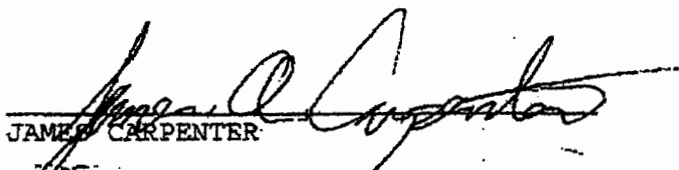
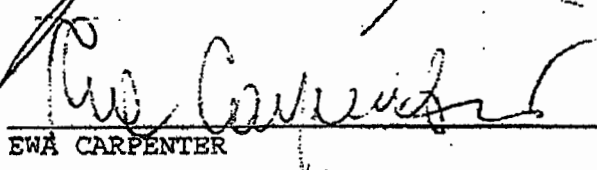

JAMES CARPENTER


EWA CARPENTER

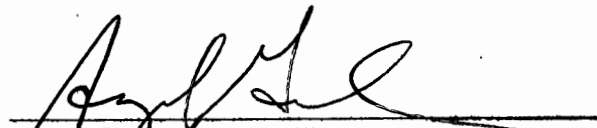
PARSIPPANY-TROY HILLS
BOARD OF EDUCATION

BY: ANGELO GIULIANA,
BROOKLAW MIDDLE SCHOOL

4. The parents of Cristina Carpenter will make every effort to ensure that Cristina arrives at the school on time on the school-provided bus transportation or otherwise;
5. The parents of Cristina Carpenter state that she is obtaining the necessary medical help so that she is able to attend school regularly commencing in September;
6. The parents of Cristina Carpenter recognize that attendance at the school is vital and that undue absence or tardiness will be considered a violation of this agreement and subject Cristina to fair and reasonable sanctions by the PARSIPPANY-TROY HILLS BOARD OF EDUCATION, including retention.


JAMES CARPENTER
EWA CARPENTER

PARSIPPANY-TROY HILLS
BOARD OF EDUCATION


BY: ANGELO GIULIANA,
BROOKLAW MIDDLE SCHOOL

OAL DKT. NO. EDU 3368-05
AGENCY DKT. NO. 49-2/05

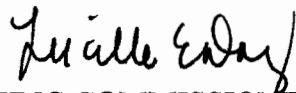
B.T.K. on behalf of minor child, B.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION	:	DECISION
COUNTY VOCATIONAL-TECHNICAL	:	
SCHOOL DISTRICT, UNION COUNTY,	:	
RESPONDENT.	:	

The record, Stipulation of Dismissal of Action with Prejudice and without Costs, 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 her approval pursuant to *N.J.A.C. 1:1-19.1*. The Commissioner has, therefore, determined to consider the Stipulation of Dismissal as a withdrawal of all claims asserted in this matter, pursuant to *N.J.A.C. 1:1-19.2*.

Accordingly, the Commissioner approves withdrawal of the instant matter, which is no longer deemed to be a contested case and is hereby dismissed with prejudice.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/05
Date of Mailing: 11/23/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 3368-05

AGENCY DKT. NO. 49-2/05

B.T.K., ON BEHALF OF MINOR CHILD, B.K.,

Petitioner,

v.

**BOARD OF EDUCATION OF UNION COUNTY
VOCATIONAL-TECHNICAL SCHOOL DISTRICT
UNION COUNTY,**

Respondent.

Aimee Torres., Esq. and Stephen M. Hudspeth, Esq., for petitioner

Edward J. Kologi, Esq, for respondent

Record Closed: October 19, 2005

Decided: October 20, 2005

BEFORE JEFFREY A. GERSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, B.T.K. on behalf of minor child, B.K. contests the denial of admission to the National Honor Society due to an alleged academic dishonesty act and placement of details of this act on child's permanent record.

The matter was transmitted to the Office of Administrative Law (OAL) on March 23, 2005, as a contested case pursuant to *N.J.S.A. 52:14B-1 to 15* and *N.J.S.A. 52:14F-1 to 13*. A hearing was held on October 19, 2005 and at that time the parties agreed the matter should be dismissed with prejudice and without costs. A signed copy of the Stipulation of Dismissal is attached hereto and made a part hereof.

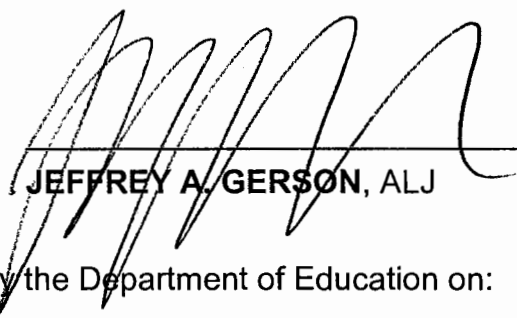
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 20, 2005

DATE



JEFFREY A. GERSON, ALJ

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

DATE

OCT 25 2005

DATE

sej

Mailed to Parties:



**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

OFFICE OF ADMINISTRATIVE LAW

STATE OF NEW JERSEY

B.T.K. ON BEHALF OF
MINOR CHILD, B.K.,
v. ^{petitioners}

UNION COUNTY VOCATIONAL-
TECHNICAL SCH. DIST BOE,
^{Respondent.}

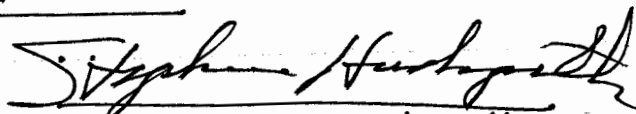
OFFICE OF
ADMINISTRATIVE LAW

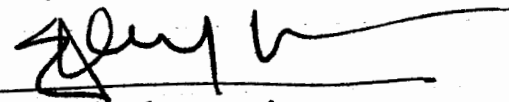
CAL DKT NO.

EDUOS 03368-
2005 NJ

STIPULATION OF
DISMISSAL OF
ACTION WITH
PREJUDICE AND
WITHOUT COSTS

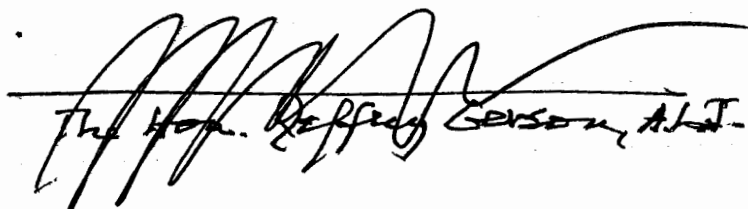
It is hereby stipulated and
agreed by and between the parties
hereto that this action, with
with prejudice and without costs
by either party to the other, is
hereby DISMISSED.


Stephen M. Hudspeeth
Attorney for Petitioners


Edward J. Koloci
Attorney for Respondent

Dated: October 19, 2005

SO ORDERED:


Hon. Jeffrey Gerson, A.J.

Jeffers

From: Duncan, Kathleen [kathleen.duncan@doe.state.nj.us]

Sent: Monday, October 24, 2005 11:42 AM

To: Jeffers

Subject: RE: EDU 3368-05 (Dismissal)

This initial decision references an attached signed stipulation of dismissal and therefore must be hand delivered with the stipulation attached. We will calculate our 45 day period for issuing the final from the date we receive the complete hard copy.

Kathy Duncan

Director, Bureau of Controversies and Disputes

609-292-5706

(fax) 609-292-4333

-----Original Message-----

From: Jeffers [mailto:Jeffers@oal.state.nj.us]

Sent: Monday, October 24, 2005 11:47 AM

To: EDU

Subject: EDU 3368-05 (Dismissal)

Importance: High

<< File: EDU 3368-05 (Dismissal).doc >>

AGENCY DKT NO. 311-11/05

IN THE MATTER OF EDMUND J. ZILINSKI, :
BLOOMFIELD BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
ESSEX COUNTY. : DECISION
_____ :

SYNOPSIS

The School Ethics Commission determined that Bloomfield Board of Education member Edmund J. Zilinski violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when he took private action in organizing confidential information containing the names of students suspended from October to November 2004 on an Excel spreadsheet and accidentally transmitted this information as an attachment to an e-mail sent to all Board members on April 4, 2005. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Edmund J. Zilinski be 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.

IN THE MATTER OF EDMUND J. ZILINSKI, :
BLOOMFIELD BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
ESSEX COUNTY. : DECISION
_____ :

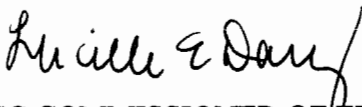
The record of this matter and the decision of the School Ethics Commission (“Commission”), finding that Bloomfield Board of Education member Edmund J. Zilinski violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when he took private action in organizing confidential information containing the names of students suspended from October to November 2004 on an Excel spreadsheet and accidentally transmitted this information as an attachment to an e-mail sent to all Board members on April 4, 2005, along with the Commission’s recommended penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, Mr. Zilinski was provided thirteen days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner’s consideration. No comments were filed either by Mr. Zilinski or counsel on his behalf.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner’s jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted to a review of the Commission’s recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Edmund J. Zilinski be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/05

Date of Mailing: 11/28/05

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

IN THE MATTER OF	:	BEFORE THE SCHOOL ETHICS COMMISSION
	:	
	:	
EDMUND J. ZILINSKI	:	Docket No. C20-05
<i>BLOOMFIELD BOARD OF</i>	:	
<i>EDUCATION</i>	:	
<i>ESSEX COUNTY</i>	:	DECISION
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on April 18, 2005 by Barbara Francisco against Edmund J. Zilinski, a member of the Bloomfield Board of Education (Board), alleging that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members in the Act when he sent an e-mail on April 4, 2005 to members of the Board with an attachment that contained confidential information listing the names of students suspended from October to November 2004. Mr. Zilinski submitted a timely answer in which he admitted sending the April 4, 2005 e-mail, but maintained that it was accidentally sent and that four minutes after it was sent he sent another e-mail with the correct attachment.

The Commission invited Mr. Zilinski to attend its July 26, 2005 meeting to present witnesses and testimony, but did not require that he be present. Neither Mr. Zilinski nor the complainant attended the hearing. Instead, on July 22, 2005, the complainant submitted a response to Mr. Zilinski's answer, and on July 23, 2005, Mr. Zilinski replied to complainant's response. At its July 26, 2005 meeting, the Commission voted to find probable cause to credit the allegations that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members in the School Ethics Act. The Commission also voted to find no probable cause that Mr. Zilinsky violated N.J.S.A. 18A:12-24.1(a). At its August 23, 2005 meeting the Commission adopted its decision finding probable cause.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, advised Mr. Zilinski that it would decide the matter on the basis of written submissions. Mr. Zilinski was invited to provide a written submission to the Commission by September 12, 2005, and set forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members. Mr. Zilinski was also told that his written submission should include his position on an appropriate sanction should the Commission determine that the Act was violated. Mr. Zilinski filed a timely response to the Commission's probable cause decision. In his response, Mr. Zilinski again admitted that he sent the April 4, 2005 e-mail with an attachment that contained the names of students suspended from October to November 2004, but he argued that his private action did not compromise the Board and that his release of confidential information to Board

members did not needlessly injure individuals or the schools. Mr. Zilinsky indicated that should the Commission find him in violation of the Act, he should only be reprimanded since he inadvertently sent the e-mail and then four minutes later sent the correct file.

FACTS

The Commission based its finding of probable cause on the following facts.

At the time of the allegations in this complaint, Mr. Zilinski and the complainant were members of the Board. The complainant was the Board President at the time Mr. Zilinski sent the e-mail and she recently retired from the Board after being on it for 12 years. Mr. Zilinski is now Board President. Board policy 8330 establishes the process for obtaining and disseminating pupil record information.

In early November, Mr. Zilinski received two anonymous letters regarding student suspensions for dress code violations. He arranged the information from the letter in an Excel spreadsheet so he could better understand it. The Excel spread sheet included the names of the students who were suspended from October to November 2004, the number of days they were suspended, the type of suspension and a reason if the suspension was for a violation of the dress code. Mr. Zilinski named the file "suspensions." After Mr. Zilinski organized the information and reviewed it, he came to the conclusion that it was useless. He made a decision not to turn the information over to the Board President because of a previous negative experience that the Board President had with the administration regarding an anonymous letter. Mr. Zilinski mentioned the letters to a couple of other Board members and they agreed that he should just let the issue die.

On April 3, 2005, Mr. Zilinski found an article in the Star Ledger reporting on how some districts use community service in lieu of out-of-school suspension. He wanted to share this information with the Board so he scanned the article into his computer and named the file "suspensions." On April 4, 2005 at 2:41 p.m., Mr. Zilinski sent an e-mail to the Board and copied himself. The e-mail included an attachment named "suspensions." When Mr. Zilinski reviewed the attachment in the e-mail that had already been sent, he realized that he had mistakenly sent the Excel spread sheet, which contained information regarding the students that had been suspended from October to November 2004. At 2:45 p.m. on April 4, 2005, Mr. Zilinski sent the Board another e-mail with an attachment named "suspensions" that was the Star Ledger article. In the e-mail he said, "Sorry, sent wrong file on previous..... this is the Star Ledger article."

ANALYSIS

The Commission found probable cause that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(e) when he sent the e-mail to all Board members on April 4, 2005 with an attachment that contained the names of students suspended from October to November 2004. N.J.S.A. 18A:12-24.1(e) provides:

I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Mr. Zilinski received the information regarding the students through two anonymous letters and organized it in an Excel spread sheet to make sense of it and then accidentally sent it as an e-mail attachment to the Board. Four minutes after that, he e-mailed the Board with the correct attachment notifying them that the first attachment was the wrong file. Mr. Zilinski did not go to either the Board President or the Superintendent after he had received the two anonymous letters. In his response to the Commission's probable cause decision, he argued that his action did not compromise the Board because only Board members received the e-mail with the confidential information. He also contended that the Board members would otherwise be entitled to the information. However, Board policy 8330 restricts access to pupil records to the pupil's parent or legal guardian, and the Board is permitted access only through the Superintendent. Therefore, the Board would not have been entitled to the confidential information in the e-mail. The Commission also notes that Mr. Zilinski could have inadvertently sent the file containing the confidential information to anyone. His children or spouse could have also accessed the file with the confidential information. The Commission finds that the Board may have been compromised when Mr. Zilinski's inadvertently sent the April 4, 2005 e-mail. Therefore, the Commission finds Mr. Zilinski violated N.J.S.A. 18A:12-24.1(e) when he took private action in organizing confidential information containing the names of students in an Excel spreadsheet, which he accidentally sent to the entire Board as an attachment to his e-mail on April 4, 2005.

The Commission also found probable cause that Mr. Zilinski violated N.J.S.A. 18A:12-24.1(g) when he sent the e-mail to all Board members on April 4, 2005 with an attachment that contained the names of students suspended from October to November 2004. N.J.S.A. 18A:12-24.1(g) provides:

I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

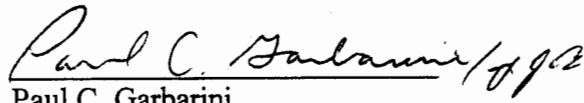
The April 4, 2005 e-mail contained confidential information regarding students including their names and the reason they were suspended if that suspension was due to a violation of the dress code. In his response to the probable cause decision, Mr. Zilinski argued that his e-mail did not result in injury and could not result in injury. However, the Commission again notes that Mr. Zilinsky's children and spouse could have accessed the file with the confidential information and those he sent it to could have inadvertently sent it to anyone. The Commission further notes that Mr. Zilinsky could have used initials rather than full names when he organized the information into an excel spreadsheet. Therefore, the Commission finds that Mr. Zilinsky violated N.J.S.A. 18A:12-24.1(g)

when he failed to hold confidential the names of students who had been suspended during October and November 2004.

DECISION

For the reasons discussed above, the Commission finds that Edmund J. Zilinski violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members in the Act. The Commission recommends that the Commissioner of Education impose a penalty of reprimand since Mr. Zilinski immediately advised the Board members that he had sent the wrong attachment.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Zilinski 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

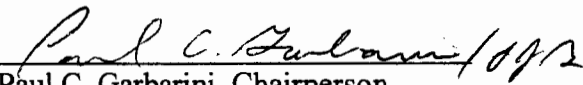
Resolution Adopting Decision – C20-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

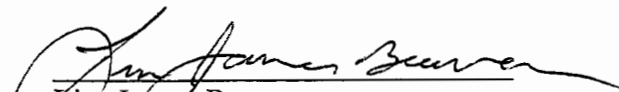
Whereas, at its meeting of September 27, 2005, the Commission found that Edmund J. Zilinski violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of October 25, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.


Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 25, 2005.


Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C20-05

JOHN MANLEY, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF OLD BRIDGE : DECISION
 TOWNSHIP, MIDDLESEX COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner, a tenured special education teacher, alleged that the Board violated his tenure rights by terminating his employment as a Subject Area Coordinator, resulting in a reduction in salary and elimination of one of petitioner's contractually delineated duties. Petitioner contends that he attained tenure in the coordinator position by serving the statutorily-prescribed period in the position. Respondent Board maintains that tenure does not attach to a position compensated by stipend.

The ALJ found that: the matter was ripe for summary judgment; service in the title of Subject Area Coordinator leads to tenure as a teacher, not to the specific position of Subject Area Coordinator; the Subject Area Coordinator position was extracurricular; and the petitioner's stipend for work in the position of Subject Area Coordinator was not treated as salary by the Board, and was granted pursuant to another agreement as "extra compensation". The ALJ concluded that the Board did not violate petitioner's tenure rights by transferring him to another teaching position where he does not receive additional Subject Area Coordinator stipend, and ordered the petition dismissed with prejudice.

Upon a thorough and independent review, the Commissioner determined, pursuant to *Shriner v. Board of Education of Boonton*, 75 S.L.D. 939, that the Board had treated petitioner's stipend position monies as an integral part of his salary. However, notwithstanding petitioner's loss of compensation due to the non-availability of a coordinator stipend position at his newly assigned school, he suffered no reduction in pay. Rather, petitioner's teaching salary for the 2004-2005 school year increased as a result of his progression on the salary guide. The Commissioner, therefore, determined that there was no relief to be accorded petitioner, adopted the Initial Decision as modified above, and dismissed the instant 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.

Issued 12/19/05

-Mailed 12/20/05

OAL DKT. NO. EDU 10644-04
 AGENCY DKT. NO. 368-10/04

JOHN MANLEY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF OLD BRIDGE	:	DECISION
TOWNSHIP, MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein. The Board did not file reply exceptions.

Petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that his compensation for functioning as a Subject Area Coordinator was not treated as an integral portion of his salary by the Board and that he, therefore, possesses no entitlement to these moneys. Rather, petitioner argues, compensation for this position was included in the paycheck he received for his teaching duties and was subject to pension contributions. Thus, petitioner maintains that he is entitled to retain the salary for this additional position even though he no longer serves as a Subject Area Coordinator. (Petitioner's Exceptions at 1-2) In support of his argument, petitioner first cites to *N.J.A.C.* 17:3-4.1 which, he avers, in pertinent part specifies:

(a) Only a member's base or contractual salary shall be subject to pension***contributions***(1) "Base salary" means the annual compensation of a member, in accordance with contracts, ordinances, resolutions, or other established salary policies of the

member's employer for all employees in the same position, or all employees covered by the collective bargaining agreement, which is reported in regular, periodic installments in accordance with the payroll cycle of the employer. (2) "Extra compensation" means individual salary adjustments which are granted primarily in anticipation of a member's retirement or as additional remuneration for performing temporary duties beyond the regular work day or work year.¹
(Petitioner's Exceptions at 2-3)

Although the ALJ determined that "inclusion of his stipend in pension contributions should not affect the tenure analysis" (Initial Decision at 8), pursuant to this regulatory provision, petitioner submits, "such inclusion is the tenure analysis." (*Id.* at 3) (emphasis in text)

Next, despite the ALJ's Initial Decision discussion of the Commissioner's holding in *Shriner v. Board of Education of Boonton*, 75 S.L.D. 939, which petitioner advances appears factually identical to the situation here, wherein he recognized

[t]here it was stated that because the Board incorporated the Petitioner's stipend into his contract salary, and in all other ways treated the stipend as salary (including pension payments), the stipend amount was protected by tenure even though the position for which Petitioner received the stipend was not. (Initial Decision at 8)

the ALJ nonetheless tried to distinguish this matter when he further stated that here "the Respondent did not treat Petitioner's stipend as salary as it was granted pursuant to another agreement and referred to as 'extra compensation.'" (Petitioner's Exceptions at 4) Petitioner maintains that the verbal categorization of these payments utilized by the Board is wholly irrelevant to the analysis. Solely germane, he argues, is that "payment for his duties as Subject Area Coordinator was part and parcel of his salary for his duties as a teacher. The former was an

¹ Petitioner asserts that, pursuant to *Siri v. Board of Trustees of the Teachers' Pension & Annuity Fund*, 262 N.J. Super. 147, 152 the term "temporary duties" is only applicable in cases where a teaching staff member is temporarily assigned to substitute for the regular holder of the position. (*Id.* at 3)

integral part of the latter. Petitioner is therefore entitled to this extra compensation for Subject Area Coordinator, even if he is no longer entitled to the position.” (*Ibid.*)

Upon careful and independent review of the record, and full consideration of petitioner’s exception advancements, the Commissioner concurs with the ALJ that Summary Decision is appropriately granted to the Board. In so determining, the Commissioner is satisfied -- for the reasons detailed in the ALJ’s decision at pp. 3-7 -- that petitioner did not acquire tenure in his coordinator position, nor were the duties of this position other than extracurricular in nature. The crux of petitioner’s remaining claim of entitlement to the additional compensation is that, pursuant to *Shriner, supra*, because the Board incorporated the stipend for his Subject Area Coordinator duties as an *integral* part of his contractual teaching salary, depriving him of these monies equates to a reduction in salary which -- absent the certification of tenure charges to the Commissioner -- is violative of his tenure rights pursuant to *N.J.S.A.* 18A:6-10. The Commissioner finds that, to the extent that *Shriner, supra*, may be read to provide petitioner relief in this matter, a reasoned reading of this decision in its entirety conclusively demonstrates that, under the circumstances existing here, such is not the case.

In *Shriner, supra*, petitioner -- a tenured teacher -- also served in the stipended position of athletic director/head of the physical education department, for which he received an additional \$550 a year. In 1964, at petitioner’s request, the Board incorporated his stipend into a single contract salary for teaching. Thereafter, it provided annual notification to petitioner of renewal of his appointment as a teacher and the athletic director/head of physical education department position at a single designated salary for the ensuing year through the 1972-73 school year, at which time his salary was \$16,500. Between May and July 1973, the Board acted to assign the duties of athletic director/head of physical education department to another individual

and reduced petitioner's 1973-74 salary by \$1,000, the amount he would have received had he continued to serve in his stipend position, which resulted in an overall reduction in salary of \$520.² On appeal, it was found

that the Board, having incorporated petitioner's stipend for performing as athletic director into his contract salary in 1964, thereafter treated it as a single salary. Payments that were made to the Teacher's Pension and Annuity Fund on petitioner's behalf were computed on the total amount of the contract salary. Such action by the Board is supportive of the conclusion that the Board, while it did negotiate the amount of stipend to be paid an athletic director, looked upon, and in fact established the additional compensation of its athletic director, as an integral portion of his salary as a teaching staff member. It therefore follows that when the Board established petitioner's salary at \$15,980 for the 1973-74 school year, it reduced his salary from the \$16,500 he was paid in 1972-73 by \$520.

Shriner at 940

As such, the Commissioner held that -- absent the certification of tenure charges -- such reduction was impermissible and must be restored.

However, Shriner's claim of entitlement to a continuing salary that was \$1,000 higher than that of other negotiated teaching staff members with equal training, assigned duties and years of experience -- irrespective of the fact that he was no longer performing the duties of the stipend position -- was rejected. Rather, the Commissioner concluded:

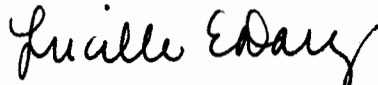
Petitioner has no continuing entitlement beyond 1972-73 to a salary \$1,000 greater than that called for in the negotiated salary policy for a teaching staff member of his years and experience, training, and assigned duties. The Commissioner so holds. *Consequently, the Board may establish petitioner's salary at \$16,500 subsequent to school year 1972-73 until his years of experience entitle him to receive the next increment on his assigned salary scale.* (citation omitted) *Shriner* at 942 (emphasis added)

² Such is the case because the Board established petitioner's 1973-74 school year salary at \$15,980, which incorporated a scheduled increment progression at the beginning of the school year.

With this background in mind, the Commissioner turns to the factual situation existing in the case at bar. The record reflects that, despite the fact that the within Board did treat petitioner's stipend payment as an integral part of his teaching salary, pursuant to *Shriner, supra*, and -- notwithstanding his loss of compensation due to the non-availability of a coordinator stipend position at his newly assigned school -- *petitioner has suffered no reduction in salary*. Indeed, it is uncontroverted that his salary as a teacher for the 2004-05 school year *increased* as a result of his progression on the negotiated salary guide. Given that petitioner is no longer performing the duties of the coordinator stipend position, and has not been impermissibly reduced in salary, the Commissioner finds and concludes that there is no relief which can be accorded him in this matter.

Accordingly, the Initial Decision of the OAL, as modified above, is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.³


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/19/05

Date of Mailing: 12/20/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10644-04

AGENCY DKT. NO. 368-10/04

JOHN MANLEY,

Petitioner,

v.

**BOARD OF EDUCATION,
OLD BRIDGE TOWNSHIP,
MIDDLESEX COUNTY,**

Respondent.

Arnold Melk, Esq., for petitioner (Wills, O'Neill & Melk, attorney)

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

Record Closed: October 31, 2005

Decided: November 4, 2005

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE

John Manley (petitioner) is a tenured teaching staff member who alleges that the school district violated his tenure rights by terminating his employment as a "subject area coordinator" for the 2004-2005 school-year. The issue is whether or not petitioner

acquired tenure in the coordinator position. Petitioner contends that he attained tenure by serving the statutorily-prescribed period in the position. Old Bridge Board of Education (respondent) maintains that tenure does not attach to a position compensated by stipend.

PROCEDURAL HISTORY

On October 21, 2004, petitioner filed a petition of appeal with the Commissioner of Education. On December 3, 2004, respondent filed its answer. On December 16, 2004, the Commissioner forwarded the matter to the Office of Administrative Law (OAL) for handling as a contested case. On June 9, 2005, in lieu of an evidentiary hearing, the petitioner moved for summary decision. On July 6, 2005, respondent filed a brief in opposition to the motion. On July 21, 2005, oral argument was scheduled and heard. The parties requested the record be kept open until the Board had the opportunity to review the settlement proposal by the petitioner. On October 31, 2005, during a conference call, the parties advised that matter could not be settled, and the record closed on that date.

STATEMENT OF FACTS

The facts in this matter are not in dispute.

1. Petitioner is a tenured special education teacher of the respondent, Old Bridge Township Board of Education.

2. From the years 2000 to 2004, the petitioner was assigned to an additional position as a Subject Area Coordinator for which he received additional compensation, and was subject to pension contribution. The job description specifies that the petitioner is required to perform some administrative duties, and is required to have a valid New Jersey Instructional Certificate, and appropriate teaching endorsement or eligibility. The additional compensation was described as a stipend (R-1).

3. The petitioner received a single paycheck for both positions.

4. In the Spring of 2004, the petitioner's new contract included the position of Subject Area Coordinator.

5. At the start of the 2004-2005 school-year, the petitioner was reassigned to the Jonas Salk Middle School, where the position of Subject Area Coordinator was not available. He did not receive compensation for the position of Subject Area Coordinator.

The preceding information is undisputed and is **FOUND** as fact.

CONCLUSION OF LAW

The facts involving this motion are not in dispute. Therefore, pursuant to *N.J.A.C. 1:12.5(b)* and *Brill v. Guardian Life Insurance Co. of America*, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact and that this matter is ripe for Summary Decision.

Generally, tenure accrues to 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. *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 81 (1982). Initially, it takes employment for three academic years and one day for a ten-month employee to acquire tenure. *N.J.S.A. 18A:28-5(b)*. Any previously-tenured teaching staff member "who is transferred or promoted with his consent to another position" obtains tenure in the new position after employment for only "two academic years in the new position, together with employment in the new position at the beginning of the next succeeding academic year." *N.J.S.A. 18A:28-69(b)*.

The sole issue to be determined is whether the petitioner acquired tenure in the position of Subject Area Coordinator. In order to resolve this issue, the following must be addressed:

1. Does the petitioner need a separate certificate to acquire tenure for his additional job duties?

2. Was petitioner's position an extracurricular stipend assignment, as opposed to a salaried position, and if so were petitioner's duties as coordinator separate from his teaching position?

3. Was petitioner's compensation treated as salary?

ISSUE ONE - DOES THE PETITIONER NEED A SEPARATE CERTIFICATE TO ACQUIRE TENURE FOR HIS ADDITIONAL JOB DUTIES?

The position presently at issue, Subject Area Coordinator, is an "unrecognized position" because it is not listed in the statutes or regulations. *N.J.A.C. 6A:9-5.5* (authorizing the use of unrecognized titles). As such, it cannot be one of the separately tenurable positions enumerated in *N.J.S.A. 18A:28-5* and, consequently, service in that title does not determine the scope of tenure protections. *Gittelman v. Hamilton Twp. Bd. of Ed., supra*, 94 *N.J.A.R. 2d* (EDU) at 268. Instead, the scope of protection provided by tenure will be determined by the certificates and endorsements required to hold the position. *Ibid.*

It is well established that "tenure is achieved in a specific 'position', and the scope of the tenured position is initially limited by the 'certificate' the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment." *Nelson v. Bd. of Ed. of Twp. of Old Bridge*, 148 *N.J.* 358, 366 (quoting, *Ellicott v. Bd. of Ed. of Twp. of Frankford*, 251 *N.J. Super.* 342, 348 (1991)). The limitation on the scope of tenure protection applies with the same force to both the positions enumerated by the regulations and to the "unrecognized positions" (those not enumerated by the regulations) authorized by *N.J.A.C. 6A:9-5.5*. *Gittelman v. Hamilton Twp. Bd. of Ed.*, 94 *N.J.A.R. 2d* (EDU) 258, 268 (1994) held that the scope of tenure protection for unrecognized

positions is also determined by the certifications and endorsements required to serve in that position.

It is equally well established that no tenure protections flow from extracurricular positions unless the position requires additional certification. *Dignan v. Bd. of Ed. of Rumson-Fair-Haven Regional High School*, 71 S.L.D. 336, 343, *aff'd*, St. Bd. of Ed., 74 S.L.D. 1376, *aff'd*, App. Div., 75 S.L.D. 1083. *Connor v. Bd. of Ed. of Twp. Of Cinnaminson*, 96 N.J.A.R. 2d (EDU) 861 held petitioner was entitled to extracurricular stipend, because he achieved tenure in the extracurricular position, and that position required a certification other than the Instructional Certificate required to teach. *Ocasal v. Elmwood Park Board of Education*, 97 N.J.A.R. 2d (EDU) 1997, concluded that nothing in N.J.S.A. 18A:28-6 can be read to suggest that a district employee working simultaneously in two assignments requiring different certifications should be deprived of tenure in the second position.

However, in the present case, an additional teaching certificate was not required. Thus, all tenure acquired under the Instructional Certificate is achieved in the position of teacher. The tenure achieved through service under that certificate extends only to the position of teacher and excludes extracurricular positions. *Duva v. State Operated School District of Jersey City*, EDU 9801-98, Final Decision, (March 6, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>.

I therefore **FIND** that since the Subject Area Coordinator only requires an Instructional Certificate (and a subject appropriate endorsement), service in that title leads to tenure as a teacher, not the specific position of Subject Area Coordinator.

ISSUE TWO - WAS PETITIONER'S POSITION AN EXTRACURRICULAR STIPENDED ASSIGNMENT, AS OPPOSED TO A SALARIED POSITION?

Because petitioner is tenured as a teacher, the Board is free to assign him extracurricular assignments that do not entitle him to tenure in that position unless they require certifications beyond those required to teach. As stated above, Subject Area Coordinator does not require any certifications other than those required for teaching.

Thus, “any determination as to whether tenure rights were violated . . . will rest substantially on whether or not the position at issue is, in fact, an extracurricular stipend assignment, as opposed to a salaried position.” *Barratt v. Bd. of Ed. of Borough of Glassboro*, *supra*, EDU 8784-99, Final Decision, (June 6, 2001), <http://lawlibrary.rutgers.edu/oal/search.html> (remanding case to ALJ to determine whether the details of position qualified it as extracurricular). This determination requires an inquiry into the details of the petitioner’s workday and compensation. *Ibid*. If the duties of the extracurricular work are “engrafted” to his duties as teacher, *Boney v. Bd. of Ed. of Pleasantville*, 71 S.L.D. 579, or if the Board treats his stipend as an integral part of his salary, *Shriner v. Bd. of Ed. of Boonton*, 75 S.L.D. 939, the petitioner may have an entitlement to the extra compensation, even though he does not have an entitlement to the position.

Petitioner asserts that his duties as Subject Area Coordinator were not extracurricular; that they were engrafted to the duties of his service as a teacher because they were performed during petitioner’s work day and were related to the duties which he performed as a teacher.

While the record is relatively bare on the duties required of a Subject Area Coordinator, or how petitioner’s day was spent filling those requirements, the fact that those duties were merely “related” to his teaching position, and achieved “during” his work day, seems insufficient to be considered “permanently engrafted” to the duties of a teacher such that they are not extracurricular.

In *Boney*, the Commissioner held that the petitioner’s service as the “chairman” of a department, a position he held in addition to his regular teaching position and which required the same certification, did not entitle him to the compensation given for that additional service. *Boney v. Bd. of Ed. of Pleasantville*, *supra*, 71 S.L.D. 579 (Comm’r). The Commissioner stated that, “[he] can find no basis for differentiating between petitioner’s extra-duty assignment as a department chairman and the many various other kinds of assignments which other teachers perform.” *Id.* at 583. Significant to the

Commissioner's finding was the fact that, "the duties of petitioner as a department chair were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment." *Ibid.* In further explanation, the Commissioner pointed out that the duties were independent of the petitioner's duties as a teacher and that the appointment to the position, like the present Coordinator position, was only for one year and had to be renewed annually. *Ibid.*

In *Barrat*, as well as this case, the petitioner performed both his duties as a teacher and his extracurricular duties under a single instructional certificate. Because such service does not generally entitle the employee to tenure protections, an examination of the interaction of the duties was needed to determine whether the non-teaching duties were truly extracurricular. *Boney v. Bd. of Ed. of Pleasantville, supra*, 71 S.L.D. 579, *Barratt v. Bd. of Ed. of Borough of Glassboro, supra*, EDU 8784-99, Initial Decision, (January 11, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>.

The Job Description for Subject Area Coordinator appears to require only "a handful of extra administrative assignments" which are independent of the duties of a teacher (R-2). While there is not the explicit disclaimer setting forth the independent nature of the two positions as there was in *Boney*, the responsibilities of the two positions seem to distinguish themselves. Moreover, it appears that time is set aside for completion of the duties of the Coordinator position so that it does not intermingle or interfere with the petitioner's teaching duties.

I therefore **FIND** that the distinct duties required of each position, and the separate time allotted for each position, indicate that they are sufficiently separate, so that the Coordinator position can be deemed extracurricular.

COMPENSATION IS NOT TREATED AS SALARY

Petitioner can also be found to have an entitlement to the stipend if the Board treated the stipend as an "integral portion" of the petitioner's salary. *Shriner v. Bd. of Ed. of Boonton*, 75 S.L.D. 939. Thus, petitioner's claim of entitlement to the Coordinator

stipend rests largely on the position that, because petitioner received only one paycheck from which pension contributions were withheld, the stipend is part of his base salary (P-1). However, *Reinhardt v. Bd. Of Ed. Of Freehold*, 97 N.J.A.R. 2d (EDU) 186, 193, stated that it is not relevant how respondent chose to characterize the components of petitioner's compensation package for pension purposes. Thus, petitioner's argument regarding the inclusion of his stipend in pension contributions should not affect the tenure analysis.

This is not to say, however, that the characterization of compensation is entirely irrelevant for tenure purposes. *Connor v. Bd. of Ed. of Twp. Of Cinnaminson*, *supra*, 96 N.J.A.R. 2d (EDU) 861, 865, held that where compensation, even though referred to as a stipend, is treated by the Board as salary, it will be considered as such in the calculation of tenurable salary. *Ibid.*

Significantly, the position for which the "stipend" was paid in *Connor* was acknowledged by the Respondent Board to be a position in which the petitioner had gained tenure independent of his service in the position for which he received his "base salary." *Connor v. Bd. of Ed. of Twp. Of Cinnaminson*, *supra*, 96 N.J.A.R. 2d (EDU) 861, 865. Because Connor had tenure in the stipended position, as acknowledged by the respondent, the characterization of the compensation for the position as a stipend was irrelevant; Connor's tenure in the position entitled him to that compensation regardless of how it was characterized. The same cannot be said in this matter. The petitioner, as discussed above, is not separately tenured in the Coordinator position; he is tenured only as a teacher.

The ruling in *Shriner v. Bd. of Ed. of Boonton*, 75 S.L.D. at 940, did not depend on this distinction, however. There it was stated that because the Board incorporated the Petitioner's stipend into his contract salary, and in all other ways treated the stipend as salary (including the pension payments), the stipend amount was protected by tenure even though the position for which Petitioner received the stipend was not.

Here, the Board did not treat petitioner's stipend as salary; it is granted pursuant to another agreement and is, therein, referred to explicitly as "extra compensation" (R-2).

CONCLUSION

Because petitioner is tenured only as a teacher under the Instructional Certificate, the Board can assign him extracurricular work to which he has no tenure. For the petitioner to have any entitlement to the extracurricular stipend he must show that either: 1) the duties of the coordinator position were engrafted into his duties as a teacher such that the Coordinator position was not truly extracurricular; or 2) the stipend for his extracurricular position was treated by the Board as salary such that *Shriner* applies.

Neither of these exceptions applies. The duties of the two positions are sufficiently distinct, and the Board does not refer to the extra compensation as salary but as a stipend. Consequently, the Old Bridge Board of Education did not violate petitioner's tenure rights by transferring him to another teaching position where he does not receive the additional Subject Area Coordinator stipend.

DECISION AND ORDER

I **GRANT** the respondent's motion and I **ORDER** the petition **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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 4, 2005

DATE _____


DONALD J. STEIN, ALJ

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

November 4 2005

DATE _____

NOV 10 2005

Mailed to Parties:

and to Parties:

Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

DATE _____

bdt

Exhibits

For Petitioner

P-1 Petitioner's Brief

For Respondent

R-1 Respondent's Brief

R-2 Statement of Extra Compensation

OAL DKT. NO. EDU 8636-05
AGENCY DKT. NO. 301-10/05

DOMINICK GIACOBBE, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION
 OF EDUCATION, :
 :
 RESPONDENT. :
 _____ :

The record of this matter has been reviewed. A letter dated November 17, 2005 from petitioner's attorney to the administrative law judge (ALJ) represented that petitioner would withdraw his "complaint" by way of stipulation of dismissal. The Commissioner notes that the documents filed in this matter were a petition and answer, and concludes that it is the petition to which the attorney referred in the correspondence.

Further, since respondent filed no counterclaim, only an executed withdrawal by petitioner is required to end the matter. The Commissioner will regard the stipulation of dismissal executed by the petitioner and submitted on or about November 17, 2005, as a formal withdrawal. Respondent's signature is unnecessary under the circumstances.

The matter is accordingly deemed withdrawn.

IT IS SO ORDERED


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/19/05

Date of Mailing: 12/19/05

RAYMOND D. GUALTIERI, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 SOMERSET HILLS REGIONAL SCHOOL :
 DISTRICT, SOMERSET COUNTY :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioner – formerly employed as Superintendent of Schools by the Somerset Hills Regional School District – claims that his tenure rights were violated when the respondent Board terminated his employment by unilaterally changing the date of his resignation in violation of his contractual rights and school law. Respondent Board argues that petitioner breached his contract by failing to provide the required 90-day notice of his intended resignation.

The ALJ found that: the matter is ripe for summary judgment; the respondent Board's unilateral action in accelerating the effective date of petitioner's resignation violated his statutory rights; and the facts in this matter are virtually identical to those in *Charles Soriano v. Board of Education of the Somerset Hills Regional School District*, decided by the Commissioner September 24, 2004, *aff'd*. State Board of Education March 2, 2005, wherein the Commissioner found that the Board forced petitioner's premature resignation and terminated his employment without consent. The ALJ concluded that petitioner's motion for summary decision should be granted, and that respondent should be directed to compensate petitioner consistent with the terms of his employment contract, less mitigation, for the period between the effective date of his unlawful termination and his proffered resignation date of September 2, 2003.

Upon a full and independent review of the record, the Commissioner concurs with ALJ for the reasons clearly presented in his Initial Decision. Accordingly, the Initial Decision of the OAL granting Summary Decision to the petitioner is adopted. The Commissioner declines to grant petitioner's request for pre-judgment interest in this matter.

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

December 16, 2005

OAL DKT. NO. EDU. 6707-03
 AGENCY DKT. No. 297-8/03

RAYMOND D. GUALTIERI,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
SOMERSET HILLS REGIONAL SCHOOL	:	
DISTRICT, SOMERSET COUNTY	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both petitioner and the Board, and petitioner's reply exceptions -- filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 -- were fully considered by the Commissioner in reaching her determination in this matter.

On exception, the Board essentially recasts and reiterates its arguments advanced below. As the Commissioner determines that a reasoned reading of the Administrative Law Judge's (ALJ) Initial Decision evidences that all material aspects of the Board's proffered contentions have been effectively addressed and resolved, they will not be revisited herein.

Petitioner excepts to the ALJ's failure to award him pre-judgment interest on his damages in light of "the Board's blatant violation of [his] tenure rights in the face of established precedent." (Petitioner's exceptions at 6)

Upon a full and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons clearly presented in his Initial Decision,

that the Board's unilateral acceleration of petitioner's resignation date violated his rights pursuant to *N.J.S.A.* 18A:17-20.2. The Commissioner is in full agreement with the ALJ that this matter is essentially factually identical to the situation which existed in *Charles Soriano v. Board of Education of the Somerset Hills Regional School District*, decided by the Commissioner September 24, 2004, *aff'd.* State Board of Education March 2, 2005, and she emphasizes her acceptance of the applicability of the analysis utilized by the Commissioner in that decision, as modified by the ALJ in his Initial Decision to the situation existing in this matter. Specifically,

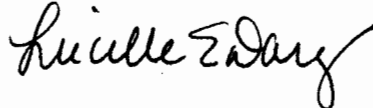
***regardless of whether this outcome was the result of outrageous connivance, as contended by the Board, or merely a collateral consequence of the [90-day resignation notice required by the contract of employment], as suggested by petitioner, the fact remains that, by unilaterally changing petitioner's proffered resignation date to an earlier one more to the Board's liking, the Board forced petitioner's premature resignation and terminated his employment without consent. Quite apart from the fact that resignation under any circumstances is a voluntary act with which the employee must be in agreement, here, in view of petitioner's undisputed tenure status, unilateral termination of his employment could not be lawfully accomplished in the absence of proceedings pursuant to *N.J.S.A.* 18A:6-10. Simply put, whatever its feelings may have been about the fairness to the district of petitioner's actions, the Board had no authority to do what it did, and petitioner must prevail on his appeal herein as a matter of law. As petitioner correctly notes, in the context of the claim he has made, other considerations are immaterial and no findings with regard to them can be made on the stipulated facts. (*Soriano, supra* at 3)
(Initial Decision at 8-9)

Finally, the Commissioner declines to grant petitioner's request for pre-judgment interest in this matter, in that the record before her does not support a finding that respondent's actions were taken in bad faith or in deliberate violation of the law. (*N.J.A.C.* 6A:3-1.17(c) 1).

Accordingly, the Initial Decision of the OAL granting Summary Decision to petitioner is adopted. The Board is hereby directed to compensate petitioner consistent with the

terms of his contract of employment, less mitigation, for the period between the effective date of his unlawful termination and his proffered resignation date of September 2, 2003.

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/16/05

Date of Mailing: 12/21/05

¹ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6707-03S

AGENCY REF. NO. 297-8/03

RAYMOND D. GUALTIERI,

Petitioner,

v.

**BOARD OF EDUCATION OF
SOMERSET HILLS REGIONAL
SCHOOL DISTRICT,**

Respondent.

Andrew Babiak, Esq., appearing for Petitioner

Philip E. Stern, Esq., appearing for Respondent (Sills Cummis Epstein & Gross, P.A.,
attorneys)

Record Closed: October 11, 2005

Decided: October 31, 2005

BEFORE ISRAEL D. DUBIN, ALJ:

This is an appeal by a Superintendent of Schools who complains that the Somerset Hills Regional Board of Education unilaterally changed the date of his resignation in violation of his contractual rights and school law. In brief, on or about June 9, 2003, petitioner Raymond D. Gualtieri tendered to the Board his letter of resignation to be effective September 2, 2003. Although the Board accepted his resignation during its regularly scheduled meetings on June 9 and June 23, 2005, it subsequently conducted a special meeting on June 30 at which it adopted a resolution terminating petitioner's employment effective immediately.

Petitioner contends that the Board's action constituted an illegal dismissal in violation of his tenure rights under *N.J.S.A.* 18A:28-8 and is seeking compensatory damages in the amount of \$35,344.15 for lost benefits and perquisites, as well as consequential damages for lost interest on his pension account. The Board denies it is under any legal obligation to compensate petitioner, arguing that he breached his contract by failing to provide it with ninety days notice of his intended resignation

Petitioner filed his Petition with the Commissioner of Education on August 19, 2003. The Board filed its Answer on September 2, 2003 and the matter was transmitted to the Office of Administrative Law (OAL) on September 29, 2003 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13 and *N.J.S.A.* 52:14B-1 to -15. Petitioner and the Board filed Cross-Motions for Summary Decision on July 13, 2004 and August 13, 2004, and reply briefs on August 26 and September 9, 2004, respectively. Despite the parties' best efforts, the matter could not be amicably resolved and the record was closed on October 11, 2005.

The material facts necessary for disposition of this matter are undisputed and I therefore make the following findings of fact:

On May 25, 2000, the Somerset Hills Regional Board of Education appointed Dr. Raymond D. Gualtieri to the position of Superintendent of Schools for a term commencing August 1, 2000 and expiring July 1, 2005. The contract of employment contained the following "Termination" clause:

In accordance with law, during the term of this contract, the Superintendent shall not be discharged, dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming of a Superintendent or other just cause, and then only in the manner prescribed by law. The Superintendent agrees that he shall not terminate this contract except upon giving the Board at least ninety (90) days prior written notice of such election to terminate.

[*Employment Contract*, Petitioner's Exhibit A]

On June 3, 2003, the East Hampton Board of Education met and unanimously authorized its president “to sign a four year agreement with Dr. Raymond Gualtieri for the position of superintendent of schools commencing August 1, 2003.” *Regular Board Meeting Minutes*, East Hampton Board of Education – June 3, 2003 (attached to *Stern Certification* as Exhibit A).

On June 4, 2003, Dr. Gualtieri sent e-mail to the members of the Somerset Hills Regional Board of Education advising them that he had accepted a position with the East Hampton Board as its Superintendent of Schools. In this e-mail, Dr. Gualtieri acknowledged his obligation to provide the Board with ninety days notice and indicated that “With vacation, I will be leaving in August or there about. I will present a letter of resignation at our Board meeting on Monday (June 9). More details to follow, Ray.” *Gualtieri E-Mail*, Petitioner’s Exhibit B.

As promised, Dr. Gualtieri submitted his letter of resignation at the Board meeting of June 9, 2003. In the concluding paragraph of this letter, Dr. Gualtieri stated, “I am tendering my resignation to be effective on or about September 2. My last day in the office will be on or about August 1.” *Letter of Resignation*, Petitioner’s Exhibit C. At that time the Board apparently met in closed session and adopted a resolution accepting Dr. Gualtieri’s resignation “effective on or about September 2, 2003.” *Minutes – Personnel*, Board of Education Meeting of June 9, 2003, Petitioner’s Exhibit D. The minutes also included the following handwritten notation: “BOE accepted resignation without date 6/9/03.” There is nothing in the record indicating when or by whom the notation was added.

Later that evening the Board met in public session and, by a unanimous roll call vote of 10-0, approved Personnel motion #18 accepting Dr. Gualtieri’s resignation “at a date to be determined.” *Public Input & Action Meeting Minutes – June 9, 2003*, Petitioner’s Exhibit D, page 2.

On June 17, 2003, the East Hampton Board of Education approved a resolution appointing Dr. Gualtieri as its interim superintendent commencing July 1, 2003 and ending July

31, 2003.¹ Upon learning of the East Hampton Board's action, the Somerset Hills Board met on June 23, 2003 to discuss matters affecting his resignation. Section XV – Personnel – of Addendum I to the *Minutes* of the Public Input and Action Meeting (Petitioner's Exhibit E) indicates that the Board resolved to accept Dr. Gualtieri's resignation effective September 9, 2003. However, a handwritten notation states that the motion was purportedly "tabled, Board (text apparently redacted), resignation but without a date again." As with the previously mentioned handwritten notation, there is nothing in record indicating when or by whom this notation was made.

On or about June 25, 2003, the Board sent Dr. Gualtieri a *Rice* notice indicating that matters affecting his employment would be discussed at a Board meeting to be held on June 30, 2003. At that meeting, the Board adopted a resolution making his resignation effective that evening.² Dr. Gualtieri's base salary at that time was \$145,600 per year.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. *N.J.A.C.* 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." In order to defeat a motion for summary decision, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." *Judson v. Peoples Bank & Trust Co. of Wesfield*, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 541 (1995). While cautioning that a judge

¹ Although the parties agree that the East Hampton board took this action, the recommendation made in Item 3 of the *Addendum to the Superintendent's Report and Recommendations* (attached to *Stern Certification* as Exhibit B) was not accompanied by an additional entry indicating that a formal resolution had been approved.

² Although they agreed that these two actions were taken by the Board, neither party submitted copies of the *Rice* notice or minutes of the June 30, 2003 meeting.

should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." *Id.* at 540 (citation omitted).

Here, a careful reading of the record discloses that the material facts giving rise to this matter are not in dispute. Therefore, pursuant to *N.J.A.C. 1:12.5(b)* and *Brill v. Guardian Life Insurance Co. of America*, 142 N.J. 520, 523 (1995), this matter is ripe for Summary Decision.

Dr. Gualtieri asserts that the Board's acceleration of his retirement date violated *N.J.S.A. 18A:17-20.2*, which reads as follows:

During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming a superintendent or other just cause and then only in the manner prescribed by sub-article B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes.

The Board demurs, asserting that Dr. Gualtieri breached the 90-day notice provision in his employment contract and thereby waived any rights he may have had under the statute.

The Board has gone to great pains attempting to establish that Dr. Gualtieri failed to provide sufficient notice. Among other things, it has argued that August 1, 2003, Dr. Gualtieri's last day in the office, must be considered the effective date of his resignation. "Thus, as of his first notice to the Board, Gualtieri was giving notice from June 4, 2003, until August 1, 2003, a mere fifty-six (56) days notice of his intention to terminate his employment." *Respondent's Brief in Support of Motion for Summary Decision*, pg. 4.

Alternatively, the Board has argued that July 1, 2003, the day Dr. Gualtieri began his employment with East Hampton as interim Superintendent of Schools, should be considered the effective date of his resignation. This time, however, it used the June 9, 2003 date of Dr. Gualtieri's letter of resignation as the date of notice to establish that "Gualtieri's ever-dwindling

notice of termination was decreasing from fifty-six (56) days to twenty-one (21) days (June 9, 2003, to July 1, 2003).” *Id.* at 6.

Granted, the June 4, 2003 e-mail may have been inartfully worded and, as a result, left open to interpretation. However, in the context of providing ninety days notice, when Dr. Gualtieri wrote “With vacation I will be leaving in August or thereabout,” he must have meant that his last day in the office would be in August and he would thereafter use accrued leave until the effective date of his resignation, which was one of the “details to follow.” Otherwise, he would not have deliberately acknowledged that he was required by contract to give such notice.

What is more, Dr. Gualtieri subsequently made his intentions abundantly clear with his June 9, 2003 letter of resignation. In this letter he formally stated, “I am tendering my resignation to be effective on or about September 2. My last day in the office will be on or about August 1.” *Letter of Resignation, supra*. Using these dates, Dr. Gualtieri gave only eighty-seven days notice, three less than the contractual requirement. Nevertheless, by approving a resolution accepting his resignation, albeit at a date to be determined,³ the Board waived any right it may have had to claim a breach of the notice provision. And even if its acceptance of his resignation did not constitute such a waiver, the fact remains that the Board subsequently passed another resolution on June 23 accepting Dr. Gualtieri’s resignation effective September 9,⁴ resulting in ninety-two days notice. I therefore find that the notice requirement was honored, and if violated, that the violation thereof was waived.

Much like *N.J.S.A.* 18A:28-8, which requires a teaching staff member to give at least sixty days written notice of his or her intention to resign, Dr. Gualtieri’s contract required him to give the Board at least ninety days prior written notice. And, much like the statute, it did not require the Board to give an equivalent, or for that matter any, notice to him. The one-sided nature of the contract suggests that the underlying intent was to prevent disruption of the students’ education. *Carrelle v. Board of Education of the Township of Bloomfield*, EDU 1852-

³ As mentioned earlier, the minutes from the personnel meeting that immediately preceded the public meeting indicate that the Board resolved to accept Dr. Gualtieri’s resignation effective on or about September 2, without any mention of his failure to comply with the contractual notice requirement.

03, Initial Decision (December 24, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>. Although there may be “no good time” for a superintendent to leave, Dr. Gualtieri submitted his letter of resignation on June 9, giving the Board approximately three months to retain the services of an acting superintendent and begin a search for Gualtieri’s replacement. In fact, the Board has not argued that the resignation in any way caused such a disruption.

The Board’s *Brief in Support of Motion for Summary Decision*, *supra*, provides more than ample explanation as to why it acted in such a vengeful fashion, including as it does the following passages:

Upon receipt of Gualtieri’s letter of resignation, the Board immediately recognized that Gualtieri had no intention of honoring his ninety-day notice obligation. Rather, the Board understood that Gualtieri was using the July 1, 2003, date to acquire another year’s worth of vacation days, sick leave days, holidays, health care, automobile allowance, medical and visual examinations, disability insurance, universal life insurance, tax sheltered annuity, home office and conversion of benefits, all of which were set forth in his Employment Contract with the Board....

Rather than allow Gualtieri to accomplish his shake down, and benefit from his violation of the Employment Agreement, the Board decided that the prudent course was to wish him good riddance, and, at its Board meeting of June 9, 2003, accepted Gualtieri’s resignation....

[*Id.* at 5.]

and

... Gualtieri has the audacity to cry foul when the Board decided to send him on his way rather than seek to lift his certification for jumping ship.⁵ Gualtieri whines that the Board unilaterally changed his resignation date of September 2, 2003. The Board unilaterally changed nothing – the September 2, 2003, date was a sham,

⁴ Given the June 9 resolution accepting Dr. Gualtieri’s resignation effective at “a date to be determined,” and June 23 resolution fixing that date as September 9, it may well have been that the parties were still in the process of negotiating a mutually acceptable date when the initial resolution was adopted.

⁵ See, *N.J.S.A.* 18A:28-8 (should a teaching staff member fail to give a board sixty days notice of his intention to resign, “he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.”).

concocted by Gualtieri to enable him to be paid by both the Board and the East Hampton School District at the same time.

Gualtieri breached his contract by failing to give the Board ninety days' notice. Rather than attempt to pilfer more money from the Board, Gualtieri should count his blessings that the Board was satisfied just to see him leave.

[*Id.* at 3.]

The Deputy Commissioner of Education dealt with virtually the exact same set of facts as these in *Charles Soriano v. Board of Education of the Somerset Hills Regional School District*, EDU 6708-03, Final Decision (September 24, 2004), *affirmed*, State Board of Education (March 2, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. In *Soriano*, petitioner, who had already accepted employment with the East Hampton Board of Education along with Dr. Gualtieri, also submitted his resignation with an effective date that enabled him to invoke the negotiated agreement's provision for immediate accrual of twenty-eight vacation days upon July 1, 2003, then requested leave for the period from July 2, 2003 through the effective date of his proffered resignation.

Rather than attempt to "reinvent the wheel," I hereby concur with the Deputy Commissioner's analysis of the issue and, with substitution of the instant facts where appropriate, incorporate it into the body of this initial decision as follows:

... regardless of whether this outcome was the result of outrageous connivance, as contended by the Board, or merely a collateral consequence of the [90-day resignation notice required by the contract of employment], as suggested by petitioner, the fact remains that, by unilaterally changing petitioner's proffered resignation date to an earlier one more to the Board's liking, the Board forced petitioner's premature resignation and terminated his employment without consent. Quite apart from the fact that resignation under any circumstances is a voluntary act with which the employee must be in agreement, here, in view of petitioner's undisputed tenure status, unilateral termination of his employment could not be lawfully accomplished in the absence of proceedings pursuant to *N.J.S.A.* 18A:6-10. Simply put, whatever its feelings may have been about the fairness to the district of petitioner's actions, the Board had no authority to do what it did, and petitioner must prevail on his appeal herein as a matter of law. As petitioner

correctly notes, in the context of the claim he has made, other considerations are immaterial and no findings with regard to them can be made on the stipulated facts.

[Charles Soriano v. Board of Education of the Somerset Hills Regional School District, supra, EDU 6708-03 at 3.]

Based on the foregoing, I **CONCLUDE** that petitioner Raymond D. Gualtieri's Motion for Summary Decision should be **GRANTED** and that respondent Somerset Hills Regional Board of Education's Cross-Motion for Summary Decision should be **DENIED**. I therefore further conclude that respondent should be directed to compensate petitioner consistent with the terms of his contract of employment, less mitigation, for the period between the effective date of his unlawful termination and his proffered resignation date of September 2, 2003. 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.

October 31, 2005

DATE

Israel D. Dubin

ISRAEL D. DUBIN, ALJ

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

October 31, 2005

DATE

NOV - 9 2005

DATE

IDD/mamf

Israel D. Dubin
Mailed to Parties:

NOV 10 2005
OFFICE OF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE INCLUSION :
OF CERTAIN QUESTIONS ON THE :
BALLOT FOR THE APRIL 2005 : COMMISSIONER OF EDUCATION
CAMDEN SCHOOL ELECTION, : DECISION
CAMDEN COUNTY. :

SYNOPSIS

Petitioner submitted request to the Camden Board of Education (Board) for inclusion of three referendum questions on the April 2005 school elections ballot in the City of Camden; the referendum questions involved, *inter alia*, school prayer and a Bible-based curriculum. The Board countered that the education laws did not require it to place the proposed referendum on the ballot. Petitioner appealed to the State Board of Education (State Board).

The State Board reviewed the record and determined to dismiss the appeal, as the statutory framework requires that the matter be remanded to the Commissioner pursuant to the original jurisdiction conferred upon her by *N.J.S.A.* 18A:6-9.

Upon a thorough and independent review of the submissions in this matter, the Commissioner determined that there is nothing in petitioner's brief that would provide a basis for her to retain jurisdiction over the petitioner's claims, which appear to rest upon federal constitutional and State civil rights laws rather than school law. Accordingly, the Commissioner dismisses the petition for lack of jurisdiction.

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

AGENCY DOCKET NO. 303-9/05

IN THE MATTER OF THE INCLUSION :
OF CERTAIN QUESTIONS ON THE :
BALLOT FOR THE APRIL 2005 : COMMISSIONER OF EDUCATION
CAMDEN SCHOOL ELECTION, : DECISION
CAMDEN COUNTY. :

Edward D. Torres, Petitioner *Pro Se*

Harvey C. Johnson, Esq. for Respondent

The submissions from the parties in this case have been thoroughly and independently reviewed, and the Commissioner has determined to decide the matter on a summary basis, pursuant to the authority granted her by *N.J.A.C. 6A:3-1.12*.

The controversy began with a February 2005 request from petitioner to respondent for the inclusion of three referendum questions on the April 2005 school elections ballot in the city of Camden. The questions were as follows:

1. Do you as a resident of Camden and a citizen of New Jersey want your Public Schools to open the daily session in prayer in a pledge of allegiance to the god we trust by the children in acknowledgment of God and His son Jesus Christ. The Prayer given to us by His Son Jesus Christ the "Our Father Which art in Heaven hallowed be Thy Name." **Yes or No**
2. Do you as a resident of Camden and a citizen of New Jersey want a Holy Bible based curriculum in your Public Schools which teaches the truth and the presence of God as creator in alignment with our New Jersey State Constitution where we are Grateful to Almighty God and looking towards Him for a blessing unimpaired in the endeavor to properly educate our children. **Yes or No**
3. Do you as a resident of Camden and citizen of New Jersey want those fellow Camden, NJ residents who are on probation, or parole, or incarcerated for non violent offenses their civil right to

vote in Camden School District Elections as a part of the rehabilitation process. **Yes or No**

Respondent's answer to petitioner apparently came in the form of a copy of a March 15, 2005 letter from respondent's counsel to respondent, outlining the reasons why it would be improper for respondent to place such questions on a school elections ballot. In summary, counsel advised that: respondent had no jurisdiction over the issue articulated in the third question; respondent had no authority under the school laws to place the first and second questions on the ballot; and that the first and second questions were essentially public polls about actions that likely violated federal constitutional rights.

Petitioner submitted to the State Board of Education (State Board) an appeal of respondent's decision not to put the three questions on the April 2005 school elections ballot, and the State Board remanded the matter to the Commissioner.

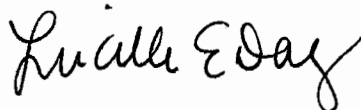
On November 9, 2005, the Bureau of Controversies and Disputes (Bureau) advised the parties that -- after careful review of the file, including numerous pleadings and documents submitted to the State Board, and a petition submitted to the Commissioner on or about September 19, 2005 -- it appeared that the respondent's action had been neither an abuse of discretion nor a violation of school law. The Bureau further advised that petitioner's claims appeared to rest upon federal constitutional and State civil rights laws over which the Commissioner of Education has no jurisdiction. Accordingly, the Bureau afforded petitioner until December 2, 2005 to submit reasons why the Commissioner should not dismiss the matter, and allowed respondent twenty days to submit a reply. Petitioner submitted his brief on or about November 30 and respondent replied on December 6.

There is nothing in petitioner's brief that would provide a basis for the Commissioner to retain jurisdiction over petitioner's claims. First, the Commissioner agrees

with respondent that its authority to conduct referenda does not include the issues in petitioner's three questions.¹ Second, petitioner's first and second questions raise federal constitutional issues. While the Commissioner is bound to uphold the federal and State constitutions, she is not empowered to adjudicate constitutional issues. *Christian Bros. Inst. v. Northern New Jersey Interscholastic League et al.*, 86 N.J. 409, 416 (1981). "Administrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction." (*Ibid.*) Finally, the issue in petitioner's third question has nothing to do with school law, and is consequently outside the Commissioner's authority.

Accordingly, the Commissioner dismisses the petition for lack of jurisdiction.

IT IS SO ORDERED²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/21/05

Date of Mailing: 12/21/05

¹ Petitioner's citation to *N.J.S.A.* 1:5-3 is not germane to this controversy. That statute simply calls for double spacing between signatures on petitions advocating referenda questions.

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.*

OAL DKT. NO. EDU 8152-05
AGENCY DKT. NO. 246-9/05

Y.R.G., on behalf of minor children, A.A.G. AND C.R.W., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

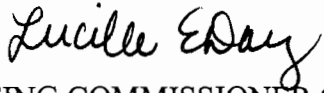
BOARD OF EDUCATION OF THE TOWNSHIP OF : DECISION
NORTH BRUNSWICK, MIDDLESEX COUNTY, :

RESPONDENT. :
_____ :

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

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

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/21/05

Date of Mailing: 12/21/05



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8152-05

AGENCY DKT. NO. 246-9/05

Y.R.G. O/B/O MINOR CHILDREN,

A.A.G. AND C.R.W.,

Petitioners,

v.

BOARD OF EDUCATION OF

THE TOWNSHIP OF NORTH

BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Y.G., petitioner, *pro se*

Lisa M. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: November 17, 2005

Decided: November 17, 2005

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 13, 2005, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

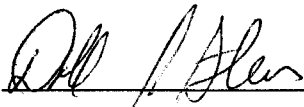
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

November 17, 2005
DATE


DONALD J. STEIN, ALJ

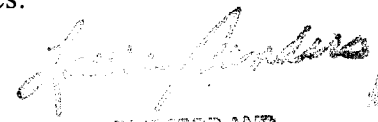
Receipt Acknowledged:

11-23-05
DATE

/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 28 2005
DATE


ROBERT J. PENDERGAST
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

bdt

Y.R.G, O/B/O Minor Children, A.A.G & C.R.W. v.
TWP of North Brunswick BOE, Middlesex Cty.

DAL Docket No.: EDV05 08152-20055

Agency Ref. No.: 246-9/05

Judge Donald J. Stein

In full settlement of all claims by both parties,
the parties agree as follows:

Minor child A.A.G. will remain in the No. Brunswick
school district for the conclusion of the Fall 2005
semester at which time A.A.G. will leave No.

Brunswick school district unless Y.R.G. has
moved to become domiciled within North

Brunswick Twp. prior to the end of the Fall 2005

OAL DKT. NO. EDU 5904-04
AGENCY DKT. NO. 172-5/04

ANGELO N. <u>RAIMONDI</u>	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD	:	DECISION
REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Westwood Regional School District Board of Education's (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 her determination.

Initially it is noted that there are no material facts in dispute in this case. The parties filed cross-motions for summary judgment, jointly stipulated to the facts in this matter and are in agreement that the only disputed issues are legal. As petitioner points out in his exceptions, the issues which the parties agreed by joint stipulation to submit to the Administrative Law Judge (ALJ) were:

1. Whether the Board was legally obligated to comply with the provisions of *N.J.S.A.* 18A:17-24.1 before it entered into an interlocal service[s] agreement with the Board of Education of [the] Vocational Schools of the County of Bergen pursuant to *N.J.S.A.* 40:8A-1 *et seq.*, for the services of a school Business Administrator for the period beginning July 1, 2004 and ending June 30, 2006.

2. Whether Raimondi's tenure and years of service in the Westwood Regional School District entitle him to employment as school Business Administrator when the services of a school business administrator are provided by the Board of Education of the Vocational Schools in the County of Bergen under the terms of an interlocal service[s] agreement.
3. Whether the Commissioner of Education's (sic) [has] jurisdiction to hear a claim under the Conscientious Employee Protection Act, *N.J.S.A. 34:19-1 et seq.* (Petitioner's Exceptions at 3, Joint Stipulation of Facts at 1-2)

With respect to the first issue, petitioner contends that the ALJ did not discuss nor decide the primary issue placed before him by the parties, *i.e.*, the relationship between *N.J.S.A. 18A:17-24.1* and *N.J.S.A. 40:8A-3*. (*Id.* at 5, 11-12) It is appropriate for the Commissioner to make this determination, petitioner reasons, because the Commissioner's concern with the provision of a thorough and efficient education permeates every aspect of school law and the running of a school district. (*Id.* at 5)

With regard to this issue, petitioner sets forth his position that the Board should have complied with the provisions of *N.J.S.A. 18A:17-24.1* when entering into an interlocal services agreement, and argues that while it may indeed be the case that the interlocal services agreement at issue may have satisfied the dictates of the Interlocal Services Act, that fact is immaterial since Westwood is a school district and the purpose of the interlocal service agreement in this matter was to share the services of a school business administrator. (*Ibid.*) In that *N.J.S.A. 18A:17-24.1* deals specifically and only with boards of education and only with boards sharing either a superintendent or business administrator or both, at minimum, petitioner claims, the Board was also obligated to comply with the requirements of *N.J.S.A. 18A:17-24.1* before entering into the interlocal services agreement because -- where there is a conflict between two statutes -- the courts have held that specific statutes take precedence over general statutes. (*Id.* at 6). Moreover, petitioner asserts, it is

possible to interpret the two statutes so that there is no conflict by concluding that the Board is mandated to comply with both statutes. (*Id.* at 7)

Petitioner further notes that *N.J.S.A.18A: 17-24.1* -- the more recent of the two statutes -- states that “the decision to share a school business administrator shall be made jointly by the boards of education of the districts, in consultation with the superintendents of the respective districts, subject to the final approval of the Commissioner of Education.” (*Id.* at 8) Thus, petitioner asserts, it is clear that Title 18A must govern herein. (*Ibid.*) However, the agreement between the two districts in this case was not prepared and submitted for the Commissioner’s approval as required by *N.J.S.A.18A: 17-24.1*. (*Ibid.*) Petitioner therefore, concludes that the actions taken by the Board were *ultra vires* and, thus, *void ab initio*. (*Ibid.*)

Turning to the issue of whether petitioner’s tenure and years of service entitle him to employment as the school business administrator when the services are provided under the terms of an interlocal service agreement, petitioner argues that -- assuming the interlocal services agreement is valid -- the Board was required to appoint him as the school business administrator because whenever a tenured employee’s position is reduced or eliminated, that employee’s ranking gives him preference for the new position within the school district. (*Id.* at 9) Since petitioner is tenured and has more seniority than the business administrator in the other district, petitioner argues, the Board was required to apply his seniority when appointing the business administrator for the shared school district. (*Id.* at 10)

With respect to petitioner’s contention that the Commissioner has jurisdiction to hear a claim arising under the Conscientious Employee Protection Act (CEPA), petitioner submits that the Commissioner clearly has primary and exclusive jurisdiction to determine the relationship between the Title 40A statute and the Title 18A statute and that his termination, as a tenured

employee, involves a matter arising under the school laws. (*Ibid.*) Moreover, petitioner asserts that his termination was in retaliation for complaints he made with regard to the Board's failure to balance the budget and that issues of budget appropriation have been found to be under the Commissioner's jurisdiction. (*Id.* at 10-11) Noting that the court found that the Commissioner had jurisdiction to hear and decide a matter arising under the law against discrimination in *Balsey v. North Huntingdon Regional Board of Education*, 117 N.J. 434 (1990), a case where a female high school student challenged the school district's refusal to allow her to try out for the football team, petitioner reasons that, as long as an issue is appropriately before the Commissioner -- in this instance, petitioner's tenure rights and the relationship between N.J.S.A. 18A:17-24.1 and N.J.S.A. 40:8A-3 -- the Commissioner must exercise jurisdiction on all aspects of the matter. (*Id.* at 11) Petitioner additionally asserts that the ALJ's reliance on *Picogna v. Board of Education of the Township of Cherry Hill*, 249 N.J. Super. 332 (App. Div. 1991), is misplaced because he is a tenured employee and the court's reasoning that the Commissioner did not have jurisdiction to hear a CEPA claim in *Picogna* -- i.e., "[t]he contract claim of a non-tenured school employee does not arise under the school laws simply because its outcome may later enable him to obtain tenure under the school laws" (*Picogna, supra* at 335) -- differs from the situation herein because *Picogna* was a non-tenured employee. (*Id.* at 10)

Finally, petitioner objects to the ALJ's finding that there was no evidence of bad faith by the Board, pointing out that the issue of bad faith was not before the ALJ. (*Id.* at 12) As a practical matter, petitioner muses, it is difficult to envisage a fashion in which an issue of bad faith could be determined on cross motions for summary judgment. (*Ibid.*)

In reply, the Board submits that what petitioner fails to recognize is the distinction between sharing a business administrator's services and subcontracting those services, which is

significant, because different statutes authorize such actions and there are separate and distinct requirements governing each arrangement. (Board's Reply Brief at 5) The Board contends, *inter alia*, that *N.J.S.A.* 18A:17-24.1 applies only to districts that have determined to share a school business administrator through a joint decision made between two boards of education, in consultation with their respective superintendents, subject to final approval by the Commissioner. (*Id.* at 5-6) In further support of its contention, the Board notes that, "[n]otwithstanding the existence of this statutorily prescribed procedure, the Legislature also stated in the same statutory scheme that:

Nothing in *N.J.S.A.* 18A:17-24.1 shall prohibit a school district from subcontracting its school business administrator to another school district pursuant to the provisions of [the Interlocal Services Act], ... the provisions of *N.J.S.A.* 18A:17-24.1 concerning the arrangement to share a school business administrator by two or more districts shall not apply when a school district subcontracts its school business administrator to another school district. [*N.J.S.A.* 18A:17-14.1]" (*Id.* at 6)

The Board thus contends that the clear language in the statutes eliminates any doubt that the requirements in *N.J.S.A.* 18A:17-24.1 apply only where two or more districts agree to share a school business administrator and is not applicable to subcontracting such services. (*Ibid.*)

Instead, the Board claims, a decision to subcontract the services of its school business administrator is governed by the Interlocal Services Act, which provides, in part:

Any local unit of this State may enter into a contract with any other local unit or units for the joint provision within their several jurisdictions of any service, including services incidental to the primary purposes of the local unit which any party to the agreement is empowered to render within its own jurisdiction. [*N.J.S.A.* 40:8A-3] (*Id.* at 6-7)

In this regard, the Board points out that when one district subcontracts the services of a business administrator from another district, there is no employment relationship between the school business

administrator and the subcontracting district, and the district which receives the services pursuant to an interlocal services agreement has no authority over employment decisions as it would if it were sharing the school business administrator pursuant to *N.J.S.A.* 18A:17-24.1. (*Id.* at 7) Moreover, when interpreting statutes, the Board avers that, absent legislative intent, the plain and ordinary meaning of that language should be used, and -- based on the unambiguous language in *N.J.S.A.* 18A:17-24.1 -- it cannot be disputed that the requirements in that statute apply only where two or more districts agree to share a school business administrator, since the Legislature explicitly stated:

When boards of educations of two or more school districts determine to share a school business administrator, the appointment shall comply with the provisions of section 4 of *P.L.* 1996, c. 111 (*C.* 18A:24-1) . . . The provisions of *P.L.* 1996, c. 111 concerning the arrangement to share a school business administrator by two or more school districts shall not apply when a school district subcontracts its school business administrator to another school district. (*Ibid.*)

Moreover, the Board argues that the Senate Education Commission's Statement on Assembly Bill 1397 (N.J. 1996), which would become PL. 1996, c. 111, provided that:

The bill would not affect the ability of a school district to subcontract the services of its school business administrator to another school district. The bill makes it clear that should a district choose subcontracting of a school business administrator over sharing, credit towards tenure acquisition accrues only in the primary district of employment. (*Id.* at 8)

Thus, the Board argues, the Legislature recognized the distinction between subcontracting for services and the sharing of services, authorizing either action by different statutes and imposing separate and distinct requirements governing such arrangements. (*Ibid.*)

Contrary to petitioner's argument that *N.J.S.A.* 18A:17-24.1 must be considered an exception to the Title 40 statute and the Board was, thus obligated to abide by the more specific

statute, the Board posits, “*N.J.S.A.* 18A:17-24.1 cannot be considered an ‘exception’ to the Act where *N.J.S.A.* 18A:17-24.9 specifically acknowledges the provision of the Act and the interrelationship between the two statutory schemes.” (*Id.* at 9) Moreover, the Board contends, an analysis under general rules of statutory construction argued by petitioner is not applicable in this instance because the Legislature set forth which statutory provision shall control in *N.J.S.A.* 18A:17-24.9, which explicitly states that:

The provisions of *N.J.S.A.* 18A:17-24.1 shall govern the sharing of a superintendent or school business administrator by two or more boards of education and shall not be deemed inconsistent with the provisions of the Interlocal Services Act insofar as that act may authorize the subcontracting of school district administrative services. (*Id.* at 10)

Additionally, the Board also points out that *N.J.S.A.* 18A:17-14.1 states that “Nothing in [*N.J.S.A.* 18A:17-24.1] shall prohibit a school district from subcontracting its school business administrator to another school district pursuant to the [Interlocal Services Act].” (*Ibid.*) Thus, the Board concludes, *N.J.S.A.* 18A:17-24.1 and *N.J.S.A.* 18A:17-14.1 *et seq.* resolved any ambiguities between the new procedure for sharing a business administrator and the existing provision for subcontracting for the services of a business administrator. (*Id.* at 11) Moreover, the Board argues, the two statutes at issue are not so clearly in conflict that they cannot reasonably stand together because they apply to different factual arrangements. (*Id.* at 12) Since it is undisputed that the Board complied with the provisions of the Interlocal Service Act and the Legislature specifically stated that the provisions of *N.J.S.A.* 18A:17-24.1 do not apply to an agreement to subcontract for the services of a school business administrator under that Act, the Board contends there is no legal support for petitioner’s claim that the interlocal services agreement was *ultra vires* for failure to comply with provisions set forth in *N.J.S.A.* 18A:17-24.1. (*Id.* at 16)

With respect to petitioner's tenure rights to the abolished position, the Board sets forth its argument that neither the Interlocal Services Act nor *N.J.S.A.* 18A:17-24.1 provide for a right of employment to the position of school business administrator based on tenure or seniority. (*Id.* at 18) In support thereof, petitioner asserts that *N.J.S.A.* 18A:17-24.1 states that, in a sharing arrangement, tenure acquisition shall accrue only in the primary district of employment and in *N.J.S.A.* 18A:17-24.5, "[t]he statutory language is clear that 'in no event shall the districts be required to appoint a tenured individual from within any of the districts to fill a shared position.'" (*Id.* at 18-19) Moreover, the Board reasons, in that the Board's interlocal services agreement subcontracting the services of a school business administrator is governed by the Interlocal Services Act, only the provision of that Act would apply and *N.J.S.A.* 40:8A-5(b) clearly states:

In the case of a contract for the joint provision of services by an officer or employee of a local unit who is required to comply with a State certification requirement as a condition of employment, the contract shall provide for the payment of a salary to the officer or employee and shall designate one of the local units as the primary employer for the purpose of that person's tenure rights. (*Id.* at 19)

Additionally, the Board asserts that it has the authority to effectuate a reduction in force for appropriate reasons -- such as economy -- and that once the Board abolished its position of business administrator, there was no position in the District for which petitioner had the right of employment based on tenure and seniority. (*Id.* at 21) Since petitioner did not have seniority or tenure rights with the Vocational Board because he was never employed by it, the Board posits, petitioner could not displace the Vocational Board's business administrator, even if he had more years of service than that individual. (*Ibid.*) Moreover, the Board points out that, even if it could be concluded that petitioner had tenure or seniority rights to the position of school business administrator provided through an interlocal services agreement, petitioner voluntarily resigned from his position for purposes of retirement and, thus, relinquished his rights. (*Id.* at 22)

With respect to the Commissioner's jurisdiction over petitioner's CEPA claim, the Board points to *Bd. of Ed. of East Brunswick v. Tp. Council East Brunswick*, 48 N.J. 94, 102-103 (1966) for the proposition that -- where the controversy or dispute does not arise under school laws, even though it may pertain to school personnel -- the Commissioner has no jurisdiction over the matter. (*Id.* at 23) The Board further argues that the Commissioner thus does not have jurisdiction over petitioner's CEPA claim because it was brought under CEPA, which is clearly not an integral part of Title 18A and, therefore, does not arise under the school laws. (*Id.* at 23) In addressing petitioner's claim that *Picogna, supra*, is distinguishable from the matter herein because petitioner had tenure in his position and *Picogna* dealt with a non-tenured employee, the Board avers that, at no time did the Appellate Division limit the prospective application of its holding solely to cases involving nontenured employees. (*Id.* at 24) Moreover, the Board contends the court distinguished cases involving tenured employees only to illustrate that even *Picogna's* alleged tenure claim was not sufficient to bring his CEPA claim within the Commissioner's jurisdiction. (*Ibid.*)

The Board further argues that, *inter alia*, while a balanced budget is within the jurisdiction of the Commissioner, whether the Board failed to balance its budget is not an issue in this case. (*Id.* at 25) Thus, the Board concludes, petitioner's assertion that the Commissioner has jurisdiction over his CEPA claim of alleged retaliatory conduct for complaints he made in regard to the Board's failure to balance the school budget does not make petitioner's CEPA claim a school law controversy over which the Commissioner has jurisdiction. (*Ibid.*)

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the grant of the Board's motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C. 1:1-12.5(b)* and *Contini, supra*. In so determining, the Commissioner finds that the

Board's decision to subcontract its board administrator services is governed by the Interlocal Services Act, *N.J.S.A. 40:8A-1 et seq.* Notwithstanding petitioner's assertion that the Board should have complied with the provisions of *N.J.S.A. 18A:17-24.1 et seq.* when entering into an interlocal services agreement, the Commissioner has concluded, for the reasons that follow, that *N.J.S.A. 18A:17-24.1 et seq.* is not applicable where -- as occurred herein -- a Board has decided to subcontract its business administrator services.

A review of the clear language of the statutes at issue, *N.J.S.A. 40:8A-1 et seq.* and *N.J.S.A. 18A:17-24.1 et seq.*, reveals that these two statutes govern two separate and distinct arrangements for the provision of business administrator services. *N.J.S.A. 40:8A-1 et seq.* sets forth the process for school districts wishing to *subcontract* for the services of a business administrator and *N.J.S.A. 18A:17-24.1 et seq.* sets forth the provisions for *sharing* the services of a business administrator with one or more other districts. In this instance, it is undisputed that the Board entered into a contract with the Vocational Schools of the County of Bergen for the purpose of subcontracting the services it required. Accordingly, the controlling statute in this matter is *N.J.S.A. 40:8A-1 et seq.*

The Commissioner is also not persuaded by petitioner's arguments that the Board should be compelled to abide by the provisions of both statutes. *N.J.S.A. 18A:17-24.9* explicitly states that *N.J.S.A. 18A:17-24.1* shall govern the sharing of a school business administrator and shall not be deemed inconsistent with the provisions of the Interlocal Services Act governing the subcontracting of such services. Moreover, in reviewing the legislative history for *N.J.S.A. 18A:17-24.1 et seq.*, enacted subsequent to *N.J.S.A. 40:8A-1 et seq.*, it is noted that the Senate Education Commission's Statement on the Assembly Bill explained that "the bill would not affect the ability of a school district to subcontract the services of its business administrator to

another school district” and the Statement also made clear that -- for a district choosing subcontracting over sharing of a school business administrator -- credit toward tenure acquisition would accrue only in the primary district of employment.

Additionally, as demonstrated by the Legislative references to *N.J.S.A. 40:8A-1 et seq.* above, when enacting *N.J.S.A. 18A:17-24.1 et seq.* the Legislature was clearly aware of the earlier enacted statute which provided for the subcontracting of services. If the Legislature had intended that boards of education subcontracting for the services of a business administrator be governed by the provisions of both statutes, *N.J.S.A. 40:8A-1 et seq.* and *N.J.S.A. 18A:17-24.1 et seq.*, as argued by petitioner, it is reasonably inferred that language dictating such dual compliance would be found in *N.J.S.A. 18A:17-24.1 et seq.* Instead, in the same legislation creating the provision for the sharing of business administrator services, *N.J.S.A. 18A:17-24.1 et seq.*, *P.L. 1996, c. 111*, the Legislature specifically addressed the relationship between the two statutes in an amendment to *N.J.A.C. 18A:17-24.1*:

. . . The provisions of *P.L. 1996, c. 111 (C. 18A:17-24.1 et al.)* concerning the arrangement to share a school business administrator by two or more school districts *shall not apply when a school district subcontracts its school business administrator to another school district.* (emphasis added)

The Commissioner, therefore, concludes that the board was not required to comply with the requirements of *N.J.S.A. 18A:17-24.1 et seq.* when it subcontracted for the services of a business administrator.

Finally, the Commissioner observes that petitioner submitted his letter of resignation “for the purpose of retirement” on April 8, 2004, effective at the end of his 2003-04 contract. (Petitioner’s Exhibit B) On April 8, 2004, the Board passed a resolution accepting petitioner’s resignation for the purposes of retirement effective July 1, 2004. (Joint Stipulation at 3, No. 6)

There is no assertion that petitioner was pressured or coerced into resigning his position. In that petitioner ended his employment relationship with the Board by voluntarily tendering his resignation, thus relinquishing any rights he may have had, there is no basis upon which relief could be granted with respect to the other claims raised in his petition, and it is therefore unnecessary for the Commissioner to consider them.

Accordingly, for the reasons set forth above, the Board's motion is granted and the petition is hereby dismissed.

IT IS SO ORDERED.*

A handwritten signature in black ink, reading "Lucille E. Day". The signature is written in a cursive, flowing style.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/23/05

Date of Mailing: 12/27/05

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



STATE OF NEW JERSEY
Office of Administrative Law

INITIAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 5904-04

AGENCY DKT. NO.: 172-5/04

ANGELO N. RAIMONDI,

Appellant,

v.

**WESTWOOD REGIONAL BOARD OF
EDUCATION,**

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, LLC, attorneys)

Rodney T. Hara, Esq., for respondent
(Fogarty and Hara, attorneys)

Record Closed: February 2, 2005

Decided: September 26, 2005

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

The parties in this case have submitted cross motions for summary decision. Resolution of the motions turn on the following questions:

1. Whether the Respondent was legally obligated to comply with the provisions of *N.J.S.A. 18A:17-24.1* before it entered into an interlocal services agreement with the Board of Education of the Vocational Schools in the

County of Bergen pursuant to *N.J.S.A. 40:8A-1 to 11*, for the services of a school business administrator?

2. Whether the Petitioner's tenure entitled him to employment as school business administrator?
3. Whether the Commissioner of Education has jurisdiction to hear acclaim under the Conscientious Employee Protection Act (CEPA), *N.J.S.A. 34:19-1 to 8*?

DISCUSSION

Facts and Position of the Parties

The Respondent, Westwood Regional School District ("the District" or "the Board"), provides educational services for kindergarten through twelfth grade for students in the Borough of Westwood and the Township of Washington. The Petitioner, Angelo Raimondi, was employed by the Respondent as the board secretary and school business administrator. The Petitioner was employed in this position since 1983 and resigned from this position on April 8, 2004. The Petitioner asserts that his resignation was forced upon him by the Respondent's decision to eliminate his position in favor of an interlocal service agreement with the Board of Education of the Vocational Schools in the County of Bergen ("Vocational Board"). The interlocal service agreement provided that the two boards would share a school business administrator. The Petitioner contends that this agreement is in violation of *N.J.S.A. 18A:17-24.1*¹ and thus is ultra vires. Therefore, the Petitioner argues that under the Conscientious Employee

¹ *N.J.S.A. 18A:17-24.1*, in relevant part, states that two boards of education:

may share a superintendent or a school business administrator or both. A shared superintendent or business administrator shall be subject to the same rules governing eligibility for employment as are superintendents or business administrators of a single district. The decision to share a school business administrator shall be made jointly by the boards of education of the districts, in consultation with the superintendents of the respective districts, subject to the final approval of the Commissioner of Education.

[*N.J.S.A. 18A:17-24.1*]

The statute requires that the two districts study the feasibility of sharing a school business administrator, provide for community input and prepare a report for the county superintendent outlining the advantages and disadvantages. *N.J.S.A. 18A:17-24.1(a)*. Since the Respondent contends that it was not required to comply with this statute, there is no dispute that no study was conducted, no community input received and no report was generated.

Protection Act ("CEPA"), N.J.S.A. 34:19-1 to 8, the Petitioner is entitled to the position of shared business administrator by virtue of his seniority and tenure.

The parties have stipulated to the following facts:

1. As a result of his employment with the Board, Raimondi acquired tenure as board secretary/school business administrator in the District.
2. On April 8, 2004, Raimondi submitted a letter of resignation, from the position of board secretary/school business administrator for the purpose of retirement, effective the end of the 2003-2004 school year.
3. On April 8, 2004, the Board passed a resolution accepting the resignation of Raimondi for the purpose of retirement from the position of board secretary/school business administrator, effective July 1, 2004.
4. On April 8, 2004, after passing the foregoing resolution, the Board passed the following resolution:

WHEREAS, the Westwood Regional Board of Education is desirous of effectuating economies and achieving cost savings to improve the financial condition of the Westwood Regional School District;

WHEREAS, economies could be effectuated and costs savings can be achieved by entering into an interlocal services agreement with the Board of Education of the Vocational Schools in the County of Bergen for the services of a school business administrator; and

WHEREAS, an interlocal services agreement has been negotiated with the Board of Education of the Vocational Schools in the County of Bergen for the services of a school business administrator;

BE IT RESOLVED that the Westwood Regional Board of Education hereby approves the interlocal services agreement with the Board of Education of the Vocational Schools in the County of Bergen for the services of a school business administrator for the period beginning July 1, 2004 and ending June 30, 2006;

BE IT FURTHER RESOLVED that the Westwood Regional Board of Education authorizes the Board President and the Superintendent of Schools to sign the interlocal services agreement on behalf of the Westwood Regional Board of Education;

BE IT FURTHER RESOLVED that, effective July 1, 2004, the Westwood Regional Board of Education abolished the position of board secretary/business administrator and the job description of the position;

BE IT FURTHER RESOLBED that, effective July 1, 2004, the Westwood Regional Board of Education adopts the following job descriptions, effective July 1, 2004:

1. School Business Administrator
2. Board Secretary

(Exhibit C)

5. Effective July 1, 2004, the services of a school business administrator for the District was provided by the school business administrator employed by the Board of Education of the Vocational Schools in the County of Bergen (hereinafter referred to as "Vocational Board") in accordance with the provisions of the interlocal services agreement between the Board and the Vocational Board. The school business administrator for the Vocational Board, who was employed by the Vocational Board after Raimondi was first employed by the Board, has acquired tenure with the Vocational Board.
6. Effective July 1, 2004, Dr. Roy Montesano, the Superintendent of Schools for the District, also performed the duties of board secretary for the Board.
7. Prior into entering into an interlocal services agreement, the Board and the Vocational Board did not prepare and submit a report to the County Superintendent which outlined the anticipated advantages to the districts, the feasibility of a shared arrangement and a plan explaining how the shared arrangement would operate. As a result, neither the County Superintendent nor the Commissioner of Education approved or disapproved the plan.
8. A report was not prepared and submitted to the County Superintendent for the approval of the Commissioner of Education because it was the Board's position that the requirements of *N.J.S.A. 18A:17-24.1* did not apply when two school districts enter into an interlocal services agreement for the services of a school business administrator. It is, however, Raimondi's position that the Board was obligated to comply with the provisions of *N.J.S.A. 18A:17-24.1*.

[Joint Stipulation of Facts, pp. 2-5.]

Because there are no material facts at issue, both parties have moved for summary decision.

The Respondent counters the Petitioner's arguments by asserting that it was not required to comply with *N.J.S.A. 18A:17-24.1*, since the board was subcontracting for the services of the school business administrator from the Vocational Board. Furthermore, the Respondent argues, that it's actions were not ultra vires since it did comply with *N.J.S.A. 40:8A-1* to 11, which governs the procedures for an interlocal services agreement. Additionally, since the Respondent effectively eliminated the Petitioner's position via a reduction in force for the reason of economy, the Respondent contends that there is no position within the District which the Petitioner is entitled to based upon tenure. Finally, the Respondent challenges the subject matter jurisdiction of the Petitioner's claim under CEPA.

Summary Decision Standard

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 by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

[*N.J.A.C.* 1:1-12.5(b).]

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.htm>>. 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 the instant matter there are no material factual issues. The facts in this matter are set out in the Joint Stipulation of Facts and the parties have agreed to cross-motions for summary decision. Thus, the only remaining disputed issues are legal.

The OAL has no jurisdiction to hear claims under CEPA

The Office of Administrative Law, like all administrative agencies, has only the jurisdiction that is conferred on it by statute. *Borough of Park Ridge v. Salimone*, 36 *N.J. Super.* 485, 495 (App. Div. 1955), *aff'd* 21 *N.J.* 28 (1956) (noting that an administrative body has only the authority that is expressly conferred by the legislative enactment); 37 *New Jersey Practice, Administrative Law and Practice* § 7.6 (Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty) (rev. 2d ed. 2000). Under *N.J.S.A.* 18A:6-9, the Commissioner of Education has jurisdiction only over matters arising under the school law. See *Balsley v. North Hunterdon Regional School Dist. Bd. of Educ.*, 117 *N.J.* 434 (1990); *Bd. of Ed. of East Brunswick v. Tp. Council, East Brunswick*, 48 *N.J.* 94 (1966).

CEPA was enacted by the New Jersey Legislature in 1986 to protect employees who "blow the whistle" on employers who engage in illegal activity. "Although CEPA has been described as the most far reaching 'whistleblower statute' in the nation, it is still a "Whistleblower Act," and not a "Chronic Complainer Act." *Blackburn v. United Parcel Services*, 3 *Fed. Supp.* 2d 504, 517-18 (D.N.J. 1998). Therefore, in order to prevail on a claim under CEPA, a plaintiff must show that he or she reasonably believed that the employer's conduct violated either a law, regulation, or rule. *Carlino v. Gloucester City High School*, 57 *Fed. Supp.* 2d, 1, 35-36 (D.N.J. 1999). A disclosure that fails to reveal

illegal activity also fails as a cause of action under CEPA. *Ibid.* Here, the Petitioner argues that the basis for his claim is the Respondent's violation of *N.J.S.A. 18A:17-24.1*.

However, the plain language of CEPA does not appear to grant jurisdiction to any administrative entity. *N.J.S.A. 34:19-5* states that an aggrieved employee may, "within one year, institute a civil action in a court of competent jurisdiction. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit." The availability of a jury trial under CEPA points conclusively against a determination that the OAL has jurisdiction because the OAL cannot conduct a jury trial. See *Abbamont v. Piscataway Twp. Board of Education*, 238 *N.J. Super.* 603 (App. Div. 1990) (per curiam), *rev'd by statute on other grounds*, *N.J.S.A. 34:19-5*, *on remand* 238 *N.J. Super.* 603 (App. Div. 1993), *aff'd* 138 *N.J.* 405 (1994) (noting that CEPA actions do not augment or parallel any administrative remedy). *Abbamont* involved a non-tenured teacher who was allegedly terminated for whistle blowing activities. None of the published opinions in the *Abbamont* case suggested that the Commissioner of Education had jurisdiction over the matter or that any exhaustion of administrative remedies was needed. Consequently, it is clear that under a plain meaning reading of the CEPA statute, the OAL lacks the jurisdiction to hear claims under CEPA. *Przygocki v. New Jersey Department of Environmental Protection*, CSV 4181-01, Initial Decision, (November 12, 2002), *adopted*, Merit System Board (January 13, 2003) <<http://lawlibrary.rutgers.edu/oal/search.html>> (noting that the OAL has no jurisdiction to hear claims under CEPA).

The Petitioner argues that *Picogna v. Board of Education of Cherry Hill*, 249 *N.J. Super.* 332 (App. Div. 1991), which held that the Commissioner of Education and the State Board of Education had no jurisdiction under CEPA, is distinguishable. In *Picogna*, *supra*, the Commissioner and the State Board had affirmed the ALJ's determination that the petitioner, a non-tenured school employee, had waived his right to seek relief from the Commissioner by filing a CEPA claim in the Chancery Division. (Under *N.J.S.A. 34:19-8*, institution of an action under CEPA is deemed a waiver of rights and remedies available in other forums). The Commissioner and the State Board determined that they had no jurisdiction over the contract claims by the petitioner. *Id.* at 335. The Appellate Division affirmed. *Ibid.*

In the case *sub judice*, the Petitioner's argument that *Picogna, supra*, is distinguishable and allows CEPA jurisdiction rests upon the premise that the *Picogna* court's decision was based upon the fact that the petitioner in that case had waived his right to seek relief and the contract claim at issue did not arise under the school law. Thus, the Petitioner contends, this implies that jurisdiction under CEPA would exist if the waiver had not occurred and the claim at issue was within the province of school law. This argument fails. The *Picogna, supra*, court went onto say that:

The contract claim of a non-tenured school employee does not arise under the school laws simply because its outcome may later enable him to attain tenure under the school laws; **whether petitioner's employment was wrongfully terminated under the contract and under the CEPA is for the court, not the Commissioner to decide.**

[*Picogna, supra*, 249 N.J. Super. at 335 (emphasis added).]

Thus, as the Respondent points out, nowhere in *Picogna, supra*, is it implied that the court's conclusion was based upon the tenure status of the petitioner in that case. It seems clear that the court's decision simply followed established precedent that the OAL lacks jurisdiction to hear CEPA claims.

Bad Faith

However, the Commissioner's final decision in *Cheloc v. Bd. of Ed. of Elizabeth*, Initial Decision, (April 24, 2000), *modified*, Commissioner, (June 12, 2000) <<http://lawlibrary.rutgers.edu/oal/search.html>>, supports the position that the Petitioner's termination can be considered in the context of bad faith. In *Cheloc, supra*, the petitioner was a tenured assistant board secretary and director of administration. *Ibid.* The Board reassigned her duties to a new position and the petitioner claimed that this action was retaliation in violation of CEPA for her objections to budget actions. *Ibid.* ALJ Bari-Brown declined to exercise jurisdiction based upon *Picogna, supra*, stating, "CEPA claims are beyond the jurisdiction of the Commissioner of Education." *Ibid.* In the Commissioner's final decision, the Commissioner declined to reach the ALJ's

findings regarding CEPA jurisdiction but instead considered the Petitioner's claims under the "general assertion that the Board's actions were taken in bad faith." *Ibid.*

"The School Law vests the management of the public school ... in the local boards of education, and unless they violate the law, or *act in bad faith*, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." *Kenney v. Montclair BOE*, 1938 S.L.D. 647 (1935), *aff'd.*, *St. Bd.* at 653 (emphasis added). A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. *Quinlan v. North Bergen BOE*, 73 N.J. Super. 40, 46 (App. Div. 1962); see also *Schinck v. Westwood BOE*, 60 N.J. Super. 448 (App. Div. 1960). This presumption extends to a board's determination that, for reasons of economy, a tenured employee may be subject to a reduction in force. *Jamison v. Morris Sch. Dist. BOE*, 198 N.J. Super. 411, 415 (App. Div. 1985). Actions of a board of education are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis. See *Kopera v. West Orange BOE*, 60 N.J. Super. 288 (App. Div. 1960). Bad faith has been explained as meaning improper or evil purpose or motive. *Thompson v. Pleasantville BOE*, 95 N.J.A.R.2d (EDU) 278, 282 (citation omitted).

The Respondent argues that it eliminated the Petitioner's position for reasons of economy. A local board of education has the authority to engage in a reduction of force, even where tenured positions are affected, if done for reasons of economy. *Klinger v. Cranbury BOE*, 190 N.J. Super. 354, 357 (App. Div. 1982), *certif. denied*, 93 N.J. 277 (1983); *Trigani v. Monmouth Beach BOE*, EDU 8644-00 and 8645-00, Initial Decision, (Oct. 11, 2002), <<http://lawlibrary.rutgers.edu/oal/search>>, *adopted*, Comm'r (Dec. 2, 2002) <<http://lawlibrary.rutgers.edu/oal/search>>. Such decisions are subject to review to determine whether the position has been abolished or merely transferred in violation of the tenure statutes. *Viemeister v. Prospect Park BOE*, 5 N.J. Super. 215 (App. Div. 1949). In an unpublished opinion, the Appellate Division affirmed that the deciding tribunal (in that case the State Board) should determine whether the local Board's action is arbitrary or capricious in abridging the tenure rights of a teacher.

Lingelbach v. Hopatcong BOE, A-4783-83, slip op. at 3 (N.J. App. Div. May 17, 1985).

The applicable statute controlling this issue, *N.J.S.A. 18A:28-9*, states:

Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

[*N.J.S.A. 18A:28-9* (emphasis added).]

A local board of education has the authority to reduce its teaching staff so long as it “is genuinely for reasons of economy.” *Impey v. Shrewsbury BOE*, 142 N.J. 388, 398 (1995) (citations omitted).

The determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions. *E.g., Klinger, supra*, 190 N.J. Super. at 357. (Concluding that a local school board may alter the full-time status of a tenured employee in order to restructure a department to meet financial constraints while continuing to provide identical services). Whether those services are eliminated, reduced or modified, however, may be a relevant factor in determining whether abolition of a position genuinely advances the goals of economy and efficiency and was undertaken in good faith. *Cf. Viemeister v. Prospect Park Bd. of Educ.*, 5 N.J. Super. 215, 218, (App. Div. 1949) (stating that the “substance” rather than the form of change controls and if position of “principal” was replaced with identical position with different title, it would not constitute a valid reduction in force) ...

[*Impey, supra*, at 399 (internal citations omitted).]

The Petitioner therefore has the burden of proving, by a preponderance of the credible evidence, that the abolition of the position was undertaken in bad faith or was arbitrary and capricious or was in any other fashion contrary to the dictates of *N.J.S.A. 18A:28-9*.

Dearden v. Trenton BOE, 96 N.J.A.R.2d (EDU) 321, 323; *Wollman v. Trenton BOE*, 96 N.J.A.R.2d (EDU) 20, 22, *aff'd*, *Comm'r* at 27.

[I]n order for an aggrieved party to prevail where there has been a reduction in force, it is necessary that he or she demonstrate that the decision is clearly improper, arbitrary and capricious and he will be [sic] generally not prevail in situations where there exists any reasonable justification for the reduction absent such proof of bad faith. See *Klig v. Borough of Palisades BOE*, 1975 S.L.D. 168, 173-174. *In re Maywood Board of Education*, *supra*.

[*Wollman*, *supra*, 96 N.J.A.R.2d (EDU) at 24 (emphasis added).]

The Petitioner in this case has offered little to overcome the presumption accorded the Board. The Petitioner asserts that the Board was legally required to comply with N.J.S.A. 18A:17-24.1 before it entered into an interlocal services agreement with the Vocational Board. While the Petitioner's assertion might suffice to sustain a claim under CEPA, such a claim must be pursued in the Superior Courts and not in the OAL. Moreover, it does not sustain a claim for bad faith termination. Assuming, *arguendo*, that the Petitioner is correct that the Board was required to follow N.J.S.A. 18A:17-24.1 in the Board's agreement with the Vocational Board, the Petitioner has not asserted that the Board failed to follow the dictates of that statute for the bad faith purpose of terminating his employment. Nor has the Petitioner asserted the Board's abolishment of his position was based upon other bad faith actions of the Board.

Furthermore, the Petitioner has offered no assertions that he was pressured or coerced into resigning his position. Since there is no assertion that the Petitioner did not voluntarily resign, any right to a tenure claim is waived. See *Kimless v. Bd. of Ed. of Woodbridge Twp.*, 1978 S.L.D. 651. Accordingly, I **FIND** that the Petitioner's termination was not taken in bad faith and grant summary decision in favor of the Respondent.

ORDER

Summary Decision is **GRANTED** in favor of respondent and the matter is **DISMISSED**.

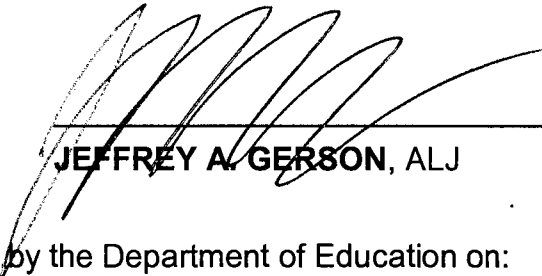
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/26/05

DATE


JEFFREY A. GERSON, ALJ

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

SEP 26 2005

DATE

Mailed to Parties:



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 27 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

HONORABLE DANIEL J. REIMAN, MAYOR :
 OF CARTERET, INDIVIDUALLY AND IN
 HIS OFFICIAL CAPACITY, AND BOROUGH :
 OF CARTERET, MIDDLESEX COUNTY,

PETITIONERS,

:

: COMMISSIONER OF EDUCATION

V.

:

DECISION

NEW JERSEY STATE DEPARTMENT OF
 EDUCATION,

:

RESPONDENT.

:

SYNOPSIS

Petitioners filed a Verified Petition of Appeal alleging that the children of the Carteret School District have been and continue to be denied their right to a thorough and efficient (T&E) education under N.J. Constitution, Article VIII, § 4, ¶ 1. Additionally, petitioners allege that the Borough cannot increase its local tax levy and, as a result, that the *Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA)* is unconstitutional as applied to the Borough. Respondent contends that: the Borough -- as a municipality -- lacks standing to challenge the District Factor Group (DFG) classification of the Carteret School District, and only the District itself, as the entity subject to the rules of the State Board of Education, may raise the claim at issue; the Borough may not raise the claims of its taxpayers; and the Mayor, as both a taxpayer and Borough official, lacks standing to bring the claims in issue. Respondent filed a motion for summary decision seeking dismissal of the petition.

The ALJ identified standing as the threshold issue in this matter, and found that: Carteret Borough -- and Mayor Reiman in his official capacity -- lack standing to challenge the respondent's *Abbott* classification of its school district; the responsibility for asserting T&E claims lies with the Borough's District Board of Education; and citizen Reiman may not maintain this action as a taxpayer because he has failed to allege actual harm or a substantial likelihood of same based on the respondent's classification of the Carteret School District. The ALJ concluded that the respondent's motion for summary decision should be granted, and the petition dismissed.

Upon a full and independent review of this matter, the Commissioner determined that there was no genuine issue of material fact in dispute, and granted summary decision to the Department. In so deciding, she found, *inter alia*, that: petitioners' claim is derivative to the Board's claim; petitioning Borough is barred from bringing its claim as it is a creature of the State; the T&E clause mandates a system of educational opportunity for children, not equitable tax burdens, and accordingly the mayor as an individual citizen is precluded from maintaining this action based on the T&E constitutional provision. The Commissioner adopted the Initial Decision as the final decision in this matter, and dismisses the petition.

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

December 27, 2005

OAL DKT. NO. EDU 8564-04
 AGENCY DKT. NO. 344-9/04

HONORABLE DANIEL J. REIMAN, MAYOR	:	
OF CARTERET, INDIVIDUALLY AND IN	:	
HIS OFFICIAL CAPACITY, AND BOROUGH	:	
OF CARTERET, MIDDLESEX COUNTY,	:	
	:	
PETITIONERS,	:	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. Petitioners' exceptions and the Department's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching her decision.

In their exceptions, Petitioners claim that -- although this matter arises in the context of seeking Abbott District status for the Carteret School District (District) -- the relief sought on behalf of the Borough of Carteret (Borough) and its taxpayers in this matter is distinct from that sought in the typical Abbott petition brought by a board of education or parents of school children in the district. (Petitioners' Exceptions at 1) Petitioners submit that the Legislature's enactment of the Comprehensive Education Improvement and Financing Act (CEIFA) of 1996 in response to the Supreme Court mandates in *Abbott v. Burke*, 119 *N.J.* 287 (1990) (*Abbott II*) usurped the control of municipalities and their voting constituents over the portion of the municipal tax levy that must be raised in order to meet pre-calculated and compulsory per-pupil funding levels because, under CEIFA,

the State determines the amount needed to provide the thorough and efficient (T&E) education mandated by the State's constitution and "the Borough has no choice but to exact the obligatory local share from its constituent taxpayers and turn those tax monies over in their entirety to the local school district." (*Ibid.*)

Petitioners assert that the Administrative Law Judge's (ALJ's) determination is fatally flawed and must be rejected because the ALJ mischaracterized the nature of their appeal and the relief sought. (*Id.* at 3) Pointing to the petition at pages 43-58, petitioners aver that their actual claim is that the Department's failure to properly designate the Carteret School District as eligible for *Abbott* status has resulted in an ongoing disparate and burdensome tax levy upon the Borough and its taxpayers; as a result, the strictures of CEIFA are unconstitutional as applied to the Borough and its taxpayers. (*Ibid.*) Petitioners allege that the ALJ "transposed and otherwise contorted the nature of the claims to make it appear that the Petitioners are asserting that it can no longer suffer a tax levy that has been 'placed' by the 'State Department of Education,' and that '[a]s a result, petitioners contend that the *children of the District*' are being denied T&E.'" (emphasis in text) (*Id.* at 5, quoting Initial Decision at 5) Petitioners maintain that they are not merely asserting a T&E claim on behalf of the District and its pupils, but, instead, are bringing their own claim to vindicate their own interests. (*Ibid.*) According to petitioners, when a municipality is overburdened to an extent that it interferes with its ability to fund a T&E education, it is not just the school district that suffers the consequences, because the municipality itself is now prohibited -- under CEIFA -- from failing to raise the requisite T&E funds for the District. (*Ibid.*)

With respect to the nature of the relief sought, petitioners claim that the ALJ again pigeonholed the Borough's claims into the type that only a board of education may bring by miscasting the relief sought as being limited to a change in the District Factor Group (DFG) ranking of the

District. (*Ibid.*) Petitioners note that districts with a DFG ranking of “B” can be designated *Abbott* Districts if they can demonstrate additional substantial economic hardship and that a DFG ranking of “A” does not automatically confer Abbott status. (*Id.* at 6) The relief they are actually seeking, petitioners maintain, is the relief set forth in the “Wherefore” clause of the petition -- that the District be afforded *Abbott* District status. (*Ibid.*)

Moreover, petitioners argue, in granting the Department’s motion to dismiss, the ALJ failed to grant all legitimate inferences in favor of petitioners as set forth by the Supreme Court in *Brill v. Guardian Life Insurance Company of America et al.*, 142 N.J. 520 (1995). (*Id.* at 6-7) In this regard, petitioners contend that, instead of inferring that petitioners have a claim of entitlement to the relief sought, the ALJ “approached his analysis from the inappropriate perspective that the Petitioners had failed to state a claim that ‘should be granted,’ (decision at p.6), rather than observing the requisite standard of failure to state a claim *upon which relief can be granted.*” (emphasis in text, *Id.* at 7) Petitioners further contend that the discovery necessary to resolve disputed material facts -- “such as the percent differential between the municipality’s equalized tax rate and the State tax rate and the use of Free and Reduced Lunch Figures” -- has not even begun, and that the Department based its motion on the premise (disputed by petitioners) that certain indicators are dispositive and insufficient to demonstrate conditions of severe poverty. (*Id.* at 8)

Pointing to *Schierstead v. City of Brigantine*, 29 N.J. 220 (1959) (wherein the Appellate Division reversed the Law Division’s ruling, stating that the matter should not have been decided on such a barren record by the trial judge) and *Muniz v. United Hospitals Medical Ctr. Presbyterian Hosp.*, 153 N.J. Super 79 (App. Div. 1977) (wherein the dismissal was reversed as premature because plaintiffs were not given the opportunity to amend their complaint and to conduct discovery), petitioners maintain that there is no justification for dismissing this matter outright in that

the record in this matter is similarly barren of findings on the key issues. (*Id.* at 7-8) Additionally, petitioners assert that it may be reasonably inferred from their pleadings that they are entitled to the relief sought in that “it is clear that such relief is within the authority and ability of the Department to grant,” and the process outlined in the Commissioner’s April, 2003 “Designation of Abbott Districts, Criteria and Process” document permits relief to be granted on a sliding scale. (*Id.* at 8) Since petitioners have stated a claim on which relief -- whether partial or absolute -- may be granted, petitioners argue that there is no justification for dismissing this matter outright. (*Ibid.*)

With respect to the petitioning Borough’s standing to bring its claims against the Department, the Borough takes issue with the Department’s assertion that it lacks standing to bring its claims because it is a “creature of the state,” asserting that the Borough has as much right to bring a claim as a board of education does. In support thereof, the Borough points to *Board of Ed. of Twp. of East Brunswick v. Township Council of Twp. of East Brunswick*, 48 N.J. 94, 108 (1966), citing *Botkin v. Mayor and Council of Borough of Westwood*, 52 N.J. Super. 416 (App. Div. 1958), app. dismissed 28 N.J. 218 (the Borough herein avers the borough in *East Brunswick* “was found to be the sole party in actual interest to proceedings challenging its issuance of a referendum on a school governance issue”¹), in arguing that an independent governing body that will be adversely impacted by an erroneous action of another governing body has the right, if not the obligation, to seek review. (*Id.* at 9) Moreover, the Borough contends it has a direct interest sufficient to afford it standing to do so. (*Ibid.*) Referencing *East Brunswick, supra*, citing *Inglewood v. Los Angeles*, 451 F2d 948 and *Rogers v. Brockette*, 588 F2d. and *Botkin, supra*, the Borough avers that it is well-settled that municipalities may sue and be sued in civil actions and that “a municipality may maintain an action, including constitutional claims against another municipality, a county, the State, or State department, such as here, provided the municipality is not attacking the laws which created it. (*Id.* at 9-10) The

¹ It is noted that the Commissioner was unable to locate this finding in the *Botkin* decision.

Borough asserts that there is no dispute that the Borough was not created by either the Department of Education or the State's education laws, but has been unfairly impacted by them. (*Id.* at 10)

Moreover, the Borough contends that the *Abbott* cases, specifically *Abbott II*, *supra* at 300-301, stand for the premise that "an Act of the Legislature, even having been declared facially constitutional, may be *** 'unconstitutional as *applied*' to individuals, and/or to local governmental entities." (emphasis in text) (*Ibid.*) Thus, the Borough contends, the ALJ misapplied the decision in *Stubaus v. Whitman*, 339 N.J. Super. 38 (2001), cert. den. 171 N.J. 442 (2002), because he failed to acknowledge that the *Stubaus* matter involved a claim that CEIFA was unconstitutional on its face, a claim not being asserted by petitioners herein. (*Ibid.*) The Borough also maintains that the ALJ failed to recognize that what the Appellate Division in *Stubaus* actually found was that "the *school district* could not assert a claim for tax relief on behalf of the taxpayers of the municipality, *not* that a municipality was prohibited from asserting such a claim," nor does *Stubaus* stand for the proposition that a municipality must first demonstrate that the taxpayers are incapable of bringing their own claim. (*Ibid.*)

Additionally, the Borough points out that three boroughs raised legal challenges to the equities of the taxation scheme with respect to the funding of the Manchester Regional High School District on their own behalf and that of their constituent taxpayers in matters that were litigated this year before the Appellate Division and the Supreme Court in *In the Matter of the Petition for the Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District*, Dockets No. A-2901-01 and 5788, respectively. (*Id.* at 11) At no time during this litigation, the Borough contends, was the question of the boroughs' standing to bring the action raised nor have the boroughs ever been required to show that the taxpayers would have difficulty challenging their respective school tax burden on their own.

(*Id.* at 11-12) The petitioning Borough herein asserts that, in the *North Haledon* matter, standing was conferred as a matter of course, notwithstanding the status of the boroughs as “creatures of the state.”

(*Id.* at 12) Accordingly, the Borough reasons, petitioners in this matter have a similar right to challenge the school tax burden being imposed on the Borough and its taxpayers. (*Id.* at 12)

The Borough also notes its disagreement with the ALJ’s conclusion that standing should be denied to the Borough because no court in this State has yet recognized a borough’s standing in a case of this nature. (*Ibid.*) The Borough submits that the absence of any precedential decisions does not preclude standing in a case of first impression, such as the one herein, and argues that “in *In re Camden County, A Body Politic of the State of New Jersey*, 170 N.J. 439 (2002), the New Jersey Supreme Court made it clear that the ‘only’ requirement needed to confer standing is a substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision.” (emphasis in text) (*Ibid.*) In *Camden County*, the Borough avers, the Supreme Court reversed an Appellate Division determination that had denied standing to a governmental entity which was obligated by statute to contribute to funding operations run by that agency but were not within the entity’s purview, finding that “[a]lthough the mere assertion of a public interest -- even by a governing body -- ordinarily is not sufficient to acquire standing to seek judicial review of an administrative agency decision, the existence of a financial interest that is affected directly by the agency action will confer standing on a governing body.” (emphasis supplied in text) (*Id.* at 13-14, citing *Camden County* at 448) The petitioning Borough, therefore, contends that the Court’s holding in that matter -- that the County was entitled to standing in an administrative hearing where a full record could be developed before the State agency made a final determination on the challenged statutory entitlement -- should be applied in this matter so as to permit the Borough to participate in the development of a record, and to argue its case on the merits of its claim. (*Id.* at 15)

The Borough further excepts to the ALJ's conclusion that its petition should be dismissed because the Carteret Board of Education has a more direct interest in protecting its students' right to a thorough and efficient education. (*Ibid.*) Petitioners note, as clarified above, that their "claim arises from allegations of harm to the taxpayers and the public fisc, in which the interest of the Borough is clearly more direct than the Board," and argues the Borough is thus properly pursuing this claim on behalf of the taxpayers and other citizens and residents to whom it stands as *parens patriae* within the ambit of its political responsibility. (*Id.* at 15-16) The Borough emphasizes that it is the Borough's responsibility to provide mandatory governmental services and competing local service and that its responsibility includes a fiduciary responsibility to the individuals from whom funds are collected, and on whose behalf they are administered and disbursed. (*Id.* at 16) In this regard, the Borough claims that it meets the requirement for standing because it has a real and sufficient stake in the outcome of whether a district has *Abbott* status because the gap between educational funding and educational need must be bridged with local taxes, which results in a demonstrable impact upon both its constituent taxpayers and its own municipal finances. (*Id.* at 16-17)

With respect to whether the petitioning Mayor has standing to bring this action, petitioners vigorously except to the ALJ's conclusion that the Mayor lacks standing because "he has not alleged that *his* current tax burden is ...disparate." (emphasis in text) (*Id.* at 17, quoting Initial Decision at 12-13) Petitioners note that it is undisputed that the Mayor is a resident and a taxpayer of the Borough and petitioners have alleged that the Borough's taxpayers are suffering an ongoing disparate tax burden. (*Id.* at 17-18) Thus, it follows, petitioners argue, that the Mayor's tax burden is disparate by definition. (*Id.* at 18) Moreover, petitioners point out that the ALJ made this finding having denied standing to the Borough to bring an action such as this on the basis that such taxpayers should bring their own claims, and the Mayor -- as just such a taxpayer -- therefore does

have standing. (*Ibid.*) In this regard, petitioners aver that the ALJ misapplied *Carlin v. City of Newark*, 36 N.J. Super. 74 (Law Div. 1955) as precluding the Mayor from bringing his claims in his official capacity on the basis that his right to bring his action “flowed from his private right to sue,” and then failing to apply that same premise to the Mayor’s right to maintain the within action in his private capacity. (*Ibid.*, quoting Initial Decision at 8)

Petitioners also take exception to the ALJ’s conclusion that the Mayor lacks standing “because he failed to demonstrate which and how municipal services will be impacted by an unfavorable decision,” claiming that *Brill, supra*, requires an assumption that the alleged adverse impact is actionable for purposes of the Department’s motion. (*Id.* at 19) Petitioners assert that the Supreme court in *Printing Mart-Morristown v. Sharp Electronics, Inc.* 116 N.J. 739, 746 (1989) established the standard for determining the adequacy of a pleading as “whether the cause of action is suggested by the facts” and that the Commissioner in *George Osborne v. Board of Education of the City of Lakewood, Ocean County*, decided by the Commissioner August 26, 2003, *aff’d* State Board April 7, 2004, *aff’d* App. Div. A4775-03T2 May 4, 2005, concluded that “the petitioning taxpayer, *merely by virtue of being a taxpayer*, was able to demonstrate a sufficient stake in the outcome of the proceedings to confer standing to pursue his constitutional challenge.” (emphasis in text) (*Ibid.*) Petitioners thus conclude that the Mayor herein has similarly demonstrated that, as a taxpayer, he is and will be directly impacted by the Department’s determinations as to the District’s *Abbott* status, which governs the calculation of the Borough’s local share under CEIFA of 1996. Petitioners, therefore, request that the Initial Decision be rejected in its entirety and this matter be returned to the OAL for proceedings on the merits. (*Id.* at 19-20)

In response, the Department maintains that the ALJ correctly found petitioners’ claim to be derivative to the claims brought by the Carteret Board of Education in that petitioners’ appeal

alleges that: 1) the Borough's children have been denied their right to a T&E education under the New Jersey Constitution; 2) the school district has been unable to provide a T&E education and its inability to do so can not be remedied by different programmatic and fiscal choices; 3) the Borough's children have been denied a T&E education on a continuing basis; and 4) there are alleged District educational failures. (Department's Reply Exceptions at 1-2) Notwithstanding the raising of separate allegations regarding the effect of CEIFA on the Borough and its taxpayers in the petition, the Department argues, the relief sought by petitioners herein is identical to that sought by the Board; namely, that CEIFA as applied to the District violates the T&E clause of the State constitution. (*Id.* at 2) Accordingly, the Department contends, petitioners' claim arises under the T&E clause and is, thus, derivative to the Board's claim. (*Ibid.*)

Citing *Robinson v. Cahill*, 62 N.J. 473, 513 (1973), cert. denied, 414 U.S. 976 (1973), the Department asserts that the T&E clause was not intended to "insure statewide equality among taxpayers," but, instead, was to insure that students be equipped to compete with relatively advantaged students so that they could become citizens and competitors in the labor market. (*Id.* at 2-3) In that it is the school district which is enlisted by the State to provide its students with a T&E education and it is the State which ensures that school districts have the means to satisfy the constitutional obligation, the Department argues, it is the District, not petitioners herein, that has standing to raise a T&E claim. (*Id.* at 3) Moreover, the Department argues, contrary to the petitioners' implication that CEIFA somehow changes the scope of the court's discussion of the T&E clause in *Abbott II*, nothing within CEIFA suggests that a Borough has a direct interest under the statute to support a T&E claim against the Department. (*Id.* at 4) Since CEIFA focuses on the child receiving a T&E and the school district that must deliver the constitutionally-guaranteed education, the Department contends, petitioners' attempt to distinguish their claim from the T&E claim raised by the Board must be rejected. (*Ibid.*)

The Department also takes issue with petitioners' contention that CEIFA directly affects the Borough because the Borough is prohibited from failing to raise the required T&E funds for the District, claiming that such contention is wholly without merit because it is the District, not the municipality, which creates the school budget and the initial determination of the amount of local tax levy to support the budget, pursuant to *N.J.S.A.* 18A:7F-5 and *N.J.A.C.* 6A:23-8.1(b). (*Id.* at 5) Moreover, pointing to *Stubaus, supra*, at 45-46, the Department avers that districts have some limited discretion in determining the amount of local tax levy and that a district may increase the local tax levy by going beyond the T&E minimum or decrease the local tax levy by spending below the T&E minimum budget. (*Ibid.*) The Department notes that the school districts -- not the municipalities -- must submit their budgets to the voters for approval and that, in the event that voters reject a proposed budget that is within the T&E range and the municipality reduces the budget, the district may appeal the reductions to the Commissioner on the grounds that the amount is needed to meet core curriculum content standard or long-term planning and budgeting. (*Id.* at 5-6) Thus, the Department reasons that the Borough's argument should be rejected in that it is the District that must act under CEIFA. (*Id.* at 6)

The Department further points to the Court's discussion in *Abbott II* at 355-357, where municipal overburden was discussed in the context of how the poor urban school districts were laboring under tax rates at a level well-above the State average; the Court noted that the school district suffers the consequences of municipal overburden, and it is the school district that is prevented from raising additional funds for its education program. (*Id.* at 6) Accordingly, the Department concludes, the ALJ properly concluded that petitioners' claim was derivative to the District's claim. (*Ibid.*)

With respect to petitioners' argument that the ALJ did not grant all inferences in favor of the Borough in determining whether petitioners had failed to state a claim for which relief could be

granted as set forth in the Department's motion to dismiss, the Department maintains that the ALJ did not rule on the Department's argument that petitioners failed to demonstrate the educational and poverty failure necessary to bring their claim under the T&E clause, but decided the Department's motion solely on the issue of standing. (*Id.* at 7-8) Citing *New Jersey Citizen Action v. Riviera Motel Corp.*, 296 N.J. Super. 402, 422 (App. Div. 1997), *appeal dismissed*, 152 N.J. 361 (1998), the Department contends that a dismissal for lack of standing amounts to a refusal by the court to resolve the matter as opposed to dismissal for failure to state a claim, which occurs only after the court has agreed to resolve a controversy. (*Id.* at 8) Thus, the Department concludes, the ALJ applied the correct standard in dismissing petitioners' claim. (*Id.* at 9) Moreover, the Department avers, petitioners' argument that the ALJ failed to apply the proper standard of review must be rejected because the ALJ accepted the allegations in the petition as true for purposes of reviewing the Department's motion, and that petitioners failed to support their argument that the ALJ did not draw all legitimate inferences in their favor in that they did not cite to any specific factual conclusions within the Initial Decision that support their assertion. (*Ibid.*)

Turning to the question of the Borough's standing, the Department argues that the Borough is barred from bringing its T&E claim because it is a creature of the State and -- as found by the ALJ -- is, thus, not entitled to invoke the protections of the New Jersey Constitution against the State. (*Id.* at 10) In so arguing, the Department points to *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933), providing that a municipality, created by the state, may not invoke constitutional privileges or immunities against its creator; *City of Newark v. New Jersey*, 262 U.S. 192, 196, 43 S.Ct. 539, 540, 67 L.Ed. 943 (1923), providing that a municipality cannot challenge state action on Fourteenth Amendment equal protection grounds; and *City of Trenton v. New Jersey*, 262 U.S. 182, 188, 43 S.Ct. 534, 537, 67 L.Ed. 937 (1923), providing

that a municipality holds its powers and privileges subject to the sovereign will. (*Ibid.*) Moreover, the Department notes its agreement with the ALJ's analysis that *Board of Educ. of the Township of E. Brunswick v. Township Council of E. Brunswick*, 48 N.J. 94 (1966) does not support petitioners' argument that they have standing to bring their constitutional claim against the Department in that the *E. Brunswick* matter involved a municipality and a school district wherein the court found that the board of education was not prevented from bringing its claim against the municipality because the local board had a direct interest in its claim, and previous cases had occurred between municipalities and autonomous municipal agencies. (*Id.* at 11)

Additionally, the Department notes that the ALJ distinguished petitioners' claim from *Bergen County v. Port of New York Authority*, 32 N.J. 303 (1960), wherein Bergen County (County) brought a claim alleging that a State statute exempting the Port Authority property from taxation was unconstitutional. (*Id.* at 11-12) The court therein found that a "local governmental body may act with respect to property or power it holds for the benefit of its citizens but it may not generally bring a claim on behalf of its citizen taxpayers." (*Id.* at 12) Moreover, the Department avers, no court has recognized that a Borough or mayor in his official capacity may bring a claim that CEIFA is unconstitutional as applied on behalf of its taxpayers. (*Ibid.*) The Department observes that previous T&E claims were either brought by the individual students and their parents or the school districts. (*Id.* at 12-13)

With respect to petitioners' argument that *Stubaus, supra*, is distinguishable because it involved a school district's standing to bring a third party claim on behalf of its taxpayers, not a municipality, the Department argues that the overriding principle derived from *Stubaus* is that litigants should be discouraged from asserting the constitutional rights of third parties. (*Id.* at 13-14) The Department emphasizes that the ALJ noted the limited circumstances where litigants may assert the

rights of third parties as set forth in *Stubaus*, as follows: 1) when a plaintiff finds it difficult to assert his/her own claims; 2) when the third party's rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party; and 3) when a non-profit organization has sued on behalf of its injured members. (*Id.* at 13) In that none of these circumstances are present in this matter, the Department concludes that the ALJ properly applied *Stubaus* to petitioners' appeal. (*Id.* at 14) The Department also contends that petitioners' reliance on *North Haledon, supra*, is misplaced because that matter involved a withdrawal of a municipality from a regional high school district, not a municipality bringing a claim against a state agency for an alleged T&E claim. (*Id.* at 14) Standing was not an issue in that matter, the Department maintains, because standing was conferred by *N.J.S.A.* 18A:13-54 and -55. (*Id.* at 15) Moreover, the Department points out, *North Haledon* did not involve a municipality bringing suit against the State, but, instead, was a dispute between the constituent districts and their municipalities. (*Ibid.*)

The Department contends petitioners' reliance on *Camden County, supra*, is also unpersuasive because that matter arose from the County's claim that its statutorily authorized contractual obligation to provide a substantial portion of the cost of health benefits for employees who become disabled and are incapacitated. Thus, it did not involve a County bringing a constitutional claim against the State or one of its agencies. (*Id.* at 16) Moreover, the Department maintains, the Department has not ordered the Borough to directly pay for the District's provision of T&E, and it is not the Borough -- but the taxpayers -- that will be required to pay more money if the local tax levy is increased to accommodate the District's educational needs. (*Id.* at 17) The Department argues that petitioner's claim, however, falls squarely within the limitations of standing as set forth in *Camden, supra* at 447, wherein the court found that: 1) "a claim brought based on a perceived public interest is too 'generalized' to confer standing;" 2) "a real and direct interest must be present before

granting a third party standing to seek a judicial review of agency action[,]...[c]ounty or local governing bodies generally lack standing to challenge actions of governmental agencies merely because they represent the public;" and 3) "[p]rotecting public interests is important, but it does not take precedence over the need to prevent one governmental body from interfering with the actions of another public body." (*Id.* at 17-18) In this matter, the Department avers, petitioners' interest is the general tax burden. (*Id.* at 18) Thus, the Department argues, petitioners' assertions with respect to the alleged injury to their taxpayers are "too generalized" and do not take precedence over the State's interest in maintaining order within its governmental structure. (*Ibid.*)

Additionally, the Department asserts that petitioners cannot ignore that they "brought their claim asserting a constitutional educational violation," and that a claim brought pursuant to the T&E clause is not concerned with the Borough's ability to manage its fiscal and political obligations. (*Id.* at 19) Thus, the Department reasons, "the Borough's ability to manage its financial and political obligations does not make its interests more direct than the District's interests under a T&E claim." (*Id.* at 20) Moreover, the Department reiterates that municipal overburden as discussed in *Abbott II* refers to overburden with respect to a school district, not a municipality, and to accept such a remote interest as a basis of standing to bring a T&E claim would divert the focus from the education received to general financial issues of the municipality, which is outside the intent of the T&E clause. (*Ibid.*)

Finally, with respect to the Mayor's standing to bring his claim, the Department avers that the Mayor is precluded in his official capacity from bringing a claim in this matter, noting that the situation herein differs from that in *Carlin v. City of Newark*, 36 N.J. Super. 74 (Law Div. 1955) because the claim brought by the Newark Mayor was not a constitutional claim, and his claim was brought by that mayor in his individual capacity. (*Id.* at 21) Moreover, the Department's position is that Mayor Reiman also does not have standing to pursue a claim in this matter as an individual

taxpayer because he has not demonstrated how he will be adversely affected by an unfavorable decision by the Department. (*Ibid.*) In this regard, the Department notes its disagreement with the Mayor's assertion that he will have to pay the costs of a rising tax levy to support the District's T&E obligation, citing *N.J.A.C. 6A:24-7.1(d)5* and *Board of Education of the Township of Neptune v. Department of Education*, decided by the Commissioner October 20, 2003, in support of its contention that the grant of *Abbott* status does not guarantee that the tax levy will not be increased. (*Id.* at 21-22)

Upon a thorough and independent review of the record, the Initial Decision, the parties' exception arguments and the relevant case law, the Commissioner has determined that grant of summary decision to the Department 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, supra*), 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 petitioners' assertion to the contrary, there are no "material facts" in dispute in this matter with respect to the threshold issue of whether petitioners have standing to pursue their claims. *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." The issues characterized by petitioners as "material facts that remain in dispute" as set forth in petitioner's exceptions, such as "the percent differential between the municipality's equalized tax rate and the State tax rate and the use of Free and Reduced Lunch Figures," are facts related to the underlying merits of the case, not to the threshold issue of standing. "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 the Department prevails as a matter of law for reasons provided in the Initial Decision and explicated below.

Initially, the Commissioner rejects petitioners’ contention that the ALJ mischaracterized the nature of their appeal and the relief sought. Petitioners’ appeal alleges, *inter alia*, that: 1) the children of the Carteret School District have been denied their right to a T&E education on a continuing basis under the New Jersey Constitution (Petition at 9, No. 44); 2) the District has been unable to provide a T&E education, and its inability to do so cannot be remedied by different programmatic and fiscal choices (*Id.* at 9, No. 43); 3) socioeconomic conditions make it impossible or overly burdensome for the Borough to raise the additional taxes necessary to meet the District’s special funding needs (*Id.* at 9, No. 46); 4) the Borough is prohibited under CEIFA from failing to meet the District’s funding requirements (*Id.* at 9, No. 48); 5) the Department’s failure to properly designate the Carteret School District as eligible for *Abbott* status has resulted in an ongoing disparate and burdensome tax levy upon the Borough and its taxpayers (*Id.* at 8-9, No. 41) and 6) CEIFA as applied to the District violates the T&E clause of the State constitution (*Id.* at 10, No. 51).

Notwithstanding petitioners’ argument that the raising of separate allegations applicable to the Borough’s taxpayers -- *i.e.*, that the Department’s failure to properly designate the

Carteret School District as eligible for *Abbott* status has resulted in an ongoing disparate and burdensome tax levy upon the Borough and its taxpayers and, as a result, the strictures of CEIFA are unconstitutional as applied to the Borough and its taxpayers -- the underlying premise of petitioners' claim, as pled in their petition and noted above, is that CEIFA as applied to the District violates the T&E clause of the State constitution. As set forth in *Robinson, supra*, at 513, the T&E clause was not intended to ensure statewide equality among taxpayers, but, instead, was to ensure that disadvantaged students were able to compete with those who were relatively advantaged. Accordingly, as the ALJ properly determined, petitioners' claim is derivative to the Board's claim.

Moreover, since it is the school district, rather than the Borough, that has the obligation to provide its students with a T&E education, it is the District that has the authority to challenge Department determinations that it believes have had an adverse impact on its ability to provide its students a T&E education. It is instructive that in *Abbott II* at 355-357, the Court noted that the school district suffers the consequences of municipal overburden, and it is the school district that is prevented from raising additional funds for its education program. Thus, although the Borough argues that the adverse and disparate tax impact of the Department's failure to classify the Borough's school district as an *Abbott* district gives it standing to challenge the Department's *Abbott* classification of the District, the Commissioner finds that such argument is beyond the weight of authority.

Additionally, as thoroughly discussed in the Initial Decision, New Jersey courts have consistently held that municipalities have limited grounds upon which to challenge State action. As noted in *Stubaus, supra* at 48, "courts generally recognize that political subdivisions of the State, including municipalities and local boards of education, lack the legal capacity to challenge State action based on equal protection grounds" (citations omitted). Moreover, the Commissioner concurs that the Borough is barred from bringing its claim because it is a creature of the State and, thus, cannot

challenge State action on equal protection grounds. See *Williams, supra*, (a municipality, created by the state, may not invoke constitutional privileges or immunities against its creator) and *Newark, supra*, (a municipality cannot challenge state action on Fourteenth Amendment equal protection grounds). With respect to petitioners' reliance on *Camden, supra*, and *North Haledon, supra*, the Commissioner finds these cases are inapplicable to this case. *Camden* arose from the County's statutorily-authorized contractual obligation, not a constitutional claim against the State or one of its agencies; and in *North Haledon*, a matter involving the withdrawal of a municipality from a regional high school district, standing was conferred by *N.J.S.A.* 18A:13-54 and -55.

Moreover, it is noted that the Appellate Division in *Stubaus* concluded that the only parties who possessed standing to challenge the CEIFA funding mechanism were the taxpayers residing in the various school districts. *Stubaus, supra*, at 52. That court also set forth the limited circumstances where litigants have been permitted to assert the constitutional rights of third parties, *i.e.*, where third parties find it difficult to bring their own claims, where the third party's rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party and where a non-profit organization sues on behalf of its injured members. *Stubaus* at 51. Even assuming, *arguendo*, that the Borough and the Mayor in his official capacity are not precluded from raising a constitutional claim challenging CEIFA as noted above, neither the Borough, nor the Mayor in his official capacity, satisfies these limited circumstances so as to raise these claims on behalf of the Borough's taxpayers.

Finally, with respect to the Mayor's standing as an individual taxpayer to assert his own constitutional rights and to seek invalidation of CEIFA, the Commissioner concurs that, while the "liberal application of the standing rules is particularly appropriate in taxpayer suits" (*Stubaus* at 52, citation omitted), in this particular matter, petitioner, in his individual capacity, has failed to allege

actual harm or a substantial likelihood of same. Furthermore, the essence of such harm as he does allege is not the harm against which the T&E clause protects. T&E mandates a system of educational opportunity for children, not equitable tax burdens. "...[T]he T&E constitutional mandate does not protect taxpayers." (*Id.* at 56) The Commissioner, therefore, agrees with the ALJ that the mayor as an individual citizen is precluded from maintaining this action based on the T&E constitutional provision.

Accordingly, as articulated above, the Commissioner adopts the Initial Decision granting the Department's motion and dismissing the within petition for the reasons set forth therein.

IT IS SO ORDERED.²


ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/27/05

Date of Mailing: 12/27/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION –

STANDING

OAL DKT. NO. EDU 8564-04

AGENCY REF. NO. 344-9/04

**HON. DANIEL J. REIMAN, MAYOR,
AND BOROUGH OF CARTERET,
MIDDLESEX COUNTY,**

Petitioners,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION**

Respondent.

Nicholas Celso, Esq., for Petitioners (Schwartz, Simon, Edelstein, Celso & Kessler,
L.L.P., attorneys)

Michael C. Walters, Deputy Attorney General, for respondent, (Peter C. Harvey,
Attorney General of New Jersey, attorney)

Record Closed: April 4, 2005

Decided: August 26, 2005

BEFORE ISRAEL D. DUBIN, ALJ:

On May 27, 2004, the Borough of Carteret Board of Education filed a Verified Petition of Appeal¹ asking the Commissioner of Education to redesignate the Carteret School District as an *Abbott* district on the basis that the *Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA)*, *N.J.S.A. 18A:7F-1 et seq.*, is unconstitutional as applied to the District. The matter was transmitted to the Office of Administrative Law (OAL) on October 14, 2004 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13* and *N.J.S.A. 52:14B-1 to -15*, and assigned OAL Docket No. EDU 8565-04.

On September 27, 2004, the Hon. Daniel P. Reiman, individually and in his official capacity as Mayor of the Borough of Carteret, and the Borough of Carteret itself, filed a Verified Petition of Appeal alleging that the children of the Carteret School District have been and continue to be denied their right to a thorough and efficient education under *N.J. Const.*, art. VIII, § 4, ¶ 1. Petitioners also allege that the Borough cannot increase its local tax levy and as a result, that *CEIFA* is unconstitutional as applied to the Borough. This matter was transmitted to the Office of Administrative Law on October 14, 2004 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 to -13* and *N.J.S.A. 52:14B-1 to -15*, and assigned OAL Docket No. EDU 8564-04.

The enactment of *CEIFA* was in response to the State Supreme Court's ruling in *Abbott v. Burke*, 199 *N.J.* 287 (1990) (*Abbott II*) and its progeny.² *N.J.S.A. 18A:7F-2(a)(2)*. The purpose of the Act is to ensure "a thorough and efficient system of public education which is uniformly applicable to all" school districts through a definition of thorough and efficient educational (T & E) programs, as well as the appropriate funding model to enact such programs. *N.J.S.A. 18A:7F-2(b)*. The *CEIFA* funding model is based upon a core curriculum and has been explained as follows:

¹ The Board subsequently filed an Amended Petition of Appeal on July 8, 2004.

² A chronology of *Abbott* school funding decisions may be found in *Abbott v. Burke*, 153 *N.J.* 480, 490-93 (1998) (*Abbott V*).

The core curriculum standards provide a substantive framework detailing what children need to know in order to participate as workers and citizens in contemporary society, which is the goal of a T & E public education system. *Abbott v. Burke*, 100 N.J. 269, 280-81 (1985) (*Abbott I*). CEIFA also established a model or prototypical school district that efficiently provides the programs and services necessary for students to achieve the core curriculum standards. Thus, CEIFA established a prototypical program that the Legislature believed would satisfy the T & E constitutional requirements. The per pupil cost to implement the prototypical model, combined with the school district's ability to contribute to that cost, is the basis under CEIFA for distributing State educational aid.

[*Stubaus v. Whitman*, 339 N.J. Super. 38, 45 (App. Div. 2001), *cert. denied*, 171 N.J. 442 (2002).]

CEIFA also includes detailed budgeting provisions that are to be used in arriving at a district's T & E budget. *Id.* at 46. It is this T & E budget that is used to calculate each district's State educational aid. *Ibid.* The budget formula is used to establish the local budget share that each district must pay toward the T & E budget and is dependent on "the relative wealth of the school district based on aggregate property values and income." *Ibid.* As a result, wealthier districts pay a larger share of the T & E budget than poorer, or so-called *Abbott*, districts. *Ibid.*

Designation as an *Abbott* district is "a remedy for poverty and educational failure so substantial, pervasive and durable that targeted efforts simply cannot produce a constitutionally sufficient result." *Bacon v. New Jersey Dep't of Edu.*, Comm'r. Decision (Feb. 10, 2003), at 137³ <www.state.nj.us/njded/legal/index.html>. To qualify for *Abbott* status, a district "must show that it has done all it can do with statutorily available resources and improvement mechanisms, yet *still* cannot provide T&E because the statutory funding scheme generates insufficient monies for this purpose." *Id.* at 141.⁴

The Department of Education contends that the Borough, as a municipality, does not have standing to challenge the DFG classification of the Carteret School District since it is the District itself, as the entity subject to the rules of the State Board of Education, that may raise the claim at issue. The Department further contends that the Borough may not raise the claims of its

³ PDF image at 6.

⁴ PDF image at 10.

taxpayers. And finally, it contends that Mayor Reiman, both as a taxpayer and Borough official, lacks standing to bring the claims in issue. It therefore seeks to have the Verified Petition of Appeal filed by the Borough and Mayor Reiman dismissed.

Petitioner Daniel J. Reiman has brought this action as a citizen, resident and taxpayer of the Borough of Carteret, as well as in his official capacity as Mayor. The Borough, which joins with him in bringing this action, is a public body corporate and politic of the State of New Jersey. An urban municipality with a high population density and poverty rate, it has been designated an Urban Enterprise Zone. Because it is located adjacent to Newark Liberty Airport and the port and rail yards of Newark, which have been designated as “hot spots” by the Department of Homeland Security, it must maintain a specially trained police force. And since it has been cited as having critical infrastructure by the State Division of Fire Safety, it must also maintain a professional Fire Department.

In 2003, the Borough had an equalized property value of \$1,485,619,545.00, with an equalized property tax value of \$1,303,872,886. The Borough’s 2003 equalized tax rate was 2.574, a number higher than the State’s average equalized tax rate of 2.094. The voters have defeated thirty-three proposed annual budgets and one building referendum in the past thirty-three years.

The Borough’s per-pupil market value in 2003-2004 was \$398,125.00, an amount less than the State average of \$605,507. The District’s free and reduced lunch eligibility rate this past school year was approximately 49%, and more than 20% of the District’s students also qualified for free or reduced cost breakfast.

The Department has assigned the School District a New Jersey Department of Education District Factor Group (“DFG”) classification of “B.” Under *CEIFA*, the Borough was therefore obligated to provide 46 percent of the District’s budget for the 2002-2003 school year and 45.10 percent of the District’s budget for the 2003-2004 school year.

Seventy percent of the District’s student population consists of minority students. The mobility rate of the District’s elementary school students was 20.95 percent and the mobility rate of the District’s secondary school students was 22.7 percent during the 2002-2003 school year,

when the State averages were 12.8 percent and 10.9 percent, respectively. The dropout rate at the District's high school was 2.7 percent, while the State average was 1.9 percent.

The District's standardized test scores have also been consistently lower than the State average. The standardized tests include the Elementary School Proficiency Assessment (ESPA) in Language Arts Literacy and Mathematics; New Jersey Assessment of Skills and Knowledge – Grade 4 (NJASK4) in Language Arts Literacy and Mathematics; Grade Eight Proficiency Assessment (GEPA) in Language Arts Literacy, Mathematics and Science; and the High School Proficiency Assessment (HSPA) in Language Arts Literacy and Mathematics. The following table summarizes the percentage of the District's students who failed the standardized tests:⁵

Percentage of Carteret Students Who Did Not Achieve Passing Scores

	<u>2001-2002</u>	<u>2002-2003</u>	<u>2003-2004</u>
ESPA-LAL	33.7	---	---
NJASK4-LAL	---	32	27.5
ESPA-Mathematics	49.4	---	---
NJASK4-Mathematics	---	35.9	33.7
GEPA-LAL	42.4	37.2	49.7
GEPA-Mathematics	51.2	54.7	57
GEPA-Science	37.5	35.4	34.1
HSPA-LAL	25.7	22.7	---
HSPA-Mathematics	38.4	34.5	---

Petitioners argue that *CEIFA* requires the Borough to certify a general fund tax levy to meet the District's needs. *N.J.S.A.* 18A:7F-5(b). They further argue that by failing to certify Carteret as an *Abbott* district, despite poverty levels and educational failures that fall within the criteria for certification as such, the State Department of Education has placed a continuing disparate and burdensome tax levy upon the Borough and its taxpayers that can no longer be suffered. As a result, petitioners contend that the children of the District have been and continue to be denied their right to a thorough and efficient education under the New Jersey Constitution.

The Department contends that the Borough and Mayor Reiman, in his official capacity, do not have standing to bring this action. The Department also contends that Mayor Reiman,

⁵ The chart summarizes data from the *Petitioner's Amended Petition*, pp. 8-9.

even in his capacity as a private citizen and taxpayer of the Borough, lacks standing to prosecute this claim. It has therefore filed a Motion for Summary Decision seeking dismissal of petitioners' appeal for failure to state a claim that should be granted.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. *N.J.A.C.* 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." *Judson v. Peoples Bank & Trust Co. of Wesfield*, 17 N.J. 67, 74 (1954).

Recently, the New Jersey Supreme Court encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted], the trial court should not hesitate to grant summary judgment." *Id.* at 540.

Here, a careful reading of the record discloses that the material facts giving rise to this matter are not in dispute. Therefore, pursuant to *N.J.A.C.* 1:12.5(b) and *Brill v. Guardian Life Insurance Co. of America*, 142 N.J. 520, 523 (1995), this matter is ripe for Summary Decision.

Standing is "a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." *In re Six Month Extension of N.J.A.C. 5:91-1 et seq.*, 372 N.J. Super. 61, 85 (App. Div. 2004). In fact, the issue of standing may 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). In order for a party to have standing, the party must have a sufficient stake in the outcome of the litigation, there must be "real adverseness with

respect to the subject matter of the litigation,” and there must be a “substantial likelihood that some harm will fall upon [the party] in the event of an unfavorable decision.” *In Re New Jersey Board of Public Utilities*, 200 N.J. Super. 544, 556 (App. Div. 1985), citing *N.J. Chamber Commerce v. N.J. Elec. Law Enforce. Comm.*, 82 N.J. 57 (1980).

The courts of this State have set a relatively low threshold for standing that is more expansive than that found in the federal courts. *In re Six Month Extension of N.J.A.C. 5:91-1 et seq.*, *supra*, 372 N.J. Super. at 85. And this approach to standing is even more liberal within the State’s administrative system. Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty, 37 *New Jersey Practice, Administrative Law and Practice* § 7.4, (rev. 2d ed. 2000); *Osborne v. Township of Lakewood Board of Education*, EDU 6348-02, Initial Decision (May 16, 2003), *modified*, Comm’r. (August 26, 2003) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

However, standing is not automatically conferred, and a litigant will not normally be granted standing to assert the rights of a third party. *In re Six Month Extension of N.J.A.C. 5:91-1 et seq.*, *supra*, 372 N.J. Super. at 85. Nor will the courts “entertain proceedings by plaintiffs who are ‘mere intermeddlers’ or are merely interlopers or strangers in the dispute.” *Stubaus v. Whitman*, 339 N.J. Super. 38, 48 (App. Div. 2001), citing *Crescent Pk. Tenants Ass’n. v. Realty Equities Corp.*, 58 N.J. 98 (1971).

As a municipality, the Borough is “a creature of the State” and is therefore prohibited from invoking constitutional claims against its creator. *See, City of Newark v. New Jersey*, 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923) (municipality cannot invoke Fourteenth Amendment claims against the State); *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923) (State may delegate powers to or withhold powers from a municipality as it sees fit); *Kessler v. Tarrats*, 194 N.J. Super. 136 (App. Div. 1984) (as creatures of the State, municipalities retain only those powers granted by the State). To allow a municipality to bring a claim against a state agency would be to disrupt the intergovernmental relationship between municipalities and the State and should therefore be discouraged. *County of Bergen v. Port of New York Authority*, 32 N.J. 303, 315 (1960) (a municipality may not attack state agencies “solely on the thesis that it represents citizen taxpayers.”).

Still, petitioners assert that since the Borough will be adversely affected by the actions of another governmental entity, it has a direct interest in challenging those actions and may even raise constitutional issues in doing so, as long as it is not attacking the very laws under which it was created. However, their argument that the Borough maintains standing to challenge the Department's *Abbott* classification of the Borough's School District is beyond the weight of authority.

New Jersey courts have consistently held that municipalities have limited grounds upon which to challenge State action. *See, e.g., Stubaes v. Whitman, supra*, 339 N.J. Super. at 48 (“political subdivisions of the state, including municipalities and local boards of education, lack the legal capacity to challenge state action based on equal protection grounds”) (citations omitted). And this is particularly true where, as here, a municipality's cause of action is essentially derivative.

The Borough's claim against the Department is based upon its assertion that the Carteret School District is unable to provide its students with a thorough and efficient education based upon its DFG classification. However, it is not the Borough, but rather its school district, that has the obligation to provide its students with a free and appropriate education. And it is also the District that is subject to the rules adopted by the State Board of Education. Therefore, it is the District that must have, and has, the ability to challenge those determinations of the Department that it believes will have an adverse impact on its ability to provide its students with a thorough and efficient education.

Petitioners' assertion that *Carlin v. City of Newark*, 36 N.J. Super. 74 (Law Div. 1955), supports Mayor Reiman's right to bring this action is unpersuasive since the mayor in that case did not bring the action in his official capacity, but rather as a “private citizen, property owner and taxpayer of the city.” *Ibid.* Acknowledging that Carlin had the right to “prosecute [the] suit in the interest of the taxpayers,” the court went on to state that this right flowed from his private right to sue, not any right that he may have enjoyed in his official capacity as mayor. *Id.* at 86.

Similarly, petitioners' argument that the Borough may maintain a constitutional claim against a State agency based upon the holding of *Board of Educ. of the Township of East Brunswick v. Township Council of East Brunswick*, 48 N.J. 94 (1966), is flawed. In *East*

Brunswick, the district board of education brought suit against the township council following the council's reduction of the district's budget by \$195,000. Citing Justice Hall's opinion in *Botkin v. Mayor and Borough Council of Borough of Westwood*, 52 N.J. Super. 416 (App. Div. 1958), *appeal dismissed*, 28 N.J. 218 (1958), the Supreme Court held that

a board of education ... is an independent governmental entity which is substantially free of any controls by the local governing body. It has been vested by the Legislature with the responsibility of providing suitable school facilities and accommodations and with the right to sue. Where, as here, it was satisfied that the governing body's action was erroneous and would deprive the local school system of necessary teaching staffs and physical facilities, *it had the right*, if not the obligation, to seek review; *clearly, the interest of the local Board of Education was more direct than various interests which have recently been recognized as sufficient under our broad judicial approach to problems of standing.*

[*Board of Educ. of the Township of East Brunswick v. Township Council of East Brunswick*, *supra*, 48 N.J. at 108 (citations omitted; emphasis added)]

As in *East Brunswick*, the interests of the Borough of Carteret District Board of Education must be deemed "more direct" than those of the Borough.

Finally, petitioners' reliance on *Bergen County v. Port of New York Authority*, *supra*, 32 N.J. 303, is misplaced. In that case, the county brought an action against the Port Authority seeking a declaratory judgment that the Port Authority lacked legal authority to enter into a lease for property located in the Borough of Moonachie, and that the statute, insofar as it purportedly granted the Port Authority tax exemptions, was unconstitutional. The Supreme Court held that the county did not have an interest sufficient to support the action since the building in question was located in Moonachie, which was the real party with interest. *Id.* at 311. As the Court concluded:

It is difficult to foresee all eventualities. It may be that situations will arise in which despite the absence of an intrusion upon the property or political powers of a county or municipality, it may appropriately speak with respect to some hurt experienced generally by its inhabitants. We need not and do not foreclose that possibility. It is enough for present purposes to say that a county

may not sue to determine the jurisdiction of another political agency of the State solely to vindicate the general public right.

[*Id.* at 315-316.]

Thus, the Court's primary criterion for a municipality to maintain standing is that it have a sufficient interest and act "within the orbit of its own political responsibility." *Id.* at 311. Under this criterion, the Borough of Carteret does not have sufficient interest since its T & E claim does not protect the property and power of the Borough. More importantly, the claim is not within the "orbit" of the Borough's political responsibility. *Ibid.* The responsibility for asserting T&E claims lies with the Borough's District Board of Education, not the Borough or the Mayor in his official capacity.

Petitioners have advanced a rather novel theory of standing, arguing that the Borough's interest lies in the fact that its taxpayers will suffer from the consequences of municipal overburden due to the District's DFG classification.⁶ That is, since it is the Borough that must provide the "local share" under *N.J.S.A.* 18A:7F-5(b), and that burden will be funded through local tax revenues, the Borough has a responsibility to bring this action on behalf of its taxpayers. However, no court in this State has yet recognized standing based on such a tenuous relationship.

To the contrary, in *Stubaus v. Whitman*, *supra*, 339 N.J. Super. 38, the Appellate Division concluded that school districts did not have standing to bring suit on behalf of their respective municipalities' taxpayers. The plaintiffs in *Stubaus* were forty-two middle-income school districts and seven individual taxpayers who challenged the public school funding model established by *CEIFA*. The gravamen of their complaint was that the funding system "caused disparate tax burdens constituting violations of the equal protection ... and thorough and efficient" clauses of the State Constitution. *Id.* at 44.

The *Stubaus* plaintiffs allowed "that a government agency's *parens patriae* interest in protecting the general public, standing alone, is generally insufficient to support standing to challenge an exercise of power by another agency of the government." Yet, having

⁶ The Borough's sufficient interest argument only peripherally addresses the "orbit of political responsibility" requirement previously discussed.

acknowledged that, they also argued that there is standing when “a public body sues to vindicate its ability to function as contemplated by its enabling legislation.” *Id.* at 49.

The court, however, did not accept the plaintiffs’ claim, premised as it was on the argument that middle-income school districts are “irrationally burdened by *CEIFA*’s calculation of local share.” *Id.* at 47. While the school districts may have had standing to challenge T & E educational requirements, they did not have standing to challenge the funding of the “local share.” *Id.* at 50. Rather, the only parties who possessed the standing to challenge the *CEIFA* funding mechanism were the taxpayers residing in the various school districts. *Id.* at 52. The court went on to explain its decision to prohibit the school districts from asserting the rights of their taxpayers as follows:

Although we have allowed litigants to assert the rights of third parties, we have only done so in limited situations. For example, when a plaintiff suffers direct impairment of constitutional rights, that plaintiff may also assert the rights of third parties who find it difficult to bring their own claims. Plaintiff(s) may also raise the constitutional rights of a third party when the third party’s rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party. Finally, we have also permitted a non-profit organization to sue on behalf of its injured members. Here, plaintiff school districts have not suffered any direct injury, the individual taxpayers are capable of bringing suit on their own, and the school districts are not members of any non-profit organization. Thus, the districts do not have standing to sue on behalf of the taxpayers.

[*Id.* at 51.]

As was the case with the plaintiffs in *Stubaus*, the Borough and Mayor have not demonstrated that the Borough’s taxpayers are having, or have had, difficulty in bringing an action on their own. Nor have they established that they have a confidential relationship with the taxpayers. And it is undisputed that the Borough is not a non-profit organization, as that term is commonly defined. Consequently, neither the Borough, nor Mayor Reiman in his official capacity, possess the requisite standing to raise these claims on behalf of the Borough’s taxpayers.

This is not to say that the Mayor, as an individual taxpayer, lacks standing to bring this action. In *Stubaus*, the court determined that taxpayers had “a sufficient stake in the matter

because an adverse decision [would] continue the disparate tax the taxpayers must pay.” *Id.* at 52. In essence, “they [would] be harmed by an unfavorable decision.” *Ibid.* citing *In re Charter School Application of Englewood*, 320 N.J. Super. 174, 222 (App. Div. 1999), *aff’d* 164 N.J. 316 (2000). What is more, “liberal application of the standing rules [is] particularly appropriate in taxpayer suits.” *Stubaus v. Whitman*, *supra*, 339 N.J. Super. at 52, citing *Ridgewood Educ. Ass’n v. Ridgewood Bd. of Educ.*, 284 N.J. Super. 427, 431 (App. Div. 1995). The Court therefore concluded that individual taxpayers had standing to assert their own constitutional rights and seek to invalidate CEIFA.

In *Stubaus*, the taxpayers argued that the CEIFA funding system not only violated the T & E mandate, but also resulted in a range of property tax rates that established a “system of school funding [which] is irrational and grossly discriminatory.” *Stubaus v. Whitman*, *supra*, 339 N.J. Super. at 56-57. This, they claimed, violated the equal protection clause *on its face*. However, the court was not convinced, expressed “unease about pronouncing a willingness to decide the claim on an equal protection basis, and ... reject[ed] any attempt to project equal protection into the school funding dispute.” *Id.* at 60. After expressing “grave doubts about the merits of plaintiffs’ equal protection argument,” *Ibid.*, the court affirmed the trial court’s dismissal of the complaints, stating that even if it were to consider the merits, it would still have difficulties with plaintiffs’ claims and would be unable to conclude that plaintiffs had set forth “a viable constitutional challenge based on the equal protection clause.” *Id.* at 61. Based upon the foregoing, the only remaining task is to examine whether citizen Reiman will be harmed by an unfavorable decision.

Mr. Reiman⁷ has alleged that the Department’s assignment of a DFG classification of “B” to the School District will have an adverse impact on him since “any gap in educational funding must be bridged with local taxes, at the expense of other important municipal services.” *Petitioners’ Supplemental Brief on the Issue of the Mayor’s Standing*, pg.6, ¶2. However, he has failed to articulate what that adverse impact will be. While he has alleged that he will be injured if forced to pay more taxes, he has not established that the DFG classification will, in fact, result in a tax increase or, at the very least, make one substantially likely. Nor has he identified the “other important municipal services” or demonstrated how they will be affected. Finally, he has

⁷ In the interest of clarity, Mr. Reiman will not be referred to as “Mayor” in this section of the Initial Decision.

not alleged that his current tax burden is presently disparate, or that the failure of his claim will result in a future disparate tax burden. Since he has failed to allege actual harm, or a substantial likelihood of same, he does not have taxpayer standing.

Based upon the foregoing, I **CONCLUDE** that the New Jersey State Department of Education's Motion for Summary Decision should be **GRANTED**, and that the Petition of Appeal filed by the Borough of Carteret and the Hon. Daniel P. Reiman, individually and in his official capacity as Mayor, should be **DISMISSED**. It is so **ORDERED**.

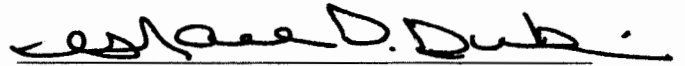
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 26, 2005

DATE



ISRAEL D. DUBIN, ALJ

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

August 26, 2005

DATE

AUG 30 2005

DATE

Mailed to Parties:



**DEPUTY AND
CHIEF ADMINISTRATIVE LAW JUDGE**

OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 4936-05
 AGENCY DKT. NO. 160-6/05

Y.R.L., ON BEHALF OF MINOR
 CHILD, K.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
 TOWNSHIP OF BERNARDS, ET AL.,
 SOMERSET COUNTY,

RESPONDENT.

:

:

COMMISSIONER OF EDUCATION

:

DECISION

:

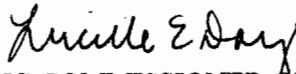
:

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

Upon review, the Commissioner observes that neither the file nor the Stipulation of Settlement contains a copy of the Board's resolution approving the settlement and designating Valarie A. Gogar, Yorven R. Liou and Francis T. Howlett to sign the agreement on its behalf, nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating the above-noted persons to sign on behalf of the Board. 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.*


 ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/30/05

Date of Mailing: 12/30/05

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4936-05

AGENCY DKT. NO. 160-6/05

Y.R.L. ON BEHALF OF MINOR CHILD K.L.,

Petitioner,

v.

**FRANCIS HOWLETT, PRINCIPAL OF WILLIAM
ANNIN MIDDLE SCHOOL, BERNARDS TOWNSHIP,
AND BOARD OF EDUCATION OF THE TOWNSHIP
OF BERNARDS, SOMERSET COUNTY,**

Respondents.

Y.R.L., petitioner, *pro se*

Steven M. Fleischer, Esq., for respondents (Sills, Cummis, Epstein & Gross, attorneys)

Record Closed: November 14, 2005

Decided: November 14, 2005

BEFORE STEPHANIE M. WAUTERS, ALJ:

This matter was transmitted to the Office of Administrative Law on July 19, 2005 for determination as a contested case, pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F-1 to -13*.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

11-14-05
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

11/16/05
DATE

Lathy Duncan (KK)
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 2005
DATE

James Sanders
DIRECTOR AND
OFFICE OF ADMINISTRATIVE LAW JUDGE

cmo

SILLS CUMMIS EPSTEIN & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondents,
Bernards Township Board of Education
and Francis T. Howlett

RECEIVED

2005 NOV 14 P 1:56

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

YORVEN R. LIOU o/b/m K.L.

Petitioners,

v.

BERNARDS TOWNSHIP BOARD OF
EDUCATION and FRANCIS HOWLETT

Respondents.

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
AGENCY DOCKET NO.: 160-6/05

STIPULATION OF SETTLEMENT

WHEREAS, on or about April 19, 2005, petitioner's son, K.L., was assigned two Saturday detentions; and

WHEREAS, Yorven R. Liou filed a Verified Petition against the Bernards Township Board of Education ("Board" or "District") and Francis T. Howlett (collectively "Respondents") on or about June 22, 2005 appealing this discipline on behalf of his son; and

WHEREAS, respondents expressly deny any wrongdoing and assert that the discipline was properly imposed; and

WHEREAS, the parties have reached an amicable resolution of this matter which protects the interests of all parties and avoids the cost and time necessary to pursue litigation; and

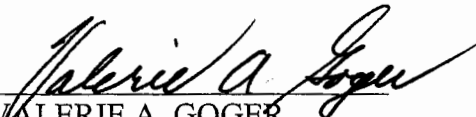
WHEREAS, this resolution serves the public's best interest by avoiding further litigation costs and the uncertainty attendant to litigation;

NOW THEREFORE, the parties agree as follows:

1. Petitioner agrees to withdraw the Petition with prejudice.

2. In complete and full satisfaction of his appeal, petitioner will have the opportunity to have a meeting with the Superintendent of the Bernards Township Schools and Francis T. Howlett to discuss the discipline which is the subject of this appeal. If petitioner would like to avail himself of such a meeting, he will contact the Superintendent within 30 days of the date that this settlement is approved by the Commissioner of Education (assuming such approval is granted). If no request is made by the end of such 30 day period, it will be assumed that petitioner does not wish to have such a meeting and petitioner will have forfeited his right to a meeting.
3. Petitioner expressly understands that the purpose of the meeting is to allow petitioner to express his views on the discipline that was imposed and that respondents may take whatever action they deem appropriate in response to this meeting and that respondents may adhere to their previous position and allow the discipline to stand.
4. Petitioner acknowledges that he has entered into this Agreement voluntarily and entirely of his own free will and that he was not subject to any duress and/or coercion. Petitioner further acknowledges that he has been advised to seek the advice of counsel in connection with the execution of this Stipulation.
5. This Agreement is subject to and contingent upon the approval of the Administrative Law Judge and the Commissioner of Education. In the event such approval is not secured, this Agreement shall be null and void and the parties returned to their respective positions prior to the execution of this Agreement.

For the Bernards Township
Board of Education

By: 
VALERIE A. GOGER

Dated: October 31, 2005

By: 
FRANCIS T. HOWLETT

Dated: October 31, 2005

By: 
YORVEN R. LIU

Dated: October 19, 2005