SEC Dkt. No. T10-19
Agency Dkt. No. 307-11/19

New Jersey Commissioner of Education
Final Decision

In the Matter of Kecia Teller,
The John P. Holland Charter School,
Passaic County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 25, 2019 Order to Show Cause, but prior to the SEC's November 19, 2019 meeting; however, the SEC notes that respondent was previously reprimanded in 2017 for failing to timely comply with the statutory requirement to complete ethics training. Due to the repeated failure to comply with her statutory obligation, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended from her position, as of the date of this decision, for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 1/03/20
Date of Mailing: 1/03/20

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

SEC Dkt. No. T11-19
Agency Dkt. No. 304-11/19

New Jersey Commissioner of Education
Final Decision

In the Matter of Travis Ally,
College Achieve Central Charter School,
Union County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is removed, as of the date of this decision, from his position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 1/03/20
Date of Mailing: 1/03/20

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

SEC Dkt. No. T05-19
Agency Dkt. No. 308-11/19

New Jersey Commissioner of Education

Final Decision

In the Matter of Caroline Clarke, The Village Charter School, Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 25, 2019 Order to Show Cause, but prior to the SEC's November 19, 2019 meeting; therefore, the SEC recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 1/3/20
Date of Mailing: 1/3/20

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

4-20SEC

SEC Dkt. No. T02-19
Agency Dkt. No. 305-11/19

New Jersey Commissioner of Education
Final Decision

In the Matter of Octavio Loyola,
Camden's Promise Charter School,
Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 25, 2019 Order to Show Cause, but prior to the SEC's November 19, 2019 meeting; therefore, the SEC recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 1/3/20
Date of Mailing: 1/3/20

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

Agency Dkt. No. 306-11/19
SEC Dkt. No. T09-19

New Jersey Commissioner of Education

Final Decision

In the Matter of Craig Woolridge,
College Achieve Paterson Charter School,
Passaic County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 25, 2019 Order to Show Cause, but prior to the SEC's November 19, 2019 meeting; however, the SEC notes that respondent was previously reprimanded in 2018 for failing to timely comply with the statutory requirement to complete ethics training. Due to the repeated failure to comply with his statutory obligation, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended from his position, as of the date of this decision, for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 1/3/20
Date of Mailing: 1/3/20

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

6-20

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

January 3, 2020

VIA E-MAIL ONLY

Roshan D. Shah, Esq.
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071

James T. Hundley, Esq.
Hundley & Bradley, LLC
35 Pilgram Pathway
P.O. Box 488
Ocean Grove, New Jersey 07756

Re: *Jared Deppeler v. Board of Education of the Township of Middletown, Monmouth County, OAL Dkt. No. EDU 1471-19, Agency Dkt. No. 309-12/18.*

Dear Counsel:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge Jeffrey N. Rabin's order, dated December 17, 2019, denying summary decision. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, respondent's request for interlocutory review is hereby denied.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

cc: Jeffrey N. Rabin, Administrative Law Judge
Clerk, Office of Administrative Law

11-20

OAL Dkt. No. EDU 06772-19
Agency Dkt. No. 78-4/19[1]

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Orange,
Essex County,

Petitioner,

v.

Board of Education of the Township of
Bloomfield, Essex County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/9/20

Date of Mailing: 1/9/20

[1] The correct agency docket number is 78-4/19, not 78-7/19 as referenced in the Initial Decision of the OAL.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06772-19
AGENCY REF. NO. 78-7/19

THE CITY OF ORANGE BOARD OF EDUCATION, ESSEX COUNTY,

Petitioner

v.

TOWNSHIP OF BLOOMFIELD BOARD OF EDUCTION, ESSEX COUNTY,

Respondent

Jessika Kleen, Esq., for Petitioner (Machado Law Group, attorneys)

Teresa L. Moore, Esq., for Respondent (Riker, Danzig Scherer Hyland & Perretti, attorneys)

Record Closed: December 16, 2019 Record Decided: December 16, 2019

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

NATURE OF PROCEEDINGS

Petitioner sought an order declaring S.G. a resident of Bloomfield and that Bloomfield is responsible for the education costs of J.W.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on May 17, 2019.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Consent Order for Dismissal with Prejudice.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

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

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

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

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

December 16, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 12/18/19

Date Mailed to Parties: December 18, 2019
db

MACHADO LAW GROUP

1 CLEVELAND PLACE SPRINGFIELD, NJ 07081 732.540.8276 FAX 732.540.8296 WWW.MACHADOLAWGROUP.COM

Jessika Kleen, Esq.
jkleen@machadolawgroup.com

December 13, 2019

Via Electronic Mail
Honorable Thomas Betancourt, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: The City of Orange BOE, Essex Co. v. Twp. of Bloomfield BOE Essex Co.
OAL Dkt. No.: EDU 06772-2019
Agency Ref. No.: 78-7/19

Dear Judge Betancourt:

This firm represents the Orange Board of Education in the above referenced matter. Enclosed please find the fully executed Settlement Agreement and Board Resolutions approving same.

Thank you for your courtesies.

Sincerely,
Machado Law Group



Jessika Kleen, Esq.

JK/cf

cc: Lisa Spottswood-Brown, *Registrar* (via email)
Teresa L. Moore, Esq. (via email)

BOARD OF EDUCATION
155 Broad Street
Bloomfield, NJ 07003

The following is an extract from the minutes of the Regular Meeting of the Bloomfield Board of Education held on Tuesday, November 19, 2019.

****

Board Members Present: Mr. Shane Berger, Ms. Jill Fischman, Mr. Thomas Heaney, Mr. Michael Heller, Ms. Lillian Mancheno, Mr. Benjamin Morse, Ms. Ellen Rogers, Ms. Jessica Salinas, Mr. Ralph Walker

****

Upon the motion of Ms. Rogers, seconded by Ms. Mancheno, the following resolution was introduced:

Resolved, the Bloomfield Board of Education, upon the recommendation of the CSA, approves the revised settlement agreement, as originally approved by the board on 9-24-19, captioned as City of Orange v. Bloomfield Board of Education and Simone Gordon o/b/o J.W. pursuant to the terms of the attached settlement.

Carried unanimously (9-0)

I, HWEY-HWEY "VICKY" GUO, Secretary to the Board of Education of the Township of Bloomfield, Essex County, New Jersey, do hereby certify that this is a true copy of a resolution adopted at the Regular Meeting of the Board of Education of the Township of Bloomfield, NJ held on Tuesday, November 19, 2019.

Hwey-Hwey "Vicky" Guo

DRAFT AS OF 10/28/19

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Teresa L. Moore (Attorney No. 024941987)
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800
Attorneys for Respondent
Bloomfield Board of Education

CITY OF ORANGE BOARD OF EDUCATION, Petitioner, v. BLOOMFIELD BOARD OF EDUCATION and SIMONE GORDON, Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 06772-19 AGENCY REF. NO. 78-4/19 **SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made by and between Petitioner Orange Board of Education, with a central office located at 451 Lincoln Avenue, Orange, New Jersey 07050 ("Orange Board"), and Respondent Bloomfield Board of Education, with a central office located at 155 Broad St., Bloomfield, New Jersey 07003 ("Bloomfield Board"); and

WHEREAS, Orange Board filed a petition against Bloomfield Board and Simone Gordon, mother of J.W, seeking reimbursement for special education and related services provided to J.W. for the period November 2017 through June 30, 2019; and

WHEREAS, Bloomfield Board filed an answer denying liability; and

WHEREAS, Orange Board's homeless liaison issued a letter dated July 11, 2019 to respondent Simone Gordon confirming "the Gordon family's displaced status" from an address in Orange to an address in Bloomfield beginning on December 17, 2017 "which makes Orange Township Public Schools the district of residence," and confirming that from December 17, 2017 to the date of the letter, J.W. "has been enrolled within the Orange Township Public Schools;" and

WHEREAS, to the best of the parties' knowledge, J.W. has resided in Bloomfield since at least December 17, 2017; and

WHEREAS, respondent Simone Gordon has been dismissed from this action; and

WHEREAS, Orange Board has determined that its claim against Bloomfield Board is for expenses it incurred for special education and related services for J.W. for the period January 1, 2019 through June 30, 2019, in the amount of $43,700.00; and

WHEREAS, Orange Board and Bloomfield Board desire to settle this matter amicably, without admitting any liability on behalf of either party; and

WHEREAS, the parties wish to enter into this Settlement Agreement ("Agreement") in order to reach a compromise and to avoid the time and expense associated with litigation; and

NOW, THEREFORE, Orange Board and Bloomfield Board agree as follows:

1. Bloomfield Board will pay to Orange Board the sum of $43,700.00 in full and final settlement of the claims and defenses in this matter.

2. Upon receipt of payment of $43,700.00 from Bloomfield Board, Orange Board will voluntarily dismiss the petition against Bloomfield Board without prejudice to future claims

regarding the cost of J.W.'s special education, so long as J.W. remains domiciled in Bloomfield and is deemed homeless.

3. This Agreement constitutes full and final settlement as to all claims which were or could have been raised at any time against Bloomfield Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates pertaining to the claims in the petition, which claims relate to the 2018-2019 school year only.

4. In consideration for the mutual promises contained in this Agreement, Orange Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates, hereby releases, acquits, and discharges Bloomfield Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates, of and from any and all claims that Orange Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates, may have, or may have had from the beginning of time through the 2018-2019 school year. The parties agree that this Agreement is the compromise of disputed claims and that the payment and consideration set forth in this Agreement is not to be construed as an admission of liability by Bloomfield Board, or of the violation of any law, statute, or regulation, nor shall the Agreement be cited as precedent in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms. The Bloomfield Board denies liability and has agreed to settle this matter and pay the amount provided in the Agreement solely to avoid the expense and burden of litigation.

5. This Agreement represents the entire understanding between the parties and shall not be modified in whole or in part except as a mutual subsequent written and signed Agreement.

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

7. This Agreement may be executed in one or more counterparts, all of which shall be one instrument, and all of which shall be considered duplicate originals.

8. Any notices or delivery required by this Agreement shall be provided by hand, or by U.S. First Class Mail, as follows:

To Orange Board: Superintendent, Orange Board of Education
451 Lincoln Avenue, Orange, NJ 07050

To Bloomfield Board: Superintendent, Bloomfield Board of Education
155 Broad St., Bloomfield, NJ 07003

9. This Agreement is subject to approval by the Orange Board of Education and the Bloomfield Board of Education. Upon obtaining such approvals, Orange Board will take all steps necessary to withdraw the petition with prejudice. If this Agreement is not approved by both the Orange Board of Education and the Bloomfield Board of Education, the parties shall return to their original positions without prejudice.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below:

FOR PETITIONER:

Date: _____

ORANGE BOARD OF EDUCATION

By: _____
Superintendent

FOR RESPONDENT:

Date: 11-19-19

BLOOMFIELD BOARD OF EDUCATION

By: _____
Board President
Print Name: Jill Fischman

ORANGE BOARD OF EDUCATION PUBLIC SCHOOL DISTRICT

Administrative Office
451 Lincoln Avenue, Orange, New Jersey 07050

DECEMBER 10, 2019 **G19-031**

RESOLUTION APPROVE THE SETTLEMENT AGREEMENT BETWEEN THE ORANGE BOARD OF EDUCATION AND THE BLOOMFIELD BOARD OF EDUCATION

WHEREAS, Bloomfield Board of Education (Respondent) and the Orange Board of Education "Petitioner" have entered into a Settlement Agreement dated October 28, 2019 via the State of New Jersey Office of Administrative Law, hereby attached; and,

WHEREAS, the Bloomfield Board of Education and the Orange Board of Education accepted the Terms and Conditions stipulated in the Settlement Agreement.

NOW, THEREFORE, BE IT RESOLVED, the Board of Education of the City of Orange Township, on the recommendation of the Superintendent of Schools, hereby accepts the settlement agreement herewith attached with the Bloomfield Board of Education.

ROLL CALL CHECKLIST		
	YEA	NAY
Jeffery Wingfield	✓	
Siaka Sherif	abt	
Derrick Henry	✓	
Cristina Mateo	abt	
Kyleesha Hill	✓	
Brenda Daughtry m	✓	
Tyrone Tarver	✓	
Courtne Thomas, Ed. D. School Board Vice-President S	✓	
E. Lydell Carter School Board President	✓	

Attested to by: _____
School Business Administrator/Board Secretary

DRAFT AS OF 10/28/19

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Teresa L. Moore (Attorney No. 024941987)
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800
Attorneys for Respondent
Bloomfield Board of Education

CITY OF ORANGE BOARD OF EDUCATION, Petitioner, v. BLOOMFIELD BOARD OF EDUCATION and SIMONE GORDON, Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 06772-19 AGENCY REF. NO. 78-4/19 **SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made by and between Petitioner Orange Board of Education, with a central office located at 451 Lincoln Avenue, Orange, New Jersey 07050 ("Orange Board"), and Respondent Bloomfield Board of Education, with a central office located at 155 Broad St., Bloomfield, New Jersey 07003 ("Bloomfield Board"); and

WHEREAS, Orange Board filed a petition against Bloomfield Board and Simone Gordon, mother of J.W, seeking reimbursement for special education and related services provided to J.W. for the period November 2017 through June 30, 2019; and

WHEREAS, Bloomfield Board filed an answer denying liability; and

WHEREAS, Orange Board's homeless liaison issued a letter dated July 11, 2019 to respondent Simone Gordon confirming "the Gordon family's displaced status" from an address in Orange to an address in Bloomfield beginning on December 17, 2017 "which makes Orange Township Public Schools the district of residence," and confirming that from December 17, 2017 to the date of the letter, J.W. "has been enrolled within the Orange Township Public Schools;" and

WHEREAS, to the best of the parties' knowledge, J.W. has resided in Bloomfield since at least December 17, 2017; and

WHEREAS, respondent Simone Gordon has been dismissed from this action; and

WHEREAS, Orange Board has determined that its claim against Bloomfield Board is for expenses it incurred for special education and related services for J.W. for the period January 1, 2019 through June 30, 2019, in the amount of $43,700.00; and

WHEREAS, Orange Board and Bloomfield Board desire to settle this matter amicably, without admitting any liability on behalf of either party; and

WHEREAS, the parties wish to enter into this Settlement Agreement ("Agreement") in order to reach a compromise and to avoid the time and expense associated with litigation; and

NOW, THEREFORE, Orange Board and Bloomfield Board agree as follows:

1. Bloomfield Board will pay to Orange Board the sum of $43,700.00 in full and final settlement of the claims and defenses in this matter.

2. Upon receipt of payment of $43,700.00 from Bloomfield Board, Orange Board will voluntarily dismiss the petition against Bloomfield Board without prejudice to future claims

regarding the cost of J.W.'s special education, so long as J.W. remains domiciled in Bloomfield and is deemed homeless.

3. This Agreement constitutes full and final settlement as to all claims which were or could have been raised at any time against Bloomfield Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates pertaining to the claims in the petition, which claims relate to the 2018-2019 school year only.

4. In consideration for the mutual promises contained in this Agreement, Orange Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates, hereby releases, acquits, and discharges Bloomfield Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates, of and from any and all claims that Orange Board, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates, may have, or may have had from the beginning of time through the 2018-2019 school year. The parties agree that this Agreement is the compromise of disputed claims and that the payment and consideration set forth in this Agreement is not to be construed as an admission of liability by Bloomfield Board, or of the violation of any law, statute, or regulation, nor shall the Agreement be cited as precedent in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms. The Bloomfield Board denies liability and has agreed to settle this matter and pay the amount provided in the Agreement solely to avoid the expense and burden of litigation.

5. This Agreement represents the entire understanding between the parties and shall not be modified in whole or in part except as a mutual subsequent written and signed Agreement.

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

7. This Agreement may be executed in one or more counterparts, all of which shall be one instrument, and all of which shall be considered duplicate originals.

8. Any notices or delivery required by this Agreement shall be provided by hand, or by U.S. First Class Mail, as follows:

To Orange Board: Superintendent, Orange Board of Education
451 Lincoln Avenue, Orange, NJ 07050

To Bloomfield Board: Superintendent, Bloomfield Board of Education
155 Broad St., Bloomfield, NJ 07003

9. This Agreement is subject to approval by the Orange Board of Education and the Bloomfield Board of Education. Upon obtaining such approvals, Orange Board will take all steps necessary to withdraw the petition with prejudice. If this Agreement is not approved by both the Orange Board of Education and the Bloomfield Board of Education, the parties shall return to their original positions without prejudice.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below:

FOR PETITIONER:

Date: _____

ORANGE BOARD OF EDUCATION

By: _____
~~Superintendent~~ BA/BC-Sec

FOR RESPONDENT:

Date: _____

BLOOMFIELD BOARD OF EDUCATION

By: _____
Board President
Print Name: _____

12-20
OAL Dkt. No. EDU 12486-18
Agency Dkt. No. 167-7/18

New Jersey Commissioner of Education

Final Decision

Michael Raymond,

Petitioner,

v.

Board of Education of the Hunterdon Central Regional High School District, Hunterdon County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/9/20
Date of Mailing: 1/9/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12486-18

AGENCY DKT. NO. 167-7/18

MICHAEL RAYMOND,

Petitioner,

v.

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondents.

Ronald Ricci, Esq., for petitioner (Ricci Fava, LLC, attorneys)

Alicia D'Anella, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: November 27, 2019 Decided: December 13, 2019

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 1, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document. (J-1.) A copy of the minutes is attached (J-2.) as well as a personnel data sheet which confirms Mr. Raymond as employee number 4621 (J-3.)

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

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

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

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

December 13, 2019
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Received at Agency: 12-16-19

Date Mailed to Parties: 12-16-19

/vj

APPENDIX

EXHIBIT

Jointly Submitted:

J-1 Settlement Agreement
J-2 Copy of the Minutes
J-3 Personnel Data Sheet

Jennings, Valerie

From: Alicia D'Anella <adanella@comegnolaw.com>
Sent: Tuesday, November 26, 2019 11:17 AM
To: Jennings, Valerie
Cc: Ron Ricci
Subject: [EXTERNAL] Michael Raymond v. Hunterdon Central Regional High School District /EDU 12486-18
Attachments: November 18 Extract - Employee Settlement Agreement (SSN redacted).pdf; Settlement Agreement Commissioner-fully signed.pdf

Valerie,

At your request I am attaching the Settlement Agreement in the above referenced matter, which should hopefully show the signature page more legibly. I have also attached the extract from the Board meeting showing the resolution to approve the Settlement Agreement. The second page of that document is a screenshot from the Board's personnel system which shows that Mr. Raymond's employee number is 4621. I have coped Mr. Ricci on this email.

Please let me know if you need anything further to finalize this matter.

Best,
Alicia

Alicia D'Anella, Esquire

Fax 856.234.4262
Main 856.234.4114
comegnolaw.com
521 Pleasant Valley Avenue
Moorestown, NJ 08057

COMEGNO
LAW GROUP, P.C.

Moorestown, NJ | Norristown, PA

await better copy FH 12/11/19.
12/12 - OK to go

Please note that my contact information has changed, and kindly update your records to reflect my new email address: adanella@comegnolaw.com

Information contained in this email transmission is privileged and confidential. If you are not the intended recipient of this email, do not read, distribute or reproduce this transmission (including any attachments). If you have received this email in error, please immediately notify the sender by telephone or email reply.

The information contained in this Email is information protected by the attorney-client or the attorney work product privilege. It is intended only for the use of the individual named above and the privilege are not waived by virtue of this having been sent by electronic mail. If the person actually receiving this mail or any other reader of the mail is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (856-234-4114) and return the original message to us via U.S. Postal Service addressed to 521 Pleasant Valley Avenue, Moorestown, NJ 08057.

Department of Treasury Circular 230 requires that we notify you that (i) any statement contained in this message or in an attachment to it relating to any Federal tax transaction or matter was not intended or written to be used, and it cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer and (ii) such statement may not be used by any person to support the promotion or marketing of or to recommend any Federal tax transaction(s) or matter(s).

Please contact our office immediately by telephone (856-234-4114) if you receive an emailed request to change account information or send funds, without prior discussion with our office.

J-2

Hunterdon Central Regional High School

84 Route 31, Flemington, New Jersey 08822-1239
(908) 782-5727 FAX (908) 284-7314

Jeffrey Moore, Ed.D. Superintendent
Gymlyn Corbin, Business Administrator / Board Secretary

RESOLUTION OF THE BOARD OF EDUCATION
EXTRACT OF MEETING MINUTES

Date of Meeting: November 18, 2019

Present: Bruce Davidson
Michael Dendis
Lisa Hughes
Roseann Nguyen
Noelle O'Donnell
Scott Nicol
Robert Richard
Lori Blutfield
Vincent Panico
Jeffrey Moore, Superintendent
Gymlyn Corbin, Business Administrator/Board Secretary

Absent: None

Moved by Mr. Nicol and seconded by Mrs. O'Donnell, to approve settlement agreements between Hunterdon Central Regional High School and employee #4621. The motion was passed by a roll call vote of 5-0-4 with Mrs. Hughes, Mr. Richard, Mrs. Blutfield and Mr. Panico abstaining.

The foregoing information is a true copy of the official records of the Hunterdon Central Regional High School Board of Education, having been extracted and compared with the contents of the original minutes by me. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education on this twentieth day of November 2019.

Gymlyn Corbin

Gymlyn Corbin, Business Administrator/Board Secretary
(Affix seal)

Personnel 5.3 [Hunterdon Central Regional HS] Personnel Date 11/20/2019

File Edit Maintenance Reports More Window Help

Name

Employees: 1

Lookup | HR1 | HR2 | HR3 | Exp | Salary | UPC | Attend | Assign | Certs | Health | Cust Props | CPD | History | Evaluation

Emp# 4621 Last Name RAYMOND

Prefix MR First Name MICHAEL MI. Last Name RAYMOND

☑ Active Emp?* In-Activation Date* / / Soc Sec# [redacted] Tracking#

Home Address

Add 1 314 GANO RD

Add 2

City ASBURY St NJ Zip 08802

Tel# (908) 894-5807 ☐ Un-Listed?

Mailing Address (blank if same as Home)

Add 1

Add 2

City

Tel# ( ) -

Notes

7/16/18 Board approved Athletic Worker 18-19 SY. dj
2/25/19 Board approved PD workshop attendee for Google Classroom Beginner, Student Reflections Applications @$38.67/hrly effective 2/26, 3/6/19. dj
5/20/19 Board approved revision Health & PE teacher to longevity $500. dj
6/17/19 Board approved Health & PE Summer Curriculum Writing PE/Health, 2 days Weight Training @$145/day for 4 days. dj
7/8/19 Board approved Home Instructor @$40/hrly for 2019-2020 SY. dj
9/9/19 BOE moved to approve Summer Curriculum Writing Health & P&E- PE Inventory @$145/day for 2 days. dj

E-Mail Address mikeraymond20@comcast.net Former Name ☐

Emergency Info 1 [redacted] 2

*Normally adjusted through the Employment History.

P-3

J-1

RECEIVED
2019 NOV 25 A 11:51
STATE OF NEW JERSEY
OFFICE OF ADMIN

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is made by and between Michael Raymond, (hereinafter referred to as "Mr. Raymond") and the **HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION**, 84 Route 31, Flemington, NJ 08822, its predecessors, successors, individual Board members, officers, directors, administrators, representatives, employees, attorneys, agents, and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Mr. Raymond was employed as the Supervisor of Athletics for the 2016-2017 and 2017-2018 school years; and

WHEREAS, at the conclusion of the 2017-2018 school year the Superintendent recommended to the Board that Mr. Raymond's contract be renewed for the 2018-2019 school year, which would have granted him tenure upon his service to the district effective July 1, 2018; and

WHEREAS, the Board approved and then rescinded the renewal of Mr. Raymond's contract as Supervisor of Athletics; and

WHEREAS, subsequent to the Board's failure to renew Mr. Raymond's contract, Mr. Raymond returned to his previous tenured teaching position in District; and

WHEREAS, subsequent to the Board's failure to renew Mr. Raymond's contract, Mr. Raymond filed an appeal with the Commissioner of Education, captioned Michael Raymond v. Hunterdon Central Regional High School District Board of Education, OAL docket# EDU 12486-2018, and also initiated a suit in the District of New Jersey captioned Michael Raymond v. Hunterdon Central Regional Board of Education, et al. Civil Action No. 3:18-cv-17094; and

WHEREAS, the Board and Mr. Raymond wish to amicably resolve the above-referenced matters in the interest of efficiency and finality; and

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Mr. Raymond and the Board hereby agree as follows:

1. Mr. Raymond, for and in consideration of the undertakings of the Board, as set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board, its officers, members, employees and agents, and its successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, and/or now has, known or unknown, or which his heirs, executors or administrators hereafter may have by reason of any actual or perceived disability, any actual or perceived discrimination, beginning from the onset of Mr. Raymond's employment relationship with the Board and continuing through the date of the Board's approval of this Agreement, including, but not limited to the following:

- All claims of discrimination, harassment and retaliation based upon age, race, color, religion, gender, sex, sexual orientation, handicap, disability, national origin or any other

legally protected class, including claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 through 29 U.S.C. § 634, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, et seq., Executive Order 11246, as amended,, the Older Workers Benefit Protection Act, 29 U.S.C. §626(f), the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., the New Jersey Family Leave Act, N.J.S.A. 34:11B, et seq., COBRA, the Federal Family and Medical Leave Act, 29 U.S.C. §2601, et seq. & 5 U.S.C. §6381, et seq., the National Labor Relations Act, as amended, The Equal Pay Act, as amended, the New Jersey Wage and Hour Law, as amended, the New Jersey Worker Health and Safety Act, as amended, as well as any other anti-retaliation provision of any statute or law, and any other applicable federal, state or local, constitutional or statutory provision, order or regulation, arising from any event or act of omission or commission;

- All claims for breach of contract, whether express or implied;
- All tort claims, including claims for libel, slander, negligence, invasion of privacy, intentional or negligent infliction of emotional distress, fraud, interference with actual or prospective contractual rights or relations, and violation of public policy;
- All claims for wrongful discharge or termination;
- All claims under any federal, state and municipal laws, regulations, ordinances or court decisions of any kind;
- All claims for wages and benefits (including bonuses, health and welfare benefits, vacation pay, sick pay and/or any other fringe benefits;
- All claims for any type of monetary damages, including back pay, front or prospective pay, compensatory damages, and punitive damages, except as otherwise provided in this Agreement;
- All claims for equitable relief, including injunctive relief and reinstatement; and
- All claims for attorneys' fees, litigation expenses and costs.

The only exceptions to the waivers set forth above are as follows: claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Act, *N.J.S.A.* 18A:66-1 *et seq.*, the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1 with regard to civil and criminal actions, claims by third parties, as well as claims arising from any breach of this Agreement. The Board does not waive any rights that it may have to oppose indemnification pursuant to *N.J.S.A.* 18A:16-6 and 6.1.

In addition to the above waivers, Mr. Raymond shall execute stipulations of dismissal with prejudice, dismissing both pending matters, with prejudice, within seven (7) days of the Board's approval of this Agreement.

2. In consideration of Mr. Raymond's release of the Board, the dismissal of the pending matters, and the other good, valuable and sufficient consideration recited herein, the Board agrees as follows, subject to the fulfillment of the terms of this Agreement:

a. The Board agrees to pay Mr. Raymond $31,604, which represents a retroactive adjustment to his 2018-2019 salary, equivalent to the difference between what he earned during the 2018-2019 school year as a teacher and what he would have earned as the Supervisor of Athletics. The retroactive payment shall be subject to

all applicable withholdings, including but not limited to taxes, pension and Chapter 78 contributions, and is intended by the parties to represent pensionable salary.

b. For the 2019-2020, 2020-2021 and 2021-2022 school years Mr. Raymond shall be placed at Step 15, MA+15, on the salary guide set forth in the Collective Negotiations Agreement ("CNA") between the Board and the Hunterdon Central Education association. For 2019-2020 the applicable salary is $92,565, for 2020-2021, the applicable salary is $92,940 and for 2021-2022, the applicable salary is $93,310. Upon the approval of this Agreement by the Board, Mr. Raymond's 2019-2020 salary shall be retroactively adjusted back to September 1, 2019. Beginning the 2022-2023 school year, Mr. Raymond shall advance to the next Step on the applicable guide. Mr. Raymond's guide placement, set forth herein, is not intended as a waiver of the Board's right to withhold a salary increment and/or an employment adjustment for disciplinary reasons in accordance with the CNA. Further, should Mr. Raymond accrue sufficient graduate credits he will be eligible for horizontal guide movement (i.e. Step 15, MA+30), in accordance with the terms of the CNA.

c. The Board agrees to contribute $7,500 toward Mr. Raymond's attorney's fees, payable directly to Mr. Raymond's attorney, as provided for in the separately executed settlement agreement in the matter captioned Michael Raymond v. Hunterdon Central Regional Board of Education, et al. Civil Action No. 3:18-cv-17094, and subject to the terms set forth therein.

3. Other than as set forth herein, Mr. Raymond confirms as far as he is aware no other charge, complaint, action, or grievance brought by him or on his behalf is pending in any forum or form. Further, Mr. Raymond covenants and agrees not to bring any charge, complaint, action, suit, grievance or administrative proceeding in any forum whatsoever, including before any federal, state, or local administrative agency or in any federal, state or local court against the Board for any actions that could or did arise or accrue prior to and including the date of the Board's approval of this Agreement; provided, however, it does not interfere with or limit either of the Parties protected right to file a charge with or participate in an investigation by or proceeding before the Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nothing contained herein shall in any manner be deemed a waiver or extension of any applicable statute of limitations, whether administrative or otherwise. Nonetheless, Mr. Raymond understands that, by signing this Agreement, he is waiving any rights he may have to recover money or other relief in any lawsuit or proceeding he brings bring or that is brought on his behalf by any agency or third party against the Board (including but not limited to its employees, officers, board members, agents and assigns) based on events arising out of Mr. Raymond's employment with the Board, through the date of the Board's approval of this Agreement. Except where otherwise permitted under this paragraph, the Parties agree that any such action shall be dismissed with prejudice upon presentation of this Agreement. Nothing in this paragraph is intended to limit either of the Parties from instituting legal action for the sole purpose of enforcing this Agreement.

4. Both parties agree and acknowledge that this Agreement does not constitute an admission of any kind by either party.

5. The Parties mutually agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any defamatory, disparaging, or derogatory remarks or otherwise make statements that could injury the business or reputation of any of the Parties to this agreement. In the event that a party is alleged to have breached the non-disparagement provision of Agreement, then the other party may commence appropriate legal action and the prevailing party will be responsible for all attorneys' fees and costs associated with the litigation.

6. The Parties mutually understand and agree that the existence of this Agreement, and the terms herein, are completely confidential. The Parties, including their representatives or agents, further agree that they shall not reveal to anyone, other than as may be mutually agreed upon in writing, any information, facts, or terms and conditions concerning this Agreement. This non-disclosure provision does not bar the following disclosures by Mr. Raymond: (1) disclosures to members of his immediate family; or (2) disclosures for the purpose of obtaining legal, tax, accounting, or financial advice; or (3) disclosures which may be required by law or pursuant to the request of any governmental entity; or (4) disclosure to union representatives or (5) disclosures for the purpose of obtaining or maintaining publicly or privately funded benefits or insurance. This non-disclosure provision does not bar the following disclosures by the Board: (1) disclosures pursuant to a lawful request under the Open Public Records Act; or (2) disclosures as may otherwise be compelled by law or Court Order. The Parties agree to inform those persons with whom they are permitted to share such information as to the confidentiality of this Agreement, and further agree to require such persons to hold information received by them about this Agreement as confidential pursuant to the terms herein. Upon all other inquiries, the Parties shall only respond that the matter has been resolved to the satisfaction of all those concerned. In the event that a party or parties is alleged to have breached the confidentiality provision of this Agreement, then the other party or parties may commence appropriate legal action.

7. It is understood between the parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto.

MR. RAYMOND ACKNOWLEDGES THAT HE HAS BEEN ADVISED THAT HIS LEGAL RIGHTS AND RESPONSIBILITIES WILL BE AFFECTED BY EXECUTING THIS AGREEMENT AND HE ACKNOWLEDGES THAT HE HAD THE OPPORTUNITY TO BE REPRESENTED BY HIS OWN ATTORNEY AND CONSULT WITH HIS ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT.

8. In the event that any section or part of this Agreement shall be found to be void or unenforceable, the Parties will make reasonable efforts to reform that provision to be legal, valid and enforceable. Should the provision remain illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

9. This Agreement is contingent upon Board approval. In that regard, Mr. Raymond waives any rights he may have under the decisions in Rice v. Union County Regional High School Bd. of Education and Kean Federation of Teachers v Morell et al, to advanced written notice of

the Board's consideration of this Agreement at a public meeting, as well as to request a public discussion of this Agreement at a public meeting.

10. The parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey. All disputes arising under or relating to this Agreement or the breach of this Agreement shall be brought exclusively in the State courts of the State of New Jersey.

11. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document. Electronic facsimiles of signatures will have the same force and effect as original signatures.

12. By signing this Agreement, each signatory represents that he or he is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Agreement is duly authorized, approved and consented to as to terms.

13. Pursuant to the requirement of the Older Workers Benefit Protection Act, 29 U.S.C. § 626 et seq., Mr. Raymond acknowledges that he has been given the opportunity, if he so desires, to consider this Agreement for twenty-one (21) days before executing it. In the event that Mr. Raymond executes this Agreement within less than twenty-one (21) days of the date of its delivery to him, Mr. Raymond acknowledges that such decision was entirely voluntary and that he had the opportunity, if he had so desired, to consider this Agreement for the entire twenty-one (21) day period. Mr. Raymond further acknowledges that for a period of seven (7) days from the date of his execution of this Agreement, he shall retain the right to revoke this Agreement by written notice to Alicia D'Anella, Esquire, Comegno Law Group, PC, 521 Pleasant Valley Avenue, Moorestown, NJ 08057, and that this Agreement shall not become effective or enforceable until the expiration of such revocation period.

Intending to be legally bound hereby, Mr. Raymond and the Board execute the foregoing Agreement as indicated below.

MICHAEL RAYMOND
Dated: 10/23/19

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

VINCENT PANICO, BOARD PRESIDENT
Dated: 11/18/2019

13-20

OAL Dkt. No. EDU 08920-19
Agency Dkt. No. 89-5/19

New Jersey Commissioner of Education

Final Decision

J.M., on behalf of minor child, A.M.,

Petitioner,

v.

Board of Education of the Township of Mount Laurel, Burlington County,

Respondent.

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

A number of paragraphs within the Agreement reference certain actions to be taken by the parties on several specific dates. Some of the time frames referenced in the Agreement have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 1/9/20
Date of Mailing: 1/9/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08920-19

AGENCY DKT. NO. 89-5/19

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

Petitioner,

v.

BOARD OF EDUCATION OF the TOWNSHIP OF MOUNT LAUREL, BURLINGTON COUNTY,

Respondent.

J.M., petitioner, pro se

Emily E. Strawbridge, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: November 21, 2019 Decided: November 25, 2019

BEFORE **JOSEPH A. ASCIONE**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 2, 2019, 2016, 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 executed a Settlement and Release, as well as the Board Resolution, both of which are attached hereto.

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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 25, 2019
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 11-27-19

Date Mailed to Parties: 11-27-19

/lam

PARKER McCAY

Parker McCay P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054-1539

P: 856.596.8900
F: 856.596.9631
www.parkermccay.com

RECEIVED

2019 NOV 21 A 11:57

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Emily E. Strawbridge, Esquire
P: 856-985-4005
F: 856-810-5852
estrawbridge@parkermccay.com

November 20, 2019

File No. 12291-0001

Via FedEx Overnight
Honorable Joseph A. Ascione, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, NJ 08619

Do I D
Sellers
11/21/19

RE: J.M. o/b/o A.M. v. Board of Education of the Township of Mount Laurel
Docket No.: EDU 08920-2019S
Agency Ref. No.: 89-5/19

Dear Judge Ascione:

Please find the enclosed Certification by the Assistant Superintendent for Business/Board Secretary for the Mount Laurel Board of Education, certifying to the Board Action taken with respect to adopting the Resolution to approve the Settlement Agreement in this matter. This finalizes the Settlement Agreement reached between the parties referenced above and entered into before Your Honor on November 14, 2019.

Respectfully submitted,

/s/ *Emily E. Strawbridge*
EMILY E. STRAWBRIDGE

EES:
Enclosures
cc: Mr. and Mrs. J. Mateo
(via Regular Mail w/Enc.)

CERTIFICATE OF THE MOUNT LAUREL TOWNSHIP
BOARD OF EDUCATION WITH RESPECT TO THE
RESOLUTION APPROVING THE SETTLEMENT
AGREEMENT BETWEEN THE MOUNT LAUREL TOWNSHIP
BOARD OF EDUCATION AND J.M. O/B/O A.M.

I, ROBERT R. WACHTER, JR., the duly appointed Assistant Superintendent for Business/Board Secretary of the Mount Laurel Board Township Board of Education, Hereby Certify as follows:

1. Attached hereto is as "**Exhibit A**" is a true and complete copy of a Resolution entitled, "resolution of the Township of Mount Laurel Board of Education Approving the Settlement Agreement between the Mount Laurel Board of Education and J.M. o/b/o A.M.," which was duly adopted by the Board of Education at the regularly scheduled meeting held on November 19, 2019, in full compliance with the Open Public Meetings Act, N.J.S.A. 10:4-6 et. seq. as amended and supplemented (the "Open Public Meetings Act"), at which a quorum was present and acting throughout, which copy of said Resolution has been compared by me with the original thereof as recorded in the meeting minutes of the Board of Education and that said copy is true, complete and correct copy of said resolution, and said resolution has not been modified, amended or repealed, and is in full force and effect on and as of the date hereof.

By: _____
ROBERT R. WACHTER, JR.
Assistant Superintendent for Business/Board Secretary
Mount Laurel Township Board of Education

4852-9238-7757, v. 1

RECEIVED
2019 NOV 21 A 11:57
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

EXHIBIT A

RESOLUTION OF THE TOWNSHIP OF MOUNT LAUREL BOARD OF EDUCATION APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE MOUNT LAUREL BOARD OF EDUCATION AND J.M. o/b/o A.M.

WHEREAS, an Appeal of the Residency Determination of the Board of Education (Herein after "Board") was filed by J.M. o/b/o A.M. (Herein after "Petitioners") to the Office of Controversies and Disputes.

WHEREAS, the Township of Mount Laurel Board of Education (hereinafter "Board of Education") filed an Answer responding to Petitioner's claims; and

WHEREAS, the matter was transmitted to the Office of Administrative Law ("OAL") and assigned the docket number EDU 08920-2019 S.

WHEREAS, the Petitioners and Board of Education, through their respective Counsel engaged in settlement discussions since the Appeal was filed; and

WHEREAS, both the Petitioners and Board of Education acknowledge that the merits of the controversy are in dispute and have not been adjudicated, and that neither admits any liability to any other, but all have reasons to desire amicable resolution of the matter, including to avoid further cost of litigation; and

WHEREAS, a Settlement Agreement was entered into and is attached as Exhibit "A"

NOW, THEREFORE, be it RESOLVED by the Township of Mount Laurel Board of Education on this 19th day of November, 2019, as follows:

1. The Settlement of Agreement between the Township of Mount Laurel Board of Education and Petitioners is hereby approved.

EDU
08920-2019
JT-1

SETTLEMENT AGREEMENT

This Settlement Agreement and General Release (the "Agreement") is entered into by and between J.M. o/b/o A.M., and the Mount Laurel Township Public School District Board of Education (hereinafter "District"), with its mailing office located at 330 Mount Laurel Road, Mount Laurel, NJ 08054 ("J.M. o/b/o A.M. and District" hereinafter collectively, "the Parties").

WHEREAS, A.M. is a student currently enrolled in the Mount Laurel Township Public School District;

WHEREAS, A.M. is currently domiciled outside of the Mount Laurel Township Public School District;

WHEREAS, a dispute arose as to A.M.'s current domicile and her enrollment as a student in the Mount Laurel Township Public School District; and

WHEREAS, the Parties in good faith have negotiated concerning the above, and have a desire to settle this matter in an amicable way, and hereby agree as follows:

1. A.M. shall remain enrolled as a student in the Mount Laurel Township Public School District so long as her residency at the claimed address of 2308B Yarmouth Lane, Mount Laurel, NJ, 08054, is verified by the District no later than December 6, 2019.

2. J.M. o/b/o A.M. agrees that completed registration forms (available on the Mount Laurel Township School District website), a full hard copy of a current lease (including the lease term), and two copies of current utility bills for the property, will be delivered in hard copy form to the District Office located at 330 Mount Laurel Road, Mount Laurel, NJ 08054, no later than December 6, 2019.

3. J.M. o/b/o A.M. agrees to confirm the residency of A.M. at the beginning of each school year by delivering no later than September 1st of each school year, a full hard copy of a

current lease (including the lease term), and two copies of current utility bills for the property, in hard copy form to the District Office located at 330 Mount Laurel Road, Mount Laurel, NJ 08054.

4. J.M. o/b/o A.M. agrees to pay tuition to the District, for the time in which A.M. did not reside in the District. The full amount of tuition assessed under this agreement is $13,023.36, representing the 168 days school was in session from January 1, 2019 to November 12, 2019, at a cost of $77.52 per day.

5. J.M. o/b/o A.M. agrees to pay the full amount of $13,023.36 to the District over the course of **thirty months** at a rate of **$434.11** per month, beginning on January 1, 2020 and to be paid on the first of each month thereafter.

6. Payment shall be made in cash, certified check, cashier's check or money order only.

7. In the event that J.M. o/b/o A.M. presents documentation that A.M. has been residing in the district as of September 1, 2019, on or before December 6, 2019, the tuition amount owed to the district will be reduced to **$7,500.**

8. In the event that J.M. o/b/o A.M. complies with Paragraph 7, J.M. o/b/o A.M. agrees to pay the full amount of **$7,500** in accordance with the following payment schedule:

a) $1,500 to be paid no later than December 16, 2019; and

b) The balance of **$6,000** to be paid over the course of **thirty months** at a rate of **$200.00** per month beginning on January 1, 2020, and to be paid on the first of each month thereafter, until which time the full balance is paid.

9. Payment shall be made in cash, certified check, cashier's check or money order only.

10. Should J.M. o/b/o A.M. fail to deliver the payment on time, in compliance with all terms set forth in this agreement, the District shall be entitled to enter a Judgement against J.M.

less amounts already paid

for the entire amount owed by the New Jersey Office of Administrative Law.

11. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties.

12. J.M. o/b/o A.M. acknowledges that he has read and understands the terms of this Agreement, that he has had the opportunity to have the Agreement reviewed by counsel, and that he is entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

IN WITNESS HEREOF, the Parties have set their hands this 14 day of November, 2019.

BY: Emily Strawbridge DATED: November 14, 2019
Emily E. Strawbridge, Esq.
Attorney for the Mount Laurel
Township School District
Board of Education

BY: _____ DATED: November 14, 2019
J.M. o/b/o A.M.

14-20L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

January 10, 2020

Katie Mocco, Esq.
DeCotiis, FitzPatrick, Cole & Giblin, LLP
61 South Paramus Road
Paramus, New Jersey 07652

Amy P. Russoniello, Esq.
Caruso Smith Picini
60 Route 46 East
Fairfield, New Jersey 07004

Re: *In the Matter of the Tenure Hearing of Rodney Beaver, School District of the City of East Orange, Essex County, Agency Dkt. No. 274-10/19.*

Dear Parties:

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Rodney Beaver, School District of the City of East Orange, Essex County, Agency Dkt. No. 274-10/19.* The record includes the District's request to withdraw the tenure charges filed in this matter due to Respondent's resignation from the District effective December 2, 2019. In light of this information, I find that no purpose would be served by further proceedings in this matter.

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

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library

15-20
Agency Dkt. No. 316-12/19

New Jersey Commissioner of Education
Final Decision

In the Matter of the Tenure Hearing of
Leah Armstrong, School District of the
City of Camden, Camden County.

For the Petitioner, Louis R. Lessig, Esq.

No appearance by or on behalf of Respondent, Leah Armstrong

This matter was opened before the Commissioner of Education on December 6, 2019, through tenure charges of incapacity certified by Katrina T. McCombs, Superintendent of the Camden City School District ("District"), together with supporting evidence against respondent, Leah Armstrong, a tenured teaching staff member in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via certified and regular mail, on December 6, 2019.

On December 9, 2019, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured teacher. Respondent was on a leave of absence for the entire 2015-2016 school year commencing with a paid leave of absence from September 2, 2015 to December 8, 2015. Respondent has remained on an unpaid leave of absence and has not responded to the District's attempts to contact her to determine a return date.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her, the Commissioner finds that the District's charge of incapacity has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the Camden City School District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 1/9/20
Date of Mailing: 1/10/20

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

16-20

OAL Dkt. No. EDU 09617-19
Agency Dkt. No. 143-6/19

New Jersey Commissioner of Education

Final Decision

C.E., on behalf of minor child K.E.,

Petitioner,

v.

Board of Education of the Township of West Orange, Essex County,

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner did not meet his burden of demonstrating that he was a domiciliary of West Orange for the 2018-19 and 2019-20 school years. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in West Orange. Therefore, the Board is entitled to tuition reimbursement in the amount of $21,205.00 for tuition costs incurred from the beginning of the 2018-2019 school year through October 21, 2019, and $101.51 for each school day following October 21, 2019, during which time petitioner's minor child was ineligible to attend school in West Orange.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $21,205.00, plus $101.51 for each school day following October 21, 2019, for tuition costs incurred during the time period in which K.E. was ineligible to attend school in West Orange. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 1/9/20
Date of Mailing: 1/10/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 09617-19
AGENCY DKT. NO. 143-6/19

C.E. ON BEHALF OFMINOR CHILD K.E.,
Petitioner,
v.

TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

C.E. petitioner, pro se

Frances L. Febres, Esq. for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC)

Record Closed: November 24, 2019 Decided: December 6, 2019

BEFORE: **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner, C.E., is the father of K.E, who is a minor and student in the West Orange Public School District (District). During the 2018- 19 school year and through the current school year, K.E. was not domiciled in the District. Should public school be

free to K.E. in the District for the 2018-19 school year? No. Public school shall be free to a minor who is domiciled within the school district. N.J.S.A. 18A:38-1(a).

PROCEDURAL HISTORY

Petitioner, C.E., is the father of K.E, who is a minor and a student in the District.

On December 6, 2016, the West Orang Board of Education (Board) discovered that K.E. was not domiciled within the District and voted to remove K.E. from its schools. Petitioner appealed that determination, and the case was transmitted to the Office of Administrative Law (OAL). K.E. was found not to be domiciled within the District and therefore, ineligible for free public education in the District. On May 18, 2017, C.E. was ordered to pay $17,069 in back tuition for the 2016-17 school year. See C.E. o/b/o K.E. v. West Orange Public School District, OAL DKT. No. EDU 00494-17, initial decision (May 18, 2017).

On January 10, 2018, the Board again discovered that K.E. was not domiciled within the District, and again voted to remove K.E. from its schools. Petitioner appealed that determination, and the case was transmitted to the OAL. K.E. was found not to be domiciled within the District and therefore, ineligible for free public education in the District, on June 5, 2018, C.E. was ordered to pay $20,000 in back tuition for the 2017-18 school year. See C.E. o/b/o K.E. v. West Orange Public School District, OAL DKT. No. EDU 03717-18, initial decision (June 5, 2018).

In October 2018, C.E. advised the Board that he was closing on a house in West Orange, that he would provide documentation that K.E. was eligible to continue attending school in the District, and that he would remit the remaining $10,000 in back tuition for the 2017-18 school year.

On October 15, 2018, the Board held a residency hearing, determined for a third time that K.E. was not domiciled in the District, concluded that K.E. ineligible to receive

a free education from it, and voted to remove K.E. from the District. C.E. paid the remaining $10,000 in back tuition owed for the 2017-18 school year on October 22, 2018, but despite several requests, he did not supply documentation establishing K.E.'s domicile in West Orange for the 2018-19 school year.

On May 29, 2019, the Board notified C.E. that K.E. would be removed from rolls on June 21, 2019, and that C.E. would be assessed tuition for each day of ineligible attendance.

On June 21, 2019, C.E. appealed the determination.

On July 17, 2019, the Department of Education, Office of Controversies and Disputes, transmitted the case to the OAL as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On August 6, 2019, I held an initial prehearing conference during which time the parties agreed that discovery would be exchanged by September 20, 2019, and that an additional prehearing conference would be held prior to the October 21, 2019, hearing date. On August 7, 2019, a Prehearing Order was entered memorializing the discussion and scheduling a prehearing conference for September 30, 2019. On September 30, 2019, C.E. advised he had not yet supplied documentation supporting K.E.'s residency in West Orange. I instructed C.E. to provide all discovery to the Board by October 8, 2019.

On October 17, 2019, the Board notified the court that C.E. did not supply any discovery.

On the hearing date of October 21, 2019, the parties agreed that there was no need to conduct a hearing, and that the case could be resolved through a motion for

summary decision. On the record, the Board presented its oral argument for summary decision, and C.E. did not dispute the Board's position.

On November 4, 2019, the Board filed its motion for summary decision; C.E. filed no opposition; and on November 24, 2019, I closed the record.

FINDINGS OF FACT

Based on the documents the Board submitted in support of the motion for summary decision, and viewing them in the light most favorable to C.E., I **FIND** the following as **FACT**:

During the period of April 3, 2019, through May 23, 2019, the Board's residency investigators conducted simultaneous surveillance of the East Orange address identified on C.E.'s 2018 and 2019 court filings, banking records, and residency appeal petition in this case; as well as the West Orange address stated on K.E.'s student registration record, C.E.'s September 2017 application for PSE&G services, and a month-to-month lease signed by C.E. on September 20, 2017. Other than K.E.'s student registration record, no documentation supporting residency in West Orange for 2018 or 2019 was presented to the District.

On ten occasions from April 3, 2019, through May 23, 2019, during the morning hours, the investigator observed K.E. and C.E. entering and exiting the East Orange address, and the presence of C.E.'s vehicle; whereas at no time did an investigator observe K.E. or C.E. entering or exiting the West Orange address. The Board's residency investigators concluded that the East Orange address listed on the residency appeal petition is where K.E. resided with C.E. A prior investigation with simultaneous surveillance of the same East Orange and West Orange addresses in November and December 2017 and January 2018 revealed the same findings.

On May 29, 2019, the Board notified C.E. that K.E. would be removed from rolls on June 21, 2019, and that C.E. would be assessed tuition for each day of ineligible attendance.

In this case, C.E. presents no evidence to establish his domicile or that of his daughter, K.E., in the District.

Despite her domicile with C.E. in East Orange, K.E. continued to attend the West Orange public schools for the 2018-19 school year, and she continues to attend the West Orange public schools for the 2019-20 school year to this day.

Based upon a per diem tuition rate of $101.45, the tuition for general education attendance in District for the 2018-19 school year is $18,566. The per diem tuition rate for the 2019-20 school year is $101.51. Therefore, the tuition for general education attendance in District from September 4, 2019, through the hearing date of October 21, 2019, is $2,639.

To date, C.E. has made no payments to the District for the 2018-19 or 2019-20 school year.

CONCLUSIONS OF LAW

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall be served with briefs and may be served with supporting affidavits. Ibid. "The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

Even where a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence, and where the objector submits no evidence to demonstrate a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether there exists a "genuine issue" of material fact that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

In this case, no genuine issue of any material fact exists, and I **CONCLUDE** that this case is ripe for summary decision.

Public school shall be free to a minor who is domiciled within the school district. N.J.S.A. 18A:38-1(a). A student is domiciled in a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent, and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J 238, 250 (1955). New Jersey has consistently held that the domicile of the child follows the domicile of the parent. Shim v. Rutgers, 191 N.J. 374, 399 (2007). If a student does not have a right to attend the school district, the Commissioner may assess tuition. See N.J.A.C. 6A:22-6.2.

Where a local board of education seeks removal of a student, the parent may appeal to the Commissioner of Education. N.J.S.A. 18A:39-1(b)(2). In the proceeding before the Commissioner, the parent has the burden of proof by a preponderance of the evidence that the child meets eligibility requirements for a free education. Ibid. If the evidence does not support the parent's claim, the Commissioner shall assess the parent

tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Ibid.

In this case, a preponderance of the evidence demonstrates that K.E. is domiciled in East Orange, New Jersey, and was domiciled in East Orange for the 2018-19 school year to the present; and thus, the Board is entitled to prevail as a matter of law given my findings of fact, the tuition C.E. owes the District is clear. Therefore, I **CONCLUDE** that C.E. owes the Board $18,566 for the period of ineligibility for the 2018-19 school year; $2,639 from September 4, 2019, through the scheduled hearing date of October 21, 2019; and $101.51 for each school day attended beyond October 21, 2019, for the remainder of the 2019-20 school year.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that C.E. owes the Board $18,566 for the period of ineligibility for the 2018-19 school year; $2,639 from September 4, 2019, through the scheduled hearing date of October 21, 2019; and $101.51 for each school day attended beyond October 21, 2019, for the remainder of the 2019-20 school year.

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

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

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

December 6, 2019

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: December 6, 2019

Date Mailed to Parties:

ljb

APPENDIX

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Motion for Summary Decision

R-2 Certification of Gerard Drappi, Residency Officer, with exhibits

R-3 Certification of J. Scott Cascone, Superintendent of Schools, with exhibits.

17-20

New Jersey Commissioner of Education

Final Decision

Michael Ettz,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

On June 24, 2019, petitioner appealed the determination of the respondent, New Jersey Department of Education, Office of Student Protection (OSP), that he is permanently disqualified from public school employment. Petitioner was disqualified as the result of a guilty plea in 2017 to a charge of third degree assault by auto, in violation of *N.J.S.A.* 2C:12-1(c)(2). Respondent filed a motion to dismiss the petition.

The ALJ found, *inter alia*, that: *N.J.A.C.* 6A:3-1.1 et seq. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with *N.J.S.A.* 18A:6-9; in the instant matter, petitioner pled guilty to a third-degree assault by auto on September 22, 2017; petitioner was notified by letter from the respondent on March 2, 2018 that based on his guilty plea, he was permanently disqualified from employment in any educational institution under the supervision of the Department of Education; the March 2, 2018 letter further notified petitioner of the timeline for challenging the accuracy of his criminal history record; petitioner's attorney at the time confirmed receipt of the March 2, 2018 letter in a writing dated March 15, 2018, and indicated that petitioner challenged his disqualification; respondent replied to petitioner's attorney on March 16, 2018 by letter which included instructions on how to file a formal appeal with the Commissioner of Education pursuant to *N.J.A.C.* 6A:3; petitioner failed to file such formal appeal until June 24, 2019. The ALJ concluded that petitioner's appeal is time barred under *N.J.A.C.* 6A:3-1.16; further, petitioner's related but separate matter regarding an Order to Show Cause from the State Board of Examiners did not toll the running of the ninety-day limitations period for the filing of a petition of appeal. Accordingly, the ALJ granted the respondent's motion to dismiss.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

January 14, 2020

17-20

OAL Dkt. No. EDU 11396-19
Agency Dkt. No. 148-6/19

New Jersey Commissioner of Education

Final Decision

Michael Ettz,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Additionally, the petitioner has failed to present any exceptional circumstances that might justify a finding that strictly adhering to the 90-day rule would result in injustice. *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 590 (1993); *N.J.A.C.* 6A:3-1.16. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/20
Date of Mailing: 1/14/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 11396-19
AGENCY DKT. NO. 148-6/19

MICHAEL ETTZ,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,
Respondent.

Edward W. Cillick, Esq., for petitioner (Cillick & Smith, attorneys)

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

Record Closed: October 22, 2019 Decided: December 16, 2019

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioner Michael Ettz, a teacher, appeals the determination of respondent, New Jersey Department of Education, Office of Student Protection (OSP), that he is disqualified from public school employment.

PROCEDURAL HISTORY

On June 24, 2019, petitioner filed a Verified Petition with the Commissioner of Education, with a copy to the OSP[1] and the Attorney General of New Jersey. On July 12, 2019, respondent requested an extension of time to respond to the Verified Petition. On August 5, 2019, the respondent filed a Motion to Dismiss with the Bureau of Controversies and Disputes (Bureau) of the Department of Education (Department). The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 16, 2019. Review of the file revealed that petitioner had not filed a response to the respondent's Motion to Dismiss. A telephone conference was held on September 6, 2019, and petitioner was given until October 7, 2019, to file opposition to the motion to dismiss, and respondent was given until October 21, 2019, to file a reply. Petitioner filed opposition on October 8, 2019, and respondent filed a reply on October 21, 2019.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The documents attached to the transmittal, including the Verified Petition, and Motion to Dismiss reflect the following:

On September 22, 2017, petitioner pled guilty to third-degree assault by auto in violation of N.J.S.A. 2C:12-1(c)(2) in Bergen County Superior Court. By letter dated March 2, 2018, the Department's Criminal History Review Unit (CHRU)[2] notified petitioner that it had received information concerning a conviction or charge pending for a disqualifying crime or offense documented on his criminal history record, and attached the record as "Addendum: A." The March 2, 2018, letter also stated, in pertinent part, the following:

> Pursuant to state statutes, you are permanently disqualified or ineligible for employment or service as a school board member/trustee in any position with a school or other

[1] Formerly known as the Criminal History Review Unit (CHRU).
[2] Now known as the Office of Student Protection (OSP).

> educational institution under the supervision of the Department of Education or with a contracted service provider under contract with said school or educational facility. You have 14 days from the date of this written notice to challenge the accuracy of your criminal history record. You must submit documentation from the respective courts to support your claim of an error in the criminal record. If the crime or offense can be expunged and the period of time required by statute has passed, you may re-apply for school employment upon completion of that process.
>
> . . .
>
> NOTE: IF YOUR CRIMINAL HISTORY RECORD IS ACCURATE OR YOU DO NOT FILE A CHALLENGE OF YOUR DISQUALIFICATION OR INELIGIBILITY AND YOU HOLD A TEACHING CERTIFICATE, THE OFFICE OF LICENSURE & ACADEMIC CREDENTIALS WILL BE NOTIFIED. THE NOTICE OF DISQUALIFICATION OR INELIGIBILITY WILL BE REVIEWED BY THE STATE BOARD OF EXAMINERS AND MAY RESULT IN PROCEEDINGS AGAINST YOUR CERTIFICATION.

By letter dated March 15, 2018, petitioner's attorney, Jill Horowitz, Esq, of Cillick & Smith, confirmed petitioner's receipt of the March 2, 2018, letter. Petitioner was incarcerated at that time. The March 15, 2018, letter also stated, in pertinent part:

> On behalf of Mr. Ettz, we are contesting the accuracy of the criminal history information set forth in Addendum A to your letter. Specifically, the employment information is incorrect and the accurate conviction is set forth in the Judgement of Conviction attached hereto.
>
> Please be advised that we specifically challenge Mr. Ettz's disqualification and/or ineligibility.

The attached Judgement of Conviction & Order for Commitment reflected the final charge as "ASSAULT BY AUTO/VESSEL SBI VIOL 39:4-50 OR 4-50.4A," statute "2C:12-1C(2)," third degree, and a sentence of New Jersey State Prison for four years.

By letter dated March 16, 2018, the Department's CHRU notified petitioner's attorney, Jill Horowitz, Esq. of Cillick & Smith, as follows:

> I am acknowledging receipt of your correspondence of March 15, 2018 regarding an appeal of Mr. Ettz's ineligibility for public school employment. To file a formal appeal with the Commissioner of Education pursuant to N.J.A.C. 6A:3, you must also copy the Bureau of Controversies and Disputes at the Department of Education and the Office of the Attorney General. A copy of these rules may be requested from the Bureau of Controversies and Disputes at (609) 376-9079, or accessed on the Department of Education website at http://www.state.nj.us./education/code/current/title6a/chap3.pdf.

By letter dated August 9, 2018, the Department's Office of Controversies and Disputes notified petitioner's attorney, Jill Horowitz, Esq. of Cillick & Smith, as follows:

> We are in receipt of your letter dated March 15, 2018 that was just forwarded to our office from the Department of Education, Criminal History Review Unit, in which it appears that you challenge Michael Ettz's disqualification from public employment.
>
> In order to initiate a contested case before the Commissioner, a petitioner must comply with the rules set forth in N.J.A.C. 6A:3-1.1 et seq. These rules require submission of a petition in the form as described at N.J.A.C. 6A:3-1.4:
>
> - Name, address, telephone number and, if available, fax number of petitioner and respondent;
> - The specific allegation(s), and the facts supporting them, which constitute the basis of the controversy;
> - A statement of the relief which the petitioner is seeking; and
> - Signature of petitioner, or his/her attorney, if applicable.
>
> Additionally, the petitioner must write or type the statement contained in N.J.A.C. 6A:3-1.4 attesting to the truthfulness of the allegations set forth in the Petition of Appeal. <u>The statement must be signed by the petitioner and notarized</u>.
>
> Finally, the petitioner must serve a copy of the petition on each respondent and must submit to the Office of Controversies and Disputes, with the Petition of Appeal, proof that each respondent was served. **Please be advised that, in the case of a State respondent, such as the New**

> **Jersey Department of Education, Criminal History Review Unit, N.J.A.C. 6A:3-1.3(j) requires service of the petitioner on the Attorney General of the State of New Jersey, Department of Law and Public Safety, Division of Law, P.O. Box 112, Trenton, NJ 08625-0112, Attention: Education Section.** That proof may be in any one of the following forms:
>
> . . .
>
> Papers are to be submitted to the following address: Commissioner of Education, c/o Director of Office of Controversies and Disputes, New Jersey State Department of Education, P.O. Box 500, Trenton, NJ 08625. With the prior permission of the Office of Controversies and Disputes and up to a limit of 10 pages, a petition may also be faxed to (609) 292-4333, with the hard copy to follow by mail.
>
> For further information, including sample forms, you may wish to visit the Department of Education website at www.state.nj.us/education. At the top of the page, click on the grey letter "C," and then click on the "Controversies and Disputes" link. If you have procedural questions after visiting the site, you may contact the Office of Controversies and Disputes at (609) 376-9079.

The CHRU was copied on the August 9, 2018, letter.

On June 24, 2019, petitioner's attorney, Edward W. Cillick, Esq. of Cillick & Smith, filed the "Verified Petition from Adverse Underlying Action by The Criminal History Review Unit (CHRU) Of The Department of Education." Thereafter, the OSP filed the Motion to Dismiss in lieu of an answer.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:3-1.1 et seq. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1(a). N.J.A.C. 6A:3-1.1 et seq. does not apply to appeals of decisions or interlocutory decisions of the State Board of Examiners suspending or revoking teaching certificates

or interlocutory decisions of the State Board of Examiners, which appeals and requests must be made pursuant to the provisions of N.J.A.C. 6A:4. N.J.A.C. 6A:3-1.1(d).

To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner must prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 and serve such petition upon each respondent, together with any supporting papers the petitioner may include with the petition. N.J.A.C. 6A:3-1.3(a). The petitioner then must file, in accordance with N.J.A.C. 6A:3-1.3(h), proof of service on each respondent, the telephone numbers (and fax numbers and e-mail addresses where available) of the petitioner and each respondent, and the original petition and supporting materials, if any, with the Commissioner c/o the Director, Office of Controversies and Disputes, New Jersey Department of Education, 100 River View Plaza, P.O. Box 500, Trenton, New Jersey 08625-0500. N.J.A.C. 6A:3-1.3(a).

A respondent must serve an answer upon the petitioner within twenty days after receipt of the petition, unless a shorter period is required by statute, regulation, or court order, or directed by the Commissioner due to the emergent nature of a matter. N.J.A.C. 6A:3-1.5(a). However, respondent is not precluded from filing a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. N.J.A.C. 6A:3-1.5(g).

The OSP filed a motion to dismiss and argues that the petitioner's appeal is time-barred and should be dismissed pursuant to N.J.A.C. 6A:3-1.3(i), which states:

> 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 Kaprow v. Board of Education, 131 N.J. 572, 583 (1991), the New Jersey Supreme Court discussed the ninety-day limitation period, and determined that such

period "represents a reasonable procedural requirement," provides "finality in education matters," and has withstood tangential review. Additionally, the court opined:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.
>
> [Kaprow, 131 N.J. at 587 (citations omitted).]

In Kaprow, the petitioner attempted to resolve his claim through negotiations with the Board. However, the Supreme Court found that such attempt did not negate that he had received adequate notice on a date certain, nor did it toll the running of the limitations period. Similarly, in the present matter, petitioner contends that after receipt of the March 2, 2018, letter from the CHRU and after his attorney's March 15, 2018, letter, petitioner was served on or about April 8, 2018, with an Order to Show Cause by the Board of Examiners seeking to revoke his teaching certificate. Petitioner also contends that he properly responded to the Order to Show Cause and admitted that he pleaded guilty to assault by auto, but denied that he was disqualified from public employment. Petitioner further contends that the Board of Examiners entered an Order, dated May 17, 2019, revoking petitioner's teaching certificates, and "indicated it was compelled to treat his conviction as a disqualifying offense because there was no record that he challenged the findings of the CHRU based on the finding of disqualification and the additional circumstances." Accepting petitioner's representation as to the contents of the Board of Examiners' Order, the Board of Examiners correctly pointed out that there was no record that petitioner had challenged the findings of the CHRU. Petitioner omits from his opposition any mention of the March 16, 2018, letter from the CHRU to petitioner's attorney, which letter referenced N.J.A.C. 6A:3, which regulations detail the rules of procedure for an appeal and limit the time to file an appeal to ninety days. Instead, petitioner states only that "counsel never received a letter dated August 9, 2018

as referenced by the [respondent]" and "[i]n fact, the letter was addressed to Jill Horowitz who had left our office earlier in the year." While the August 9, 2018, letter may have been addressed to Jill Horowitz, Esq., it was addressed to her at Cillick & Smith, at the office's current address, and there was no explanation provided for why the mail would not have been opened by Cillick & Smith if the attorney was no longer with the office. Nevertheless, even if petitioner's attorney had never received the August 9, 2018, letter, there was no explanation as to why an appeal was not filed in accordance with the March 16, 2018, letter, and even absent any letter, the petitioner still has an obligation to comply with applicable regulations.

Petitioner also argues that respondent is mistaken in its belief that the appeal was not properly filed within ninety days. In support of its argument that the appeal was timely filed petitioner relies upon the March 15, 2018, "challenge to the disqualification" having been filed thirteen days after the March 2, 2018, letter. However, petitioner's March 15, 2018, letter did not comply with the requirements set forth in the applicable regulations, and there were multiple subsequent letters notifying petitioner that the March 15, 2018, letter was not a proper appeal. Yet, a proper appeal of the CHRU determination still was not filed. In further support of the argument that petitioner properly appealed the CHRU determination, petitioner improperly relies upon arguments alleged to have been made to the Board of Examiners in connection with its revocation of petitioner's teaching certificates – an entirely separate action.

Notwithstanding the foregoing, petitioner also argues that if it is determined that there was not strict compliance with the ninety-day time period that N.J.A.C. 6A:3-1.16 should allow for relaxation of the rules. Specifically, N.J.A.C. 6A:3-1.16 states:

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

The circumstances herein provide no basis to dispense with the ninety-day time period. The CHRU—not the Board of Examiners—sent petitioner a letter on March 2, 2018, and sent petitioner's attorney a letter on March 16, 2018, regarding the disqualification. Petitioner was on notice of the action being taken by the CHRU and after it appeared that petitioner intended to appeal, the CHRU's March 16, 2018, letter stated that to file a formal appeal pursuant to N.J.A.C. 6A:3, petitioner must also copy the Bureau of Controversies and Disputes and the Attorney General of New Jersey. Yet, petitioner has no documentation that even a copy of the March 15, 2018, letter, much less a formal appeal, was ever filed with the Bureau of Controversies and Disputes or the Attorney General of New Jersey. Additionally, the Bureau of Controversies and Disputes' August 9, 2018, letter stated that to initiate a contested case before the Commissioner, petitioner would have to comply with the rules at N.J.A.C. 6A:3-1.1 et seq. and a copy of the petition would have to be served on the Attorney General of New Jersey. Yet, petitioner again has no documentation that a formal appeal was ever served on the Attorney General, for the respondent CHRU, within ninety days. Instead, the within appeal was not filed until June 24, 2019. The related but separate matter of the Order to Show Cause from the Board of Examiners did not toll the running of the ninety-day limitations period within which petitioner was to file a petition of appeal relative to the March 2, 2018, letter, and there is no basis to disregard "a reasonable procedural requirement," more than a year after petitioner was put on notice of the adverse action and further put on notice that a formal petition had to be filed in accordance with the regulations.

Based upon the foregoing, I **CONCLUDE** that Ettz's Verified Petition is time-barred and should be dismissed.[3]

[3] Since the appeal is time-barred, the OSP's additional argument as to an alleged failure to advance a cause of action is not addressed herein.

ORDER

It is hereby **ORDERED** that respondent's Motion to Dismiss be **GRANTED**, and that Ettz's Verified Petition be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

Kelly J Kirk

December 16, 2019
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: December 16, 2019

Date Mailed to Parties:

mm

18-20E

OAL Dkt. No. EDU 12642-19
Agency Dkt. No. 235-9/19

New Jersey Commissioner of Education

Revised Order on Emergent Relief

J.M., on behalf of minor child J.M.,

Petitioner,

v.

Board of Education of the Township of Moorestown, Burlington County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Revised Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/20
Date of Mailing: 1/14/20

[1] The parties have advised the ALJ that no issues remain once the request for emergent relief is resolved. Therefore, the file should be returned to the Department pursuant to *N.J.A.C.* 1:1-3.3.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 12642-19
AGENCY DKT. NO. 235-9/19

J.M. ON BEHALF OF J.M.,
Petitioner,
BOARD OF EUCATION OF
THE TOWNSHIP OF MOORESTOWN,
BURLINGTON COUNTY.
Respondents.

J.M., parent, pro se

John Comegno, Esq., for respondent (Comegno Law Group, P.C., attorneys)

BEFORE **CARL V. BUCK III,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner[1] appealed the action of respondent Moorestown Board of Education (Board) denying him promotion from the seventh grade to the eighth grade at the William Allen Middle School for the 2019-2010 academic year. Notice of the possibility to retain student was given as early as January 2019. Direct notice of intent of the School's principal to retain student was given to petitioner on June 17, 2019. Petitioner

[1] As the petitioner and his son have the same initials, in the body of this Order the father shall be referred to as "Petitioner" or "Father" and the student shall be referred to as "Student" or "Son".

requested an appeal to the Superintendent of the Board, who upheld the principal's decision on or about July 15, 2019. Petitioner requested an appeal to the Board which upheld the decision made by the principal and the superintendent.

The State of New Jersey, Department of Education, Bureau of Controversies received a petition for emergency relief on or about September 12, 2019. The matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case on September 13, 2019, on petitioner's application for emergency relief. The Director of the OAL assigned the undersigned to hear this matter pursuant to N.J.S.A. 52:14F-5.

Oral argument on the matter was scheduled for September 18, 2019. Subsequent to oral argument on that date, both parties requested time to make an additional submission and agreed to the extension of this order so that information could be considered in the Order. Respondent was given until 10:00 am on Friday, September 20, 2019 and made a submission. Petitioner was given until 10:00 am on Monday, September 23, 2019 and did not make a submission. Nothing from petitioner was received by the close of business on Tuesday, September 24, 2019.

For the reasons discussed below, the relief sought by the petitioner is **DENIED.**

FACTUAL FINDINGS

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

Respondent Board's policy 5410 deals with retention of students within the Moorestown Township School District. This policy deals with promotion to a subsequent grade and states:

> A pupil in the elementary grades will be promoted to the next succeeding grade level when he/she has completed the course requirements at the presently assigned grade; has achieved the instructional objectives set for the present grade; has demonstrated

> the proficiency is required for movement into the educational program of the next grade; and his demonstrated the degree of social, emotional, and physical maturation necessary for a successful learning experience in the next grade.

Beginning with PAARC testing results of May 2018, student's scores indicated that he was below proficient levels in language arts and math. In August 2018 the student was placed in remedial classes for general education students for the subjects of math and language arts. The student was also recommended to the PASS class - that being a class to improve executive functioning for general education students. The petitioner initially refused to consent to these placements.

In September and October 2018, the student's teachers requested that he stay after school for extra assistance due to his low grades. Petitioner did not consent to allow the student to stay after school to accept assistance. On September 25, 2018, the teachers requested a meeting with petitioner. In October 2018 the student was referred to the intervention and referral services team; however, petitioner refused to allow the student access to this assistance. In September and October 2018, the school nurse contacted the petitioner regarding a concern with the student's need for eyeglasses. The student was not provided with eyeglasses for several months.

In November 2018 the principal met with the student to discuss the student's responsibilities to complete his work for the first marking period. Petitioner was notified of that meeting and objected to the meeting. In November 2018 the student was offered a mentor and the school nurse notified petitioner of concerns regarding the student's weight. Petitioner indicated he would not allow a mentor to assist the student nor use the nurse's advice.

In December 2018 the possibility the student joining the wrestling team was discussed with petitioner; however, petitioner failed to follow up.

In January 2019 the child study team (CST) offered to evaluate the student again and the student was recommended for the PASS class. Petitioner refused to consent to either a review or evaluation by the CST or for the student to participate in the PASS

class. In January 2019 the principal notified petitioner that the student could be retained or changed to different classes, specifically, the BSI math and the PASS class, if his grades did not improve. Petitioner refused to consent to the PASS class but consented to the BSI math class. In March 2019 petitioner was notified for the second time that the student was in jeopardy of retention if his grades did not improve. In March 2019 the principal met again with petitioner to discuss the possibility that student could be retained. This was the third time petitioner had been made aware of the possibility of his son being retained in seventh grade. Petitioner then agreed to receive weekly updates of student's progress and assignments. The student was again offered extra assistance after school, but petitioner refused to allow the student to receive such assistance.

From March 2019 through June 2019, the student's teachers communicated with petitioner regarding student's failure to complete assignments via the student's agenda book. Petitioner did note that the book was misplaced at least on one occasion. The school asserted that petitioner did not respond to the notations regarding the student's failure to complete assignments.

In March 2019 petitioner agreed he would email the student's teachers every Wednesday and would respond with updates. The teachers forwarded emails to the petitioner with updates regarding the student's progress. In June 2019 the petitioner was requested to schedule a final meeting regarding the student's retention. The petitioner requested a telephone conference for June 17, 2019. However, petitioner did not call at the scheduled time. On June 21, 2019, the principal met with the petitioner and petitioner's mother to discuss the student's retention. This was the fourth time student's retention was mentioned to petitioner.

TESTIMONY

J.M.

J.M. is the father of the student. He requests emergent relief so that his son may be advanced to eighth grade. His position is that he was told during several discussions

with the principal that if the student evidenced satisfactory effort that he would be advanced. Petitioner states that the student has tried to advance; therefore, he should be advanced to the eighth grade. Petitioner further states that the harm in retaining the student is far greater than the harm in holding him back for another year. He provided citations to many articles which petitioner stated evidence that position, but petitioner could not provide a succinct analysis of how those articles correlate to the matter at hand. It was his goal to have the student advance, as he will be responsible for the child for another year. As a single parent, he has made efforts to keep the student involved in school but was unable to do so. Petitioner argued that the burden of retaining the student will be placed on himself and the student only, and that it hurts nobody to put the student in the eighth grade.

R.K.

R.K. is the mother of the petitioner (and grandmother of the student). She represented that she possesses a master's degree in higher education and a master's degree in experimental psychology. She testified not as a professional, but simply as a family member with knowledge and involvement in this case. She has done tremendous research and found that it is harmful to not promote a student. There are mental-health ramifications for high school dropouts, and she is concerned that her grandson would ultimately become a high school dropout due to this event. She requested a CST evaluation be done and stated, what harm would it be to have him in the eighth grade while this evaluation is being done. She stated that she does not feel that it would be harmful to promote the student to the eighth grade.

Board

The Board attorney, John Comegno, Esq., reiterated the terms of Board Policy 5410 detailed above. Specifically, he detailed that when and how a promotion occurs is not based on attendance, intentions, etc. but strictly on academic results and emotional readiness to advance. The retention decision was not punitive and was based on the evidence as detailed as well as the student's final report card (R-1). The decision was initially made by the Principal, Matthew Keith. Petitioner requested an appeal to

Superintendent Scott McCartney who upheld the principal's decision. Petitioner then requested a further appeal to the entire Board of Education. The Board then upheld the decisions below made by the principal and the superintendent. In their argument, the Board relied on two decisions from the Hon. Joseph Martone ALJ dealing with similar circumstances - but not exact fact patterns. The Board then detailed the four criteria of Crowe v. DeGioia stating that the criteria were not met, and that the contention of the petitioner must ultimately fail.

A secondary issue, regarding standing (in that petitioner withdrew the student from the school system on September 9, 2019) was not heard by the Court. This issue was raised during a telephone conversation before the court date and the court's position was that that issue would not be dealt with but that the appeal would continue as filed.

LEGAL DISCUSSION AND CONCLUSION

Pursuant to N.J.A.C. 6A:3-1.6(b), an application for emergent relief shall not be granted unless it satisfies the following four standards:

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

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

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

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

[See Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982).]

The petitioner must meet all four criteria to prevail on his request. See Crowe, 90 N.J. 126; DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester Cnty. Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric,

Inc. v. S. Gloucester Cnty. Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995), adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Accordingly, each prong of the test must be analyzed:

1. Whether petitioner will suffer irreparable harm if the student is not advanced to the eighth grade for the 2019-2020 school year.

The first principle for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioner. Crowe, 90 N.J. at 132–33. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

Here, petitioner claims that no one will be hurt by the student's elevation to eighth grade. Petitioner further states that there will be ongoing harm and trauma to the student should the student not be promoted. Petitioner's mother also states that it is harmful to retain a student.

In opposition, the Board maintains that it is following its adopted Board Policy 5410. In support of its position, the Board avers that the student's grades throughout the year were deficient; with the ultimate result being that the student failed four of the core curriculum courses needed for promotion to the next grade level. (R-1). The

student failed language arts for three of the four quarters; math for three of the four quarters, science for all four quarters, cultural geography for three of the four quarters and math support for two quarters. The student's final grades reflect an A- in chorus, a B+ in art, a B in physical education, a C- in health, a P in math support. The student received an A+ and a C for two quarters of Spanish. The Board demonstrated that assistance was offered to the student throughout the course of the year but was, for the most part, rejected by the parent.

Petitioner is seeking to have the student promoted to eighth grade while a CST evaluation occurs. A CST evaluation was recommended by the school last year but was refused by the father at that time. Conducting such evaluation at a time the student in the untenable position of expecting (or hoping) that he will provide satisfactory results in a grade for which he is ill-prepared and unready is not a sound plan and doing so, in the Court's opinion, would be setting up the student for failure.

Accordingly, I **FIND** that petitioner has not shown neither irreparable harm nor the risk of harm to the student based on the Board's action. The issue of damages remains speculative and therefore does not satisfy the first prong of the four-prong test under N.J.A.C. 6A:3-1.6(b).

2. Whether the legal right underlying petitioner's claim is well settled.

Petitioner claims that the legal right underlying his claim is well settled because the principal, the superintendent, and the Board of Education have made such determination and by his citation to numerous articles citing the harm in retaining students.

Respondent claims that the Board's action is in compliance with Board Policy 5410 and does not violate any legal right of petitioner.

Pursuant to N.J.S.A. 18A:35-4.9(a), Boards of Education are empowered to develop retention and promotion policies. The policies the Board of Education produce pursuant to this delegated power have the force and effect of law. See P.D.M. o.b.o.

K.M. v Bd. Of Educ. of Somerville, EDU 6706-98, (Aug. 27, 1998); J.Y. and C.Y. o.b.o. M.Y. v. Bridgewater-Raritan Reg. Sch. Dist., EDS 6876-98 (September 17, 1998). It is well settled that decisions of local boards of education are entitled to a presumption of correctness unless they are shown to be "patently arbitrary, without rational basis or induced by improper motives." J. M., by His Guardian, D. M. v. Hunterdon Central Regional High School District, Hunterdon County, 96 N.J.A.R.2d (EDU) 415, 419; R. A. M. and C. A. M. v. Board of Educ. of the OAL DKT. NO. EDU 04389-18 8 Township of Tabernacle, 94 N.J.A.R.2d (EDU) 573, 576 (citing, Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960)). Petitioner bears the burden of proving, by a preponderance of the evidence, that the respondent's action was "arbitrary, capricious or unreasonable." J.M., 96 N.J.A.R.2d at 419.

Respondent claims that the Board's action is in compliance with Board Policy 5410 and does not violate any legal right of petitioner.

The claim before me is unique with sparse reference to caselaw. But, the statute and the Board Policy are plain on their face, and the petitioner has not shown (nor has my review revealed) that the actions here were either "arbitrary" or "capricious". Accordingly, I **FIND** that the legal issue here is settled as a matter of law.

3. Whether petitioner is likely to be successful on the merits of its claim.

Petitioner's appeal does not assert an argument that supports the contention he will prevail on the merits.

4. Whether petitioner will suffer greater harm than respondent if emergent relief is not granted.

Petitioner claims that the student will suffer greater harm than respondent if the requested relief is not granted. Petitioner has not shown that student will suffer greater hardship than respondent and it is the position of the tribunal that if the student is not provided with appropriate assistance in an appropriate classroom setting, that he will, through lack of an appropriate educational foundation, suffer harm here.

While I agree that ensuring the welfare of the student is paramount, I do not **FIND** that such a correction can be made by way of allowing the student to progress to the eighth grade when he does not have the appropriate educational background to do so.

CONCLUSION

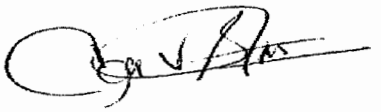
Petitioner has not satisfied the four prongs required to obtain emergent relief. Petitioner has not shown imminent and irreparable harm. He has not shown that that the legal right to petitioner's claim is well settled. He has not shown that he has a likelihood of prevailing on the merits. He has not shown any harm to the student or that the student will be negatively impacted by retention in the seventh grade.

This matter was filed as an Emergent matter only. No filing for a Due Process hearing was made by petitioner. Therefore, this office will retain this file until the final decision by the Commissioner.

ORDER

The application for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



September 25, 2019
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

lam

WITNESSES

For Petitioner:

J.M., petitioner
R.K., mother of petitioner

For Respondent:

Matthew Keith, Principal

APPENDIX

For Petitioner:

P-1 Email September 17, 2019 8:13 pm
P-2 Email September 17, 2019 7:50 pm
P-3 Email September 17, 2019 7:03 pm
P-4 Email September 17, 2019 5:40 pm
P-5 Email September 17, 2019 6:15 pm
P-6 Email September 17, 2019 6:04 pm

For Respondent:

R-1 Report card printed 09/18/2019
R-2 September 17, 2019, Letter and response to petition
R-3 September 20, 2019, Letter and supplemental submission

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGES
between

BELVIDERE BOARD OF EDUCATION,

Petitioner

-and-

DOE DOCKET NOS. 52-3/19; 56-3/19

DANIEL DEMPSEY and ANDREW POYER,

Respondents

BEFORE: SUSAN WOOD OSBORN, ARBITRATOR

DATES OF HEARING: November 19, 20, and 21, 2019

DATE OF AWARD: January 13, 2020

APPEARANCES:

For the Petitioner:

Weiner Lesniak, Attorneys
(Stephen Edelstein, of counsel)

For the Respondent:

Oxfeld Cohen, Attorneys
(Sanford Oxfeld, of counsel)

Witnesses:

Christopher Carrubba, Belvidere Supt. Of Schools
Brian Staples, Belvidere former Athletic Director
Chris Karabinus, Belvidere former Athletic Director
Sara Schiavone, Belvidere teacher
Patty Toth, Chair, Belvidere soccer booster club
Patti Grafer, Treasurer, Belvidere soccer booster club
Daniel Dempsey, Respondent
Andrew Poyer, Respondent

BACKGROUND OF THE CASE

On February 22, 2019 the Belvidere Board of Education ("Board" or "District") served High School Teachers Daniel Dempsey and Andrew Poyer ("Respondents") with tenure charges and advising each of them of their rights to file responses with the Board. At a Board meeting held on March 13, after consideration of the tenure charges, sworn written statement of the District Superintendent and the Respondent's responses, the Board voted to file the tenure charges with the Commissioner of Education. The charges against both teachers were in fact filed with the Commissioner on March 18, 2019. The Board charges that both employees engaged in unbecoming conduct, insubordination and/ other conduct amounting to just cause for dismissal or reduction in salary by (a) operating a fundraiser in which donations were solicited under false pretenses; (b) the two employees/coaches conspired together to raise money specifically for compensation for Poyer's coaching services; and (c) requisitioned and obtained a check for Poyer drawn on that associated student associated

account which was then cashed by Poyer all without permission of the Board or the district administration. Additionally, Dempsey and Poyer were charged with attempting to hinder the District's investigation of the matter by being "less than truthful" during their interviews with the Superintendent.[1]

On June 25, 2019, Respondents filed a Motion to Dismiss all charges with me. Respondents argued that Plaintiff's failure to timely submit discovery materials had prejudiced Respondents' ability to adequately prepare their defense prior to the start of the arbitration hearing. Further Respondents argued that because Plaintiff had not produced summaries of each witnesses' testimony, such evidence would not be produced at hearing and therefore the charges should be dismissed. By decision of August 1, 2019, I denied Respondents' motion but gave them an opportunity to move the start date of the hearing back to permit additional preparation time. I noted that even if I had dismissed the Board's tenure charges, it would be without prejudice to its ability to refile the charges and further delay would result.

An arbitration hearing was conducted on November 19, 20, and 21, 2019, at which time eight witnesses testified under oath. By agreement of the parties,

---

[1] An additional charge included against Poyer concerned an allegation that he had an inappropriate exchange with student N.A. during the 2017-2018 school year. That charge was withdrawn at hearing.

witnesses were sequestered during the hearing. The parties also presented documentary evidence. The parties filed post-hearing briefs by December 5. N.J.A.C. 6A:11-6.3 provides that the decision in this matter shall be issued within 45 days of the beginning of the hearing, and that the decision shall be final and binding. On November 12, I requested an extension of time to submit my award. The Department of Education granted my extension request to January 13, 2020.

ISSUE IN DISPUTE

The parties stipulated that the issue in dispute in this matter can be framed as follows:

> Did the Board of Education prove that tenure charges brought against Daniel Dempsey and Andrew Poyer amounted to sufficient cause for termination?

STATUTORY AND REGULATORY CONSIDERATIONS

N.J.S.A. 18A:6-10: Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

> (a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or
>
> (b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution

conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub article, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this sub article provided.

* * *

N.J.S.A. 18A:6-16 Proceedings before commissioner; written response; determination

* * *

... If, however, [the Commissioner of Education] shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, . . .

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S.A. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

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

* * *

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S.A. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10.

RELEVANT BOARD POLICIES

Superintendent Chris Carrubba is responsible for the general oversight of the Belvidere School District and its employees. He has been the Belvidere superintendent for the past seven years. He explained that the Board has a policy committee and that its adopted policies are available on its district website, as well as hardcopy in every building. Carrubba maintained that he expects all the teachers to be familiar with the Board-adopted policies. The Board introduced the following policies as relevant to the tenure charges in this matter.

Board Policy 1314, "Fundraising by Outside Organizations", (B-6) provides in relative part, as follows:

No person or organization may solicit funds on school property without prior permission from the Superintendent.

* * *

Funds solicited by organizations, not sponsored by the district, are not to be deposited in any regular or special accounts of the district. The Board disclaims all responsibility for the protection of or accounting for such funds.

Permission to solicit funds will be granted only to those organizations or individuals whose purposes are consistent with the goals of this district and the interests of the community. The Superintendent shall specify when and how solicitation may take place. He/she shall ensure this does not interfere with the orderly operations of the educational program.

Board Policy 3453, "School Activity Funds", concerns the use of funds derived from the pupils' activities. The policy provides in relative part, as follows:

(B-5)

School activity funds shall be audited annually along with other district funds and shall be administered, expended, and accounted for according to the rules of the state board of education.

The pupil activity funds for each school shall be kept in separate accounts, supervised by the building principal.[2] Separate and complete records shall be maintained for each pupil organization. All receipts, from pupil-fundraising projects, athletic events, and other events for which admission is charged will be deposited promptly. Bank deposits shall agree with the receipts in the case receipt book and shall be traceable to definite receipts or groups of receipts.

Disbursements must be made by check signed by the building principal and supported by a claim, bill or written order to persons

---

[2] Possible cross-references to this policy can be found in the following Board policies: 3280 Gifts, grants and bequests; 3400 Accounts; 3450 Money in school buildings; 3571.4 Audit; and 5136 Fund-raising activities. All of the above policies to include 3453, "School Activity Funds", are included in the Critical Policy Reference Manual.

supervising the fund. Checks shall bear two or more authorized signatures. All disbursements shall be recorded chronologically showing the date, vendor, check number, purpose and amount.

Borrowing from the pupil activity accounts is prohibited.

Board Policy 4112.3, "Code of Ethics" provides in relevant part, as follows:

The Board of Education endorses the code of ethics for professional educators published by the National Education Association:

1. Commitment to the Student

We measure success by the progress of each student toward achievement of his or her maximum potential. We therefore work to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals. We recognize the importance of cooperative relationships with other community institutions, especially the home.

In fulfilling our obligations to the student, we –

1. Deal justly and considerably with each student.

* * *

6. Refrain from commenting unprofessionally about a student or his or her home.

7. Avoid exploiting our professional relationship with any student.

Board's Policy 4117.50, "Discipline", provides as follows:

The Board of Education directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct.

Violations of these statutes, rules, and policies will be subject to discipline.

The superintendent shall prepare disciplinary rules for violations, discipline measures will include verbal and written warnings as appropriate and will provide, wherever possible, for progressive penalties for repeated violations. Penalties may include suspension, withholding one or more increments, and dismissal.

In the event disciplinary action is contemplated, notice will be given to the teaching staff member in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based; the text of the statute, policy, or rule that the member is alleged to have violated; a date when the member may be heard and the administrator who will hear the matter; and the penalty that may be imposed.

Board's Policy 4119.22, "Conduct and Dress", provides as follows,

The board of education expects staff conduct to be that of appropriate role models for pupils.

... Unbecoming Conduct
When an employee, either within the schools or outside normal duties, creates conditions under which the proper operation of the schools is affected, the board upon recommendation of the chief school administrator and in accordance with statute shall determine whether such acts or lack of actions constitute conduct unbecoming a school employee, and if so, will proceed against the employee in accordance with law.

Unbecoming conduct sufficient to warrant a board review may result from a single flagrant incident or from a series of incidents.

Board policy #4119.25, "Liability of Staff for Student Welfare", which sets forth in part,

... that teaching staff members are required to maintain a standard of care for supervision control and protection of students commensurate with assigned duties and responsibilities.

Board policy #5131.4, "Harassment, Intimidation, and Bullying" (HIB)

provides as follows:

The board of education believes that a safe and civil environment in school is necessary for students to learn and achieve high academic standards. Students learn by example, school administrators, faculty, staff, and volunteers are required to demonstrate appropriate behavior, treating others with dignity and respect, and refusing to tolerate harassment, intimidation or bullying. Harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment. Therefore, the school district will not tolerate acts of harassment, intimidation or bullying.

* * *

The board prohibits acts of harassment, intimidation or bullying against any student. School responses to harassment shall be aligned with the board-approved code of student conduct which establishes standards, policies and procedures for positive student development and student behavioral expectations on school grounds, including on a school bus or at school-sponsored functions. ...

<u>Consequences and Remedial Measures for Acts of Harassment, Intimidation or Bullying</u>

...<u>Staff</u>

Consequences and appropriate remedial actions for any staff member who commits an act of harassment, intimidation or bullying may range from positive behavior interventions up to disciplinary charges which could result in suspension or termination. ...

Board policy #5142, "Pupil Safety" provides in part,

The board of education recognizes the safety of its pupils as a consideration of utmost importance. The chief school administrator shall consult law enforcement agencies and social service providers, emergency management planners and other school and community resources in the development of the plans, procedures and mechanisms for school safety. The chief school administrator shall oversee development of a districtwide safety program with emphasis on accident prevention.

* * *

Staff Education and Training

All teachers shall be familiar with the provisions of this program that particularly concern them.

The chief school administrator shall inform all newly-employed staff of school safety rules and regulations within 60 days of the effective date of their employment. All district employees will receive the appropriate in-service training to recognize and respond appropriately to safety concerns including emergencies and crisis, in accordance with the district safety plans, procedures and mechanisms. The district safety plan will be updated annually and all employees will be notified of updates and changes to the safety plan in writing. . . .

* * *

School Violence Awareness Week Tolerance...

The school shall observe "School Violence Awareness Week". This week will include discussions, presentations, and training for both school. Law enforcement personnel will be invited to join school teaching staff presenting age-appropriate opportunities for students to discuss issues including, but not limited to conflict resolution, student diversity and tolerance.

POSITIONS OF THE PARTIES

The Board maintains that it had just cause to terminate Dempsey and Poyer for their conduct in conspiring to provide Poyer with monetary compensation for his volunteer coaching position, and for their pattern of breaking multiple policies, rules, and regulations of the Belvidere Board and the State Board of Education.

The Union urges that the Board has not met its burden of proving just cause for any discipline of Dempsey or Poyer, and that each charge against each of them must be dismissed. In addition, the Union maintains that Dempsey and Poyer should be restored to their classroom and coaching duties, provided with back pay, and in the case of Dempsey, the coaching stipend to which he was entitled for the duration of his suspension.

FINDINGS OF FACT

Daniel Dempsey has been an elementary school physical education teacher in the Belvidere School District since 1999. He has served as a head coach for the boys' soccer team and the girls' softball team for 19 years. He is also the ski club's advisor.

Andrew Poyer has been employed by the district as a physical education teacher for the last twelve years. He has been coaching sports' teams since 2007

and has worked with Dempsey as an assistant coach for the past four or five years, both with the boys' soccer team and the girls' softball team.

Chris Karabinus has held the position of principal of the Belvidere Elementary School for approximately four years. Karabinus served as the athletic director from July of 2014 through November of 2018 (2T48). Karabinus testified for the Employer.

Brian Staples served as assistant athletic director under Karabinus for two years and four months and was then promoted in 2018 to athletic director. He is no longer employed in the district but testified for the Employer.

School's Sports' Booster Club

Some, but not all, Belvidere school sports have booster clubs, run by the parents. The booster clubs function mainly as a means for raising extra funds for the programs that go above and beyond what the district has allocated in its budget. The booster clubs are not tied to any of the district's accounts and the clubs operate independently of the school district.

The boys' soccer team has had a booster club for several years. In 2018, the booster club consisted of three parents: Patty Toth, Patti Grafer and Tracy Linder. Toth functioned as the club president, Grafter as the treasurer and Linder as the vice president. Toth was often the spokesperson for the club.

Associated Student Account

Those sports that do not have a booster club have an "associated student account" which is held and maintained by the Board of Education. This account is the repository and payment account for funds raised and student fees, including summer sports camps. According to Carrubba, the Board oversees where the money is placed in its general operating budget for specific clubs. The associated student account is an audited account of the District; and is not a payroll account (1T-46).

Sarah Schiavone is the advisor or custodian of associated student accounts; she receives a stipend for this duty. She testified for the Respondents. Schiavone succeeded Sylvia McInerney as the custodian of student accounts in July 2017. She testified that she has never been made aware of district policy #1314, "Fundraising by Outside Organizations" and she testified that the first time she saw the policy was during this proceeding.

As Custodian of Accounts, Schiavone is responsible for maintaining the student accounts for accuracy, accepting deposits, and writing and signing checks. Schiavone described the following procedures for depositing and withdrawing funds to or from the associated student account. According to Schiavone, upon her receipt of a check for deposit, she stamps it, takes it to the bank for deposit, and writes the transaction in the appropriate account ledger. Schiavone testified

that the deposited money goes into a group of accounts such as the soccer account, the student government's account, or the future educators' account, *et cetera*. She stated that the deposit process occurs two to three times a week and is a common and transparent process. For withdrawing money from the account, the coach, adviser or other requester fills in a request form on the school's website, identifying the requester's name, date, team or activity name, payee, and the dollar amount. (2T15-16) The requester then prints the form and takes it to Schiavone. Schiavone signs the check and has High School Principal Ed Lazzara or another administrator sign it. She indicated that a second signature is always required for the simultaneous co-signing of the request (B14) and the check (B16). The co-signature must be by one of the following four positions: (3T14; 28-29)

- Business Administrator
- Superintendent of Schools
- Vice Principal of Belvidere HS
- Principal of Belvidere HS

Moreover, Schiavone testified that she is audited yearly and the Board reviews her paperwork monthly. (3T20, 22, 24, 25) The custodian stated that it is not her job to analyze whether a check drawn on one of the student accounts is appropriate or inappropriate. She maintained that her job is to be the administrator of the account. (3T27)

Schiavone stated that she is familiar with other teams/organizations that had a check drafted and payable to either a coach or a program administrator within the district. She explained that in her first year as swimming team coach in 2011, a pay-to-play sport, parents were required to pay a hundred dollars which was deposited into the associated student account – Schiavone testified that her stipend was paid from this account. (3T-23)

The associated student accounts are not payroll accounts and there are no payroll deductions made from any of the checks that are issued from the accounts that she oversees. Athletic Director Brian Staples acknowledged that he was aware of the Board's directive that proceeds from fundraisers should not be placed in the associated student accounts wherever a booster club exists. However, there were several teams that had both a booster club account and an associated student account. Staples agreed that the boys' soccer associated student account existed before the Snap fundraiser. (2T29-30; 39) To his knowledge none of the Board's funds were used to compensate Poyer.

History of District Fundraising

The Belvidere High School's athletic teams and/or booster clubs had sponsored several fundraisers in the past. Poyer testified that the first SnapRaise fundraiser was held for the softball team, followed by fundraisers for baseball, boys' and girls' soccer, and the cheerleading squad. He maintained that all of the

fundraisers were conducted by Snap. All fundraised monies were either deposited into the teams' booster club account or its student activities account; the latter, if the team was not supported by a booster club. (3T101, 102, 105)

The Events of 2018

In 2018, Poyer applied for a paid position as an assistant coach with the girls' soccer team.[3] Superintendent Carrubba stated that he and Athletic Director Chris Karabinus considered Poyer for the position but did not recommend his appointment because the then current assistant coach had been serving in that position for five years and was better suited to be in the position. Poyer filed a grievance (2T50) over his non-appointment.

While Poyer's grievance was pending, on August 13, Carrubba observed Poyer coaching a boys' soccer scrimmage and asked Karabinus if Poyer had been approved by the Board for the volunteer coaching position. Karabinus responded in the negative. On August 29, 2018, a meeting was held with Karabinus, head boys' soccer coach Dempsey, BEA President Judy Black and Poyer. The same day, after the meeting, Carrubba sent Poyer an interoffice memorandum with the Subject: Unapproved Coach – Soccer (B3). The memo states in part,

---

[3] Poyer testified that he applied for the position of Head Coach of the girls' soccer team when the head coach resigned. (3T-99) However, Carrubba testified that he applied for the position of assistant head coach, a paid position. I credit Carrubba.

> This will confirm our meeting on Wednesday August 29, 2018. Also present at that meeting were Chris Karabinus, Athletic Director, Dan Dempsey, Head Boys' Soccer Coach, and Judy Black, BEA President.
>
> ... At that time, I spoke with you about your volunteering as a soccer coach, actively coaching during a practice/game, when you had not received approval from the Board of Education to do so.
>
> Coaching and volunteer coaches need to be approved by the Board of Education.

The same day, the superintendent sent head boys' soccer coach Dempsey a memo (B4) repeating the message in Poyer's memo and adding that,

> ... At that meeting, we discussed a volunteer soccer coach who was not approved by the Board of Education but was coaching on the soccer field during a practice/game.
>
> ... As I stated, better judgment will need to be used. Coaching and volunteer coaches need to be approved by the Board of Education.

The superintendent stated that during a Board meeting of September 12, 2018, to discuss Poyer's grievance, Poyer expressed an interest in being the boys' assistant soccer coach. The Board approved Poyer as a volunteer assistant coach for the 2018-2019 school year for the boys' soccer team. In exchange for this appointment, Poyer withdrew his grievance concerning his non-appointment as the girls' soccer team assistant coach. The Board stated that Poyer's "request" for this assignment was disingenuous as he was already serving as a "volunteer" since at least August 13, 2018, when Superintendent Carrubba witnessed Poyer on the field coaching. (J1, p.5).

Dempsey and Poyer first learned about the SnapRaise fundraising program from Coach Feldman, who then coached the baseball team. Feldman also introduced Poyer to Snap Representative Tim Shonis (3T103) who had managed the baseball fundraiser. Shonis explained to Poyer that Snap fundraising is an email-based program similar to a GoFundMe fundraiser. The superintendent described the online fundraising as a system where parents, grandparents, or anyone is asked to donate funds specifically for this cause. He explained that the idea of Snap is to raise as much money as possible in a very quick time frame. Carrubba testified that the District had conducted a Snap fundraiser by one of its sports teams the previous season – and, to the objection of a few of its Board members because those members did not like the way funds were solicited.

The participating student athletes each supply 20 email addresses to Snap and then Snap does a solicitation via email. Shonis arranged with Poyer to meet with the members of the soccer team on Monday, August 20 after practice. There is no record evidence that either Dempsey or Poyer asked for permission for this meeting from any member of the district administration.

Review R-7 and R-8

Board Exhibit B-7 is an email sent to Poyer from Snap Raise to be passed along to the team members. The cover page email states,

> Attached is the SnapRaise email form. You need to print out this form if you were not at practice today. This is a fundraiser that is very easy and lucrative. All you need to do is collect 20 emails before practice on Monday. . .

Attached to this email was a form to be completed by the soccer player with email addresses. The prefatory language states, "Participants Expectation": "I expect you all to show your effort and support by participating!" Poyer emailed the cover note and attachment to each of the players. Poyer testified that he did not compose the language on the form; it was prepared by SnapRaise! The Superintendent believed that the statement on B-7 stating the coach "expected team members to participate" exploited the "teacher-to-student" relationship -- referring to item #7 of the Board's Code of Ethics policy. Carrubba testified that he would have liked Poyer to delete that sentence (1T-126). But there is nothing in the record that suggests there was an opportunity for Poyer to insist that the sentence be modified or deleted.

A second email, B-8 was distributed to the players (and donors) sometime later. According to B-8, a goal had been set between Poyer and SnapRaise to raise $4,000 for the boys' soccer team in 2018. However, as B8 notes, the actual gross amount raised by the fundraiser was $6,560. The cover page thanks contributors for their support and states that donations "will go towards the end of the year team banquet, awards, and player trophies. Donations are vital for

the success of our program." Under the section, "Personal message", the email states,

> Belvidere Soccer family, friends and fans. Thank you each for taking the time to view our fundraiser page. Your support will help us offer a higher quality experience for all our athletes. Your donation is greatly appreciated and you will be getting a receipt for your gift. If you could please spread the word about our fundraiser by sharing it with your friends on Facebook and Twitter we would greatly appreciate it. Our young men here have been working hard to properly represent this great school and Belvidere Soccer. Any support is greatly appreciated. Go County Seaters. Coach Poyer

The second page makes suggestions about how specific given amounts might be used. The suggested benefits include team awards, team spirit-wear, team snacks, etc. Both Poyer and Dempsey denied that Poyer composed the personal messages in B7 or B8 or typed his name on it. Both maintain these were generic statements written by Snap and were also used in the baseball team's fundraiser. The superintendent believed the Snap form was prepared by Snap but then edited by Poyer (1T114; B7). Again, there is no evidence in the record to support this claim.

Carrubba believed that Poyer actually solicited the student athletes and encouraged them to give money to the Snap Fundraiser (1T115). However, there is no evidence in the record to support this theory. Dempsey testified that neither he nor Poyer asked any members of the team for money. Additionally, Carrubba's theory was that Dempsey and Poyer "cooked up" the fundraising

scheme specifically so that Dempsey could obtain compensation for Poyer's unpaid coaching assignment. However, according to Dempsey, Poyer never asked him to arrange for compensation for his efforts as the assistant soccer coach. Poyer, for his part, denied any beforehand knowledge that he would receive money until he actually received the check. (2T106-108) He testified that he was surprised and "taken aback" by the booster club's gesture. Poyer and Dempsey impressed me as honest and straightforward witnesses. I credit Dempsey and Poyer. While I do not discredit Carrubba's genuinely held beliefs, the Employer has presented no proofs any that either conspiracy theory is accurate.

SnapRaise raised $6,560 in contributions. However, because the total amount raised is decreased by the percentage that Snap takes for administering the fundraising program, the net given to the team was $4797. In actuality, 26.8% of the proceeds went to Snap ($6,560 – $4,797 = 1763/6560 = 26.8%). Dempsey stated that Snap's administrative percentage of the proceeds was posted on the website (3T116-117).

In August of 2018, the Athletic Director was Chris Karabinus. Carrubba testified that the fundraiser conducted in August of 2018 was not submitted in advance to Karabinus for approval and subsequent approval by the superintendent and ultimately, the Board. However, during direct examination,

Karabinus testified that Dempsey told him about the Snap Raise fundraiser on August 16, 2018 (2T56).

Both Patty Toth and Patti Grafer testified that the booster club unanimously supported using SnapRaise to raise funds for the soccer team. The record is unclear about when or how Toth and Grafer first learned about the plan to raise money through SnapRaise or the extent of their involvement in the planning with SnapRaise.

Poyer took the lead in coordinating between the Belvidere soccer team and SnapRaise. Upon completion of its fundraising efforts on behalf of the Belvidere soccer team, SnapRaise contacted Poyer to find out who the check should be made payable to and a tax identification number. Poyer consulted with Dempsey. Dempsey testified that since they did not have the booster club's tax identification information available to them at that time, it would be okay to use the school's identification number. Dempsey explained that that information was readily available because SnapRaise had made the funds check payable to the school for prior fundraisers and there had been no problems. Dempsey told Poyer to tell SnapRaise to make the check payable to Belvidere High School and to use its tax identification number.

Upon receipt of the check from SnapRaise, Dempsey took the check to Schiavone and completed paperwork for its deposit. Schiavone deposited the check into the soccer team's student activities account.

Dempsey told Toth that he had just received the Snap fundraiser check for $4,797.70 – made out to the Belvidere High School. Dempsey informed her that he deposited the check into the boys' soccer associated student account. Toth testified that she contacted Grafer and asked her if she was aware that the money from the Snap fundraiser had been deposited into the school's associated student account. According to Toth, Grafer responded, "Absolutely not, that cannot happen, it's our fundraiser, it needs to go into our account as the booster club account." (3T47).

Toth testified that some parents were accusing Dempsey and Poyer of trying to hide booster funds from the booster club by depositing them in the school activities fund (3T50). Toth maintained that the booster club knew this was untrue as it knew that the money was mistakenly deposited into the student account rather than the booster club.

On or about October 16, 2018, Toth received an email from a parent of a soccer player asking how much money was raised by the fundraiser and what the booster club planned to do with the funds (R5). That same day, Toth sent Dempsey an email regarding dates for the season banquet. Toth also relayed to

Dempsey that parents had begun asking how much the club raised by the SnapRaise and what the club's plans were on allocating the monies. Dempsey suggested the following ideas for the Snap fundraising money: (R5)

> Coach Poyer has volunteered his time to continue being a full-time assistant coach with the boys' soccer team. He is a valuable asset to the boys' soccer program. I think it would be nice to reimburse Coach Poyer for his time.
>
> Maybe new warmups or team shirts for next season. ...

Toth responded to Dempsey:

> Of course to Coach Poyer. How much would that be? And is that something you will take care of? . . .

Toth and Grafer both testified that the booster club unanimously agreed to provide money to Poyer. Staples testified that he had spoken with Tracy Linder and that she said the booster club had not agreed to give Poyer money. Linder's written statement was not submitted into evidence in this matter and Linder did not testify. Therefore, Staples claim about what Linder told him is merely hearsay. I credit Toth and Grafer that the booster club had agreed to provide a sum of money to Poyer. Toth testified that the club was willing to go to a maximum of $3,000. However, Dempsey informed Toth that he would speak with the athletic director and other coaches before he would recommend a specific amount for Poyer. Dempsey told Toth that there were sufficient funds in

the student activities account to cover it and that he would let Toth and the school administrator know of the recommended amount for their approval. (R5)

Dempsey originally thought that $2,500 was an appropriate amount to pay Poyer. However, Dempsey learned from Coach Feldman that the volunteer assistant baseball coach had been paid $3,000 and, after his conversation with Toth, Dempsey decided that somewhere in the middle would be a fair amount -- $2,750. (2T109; 154) Dempsey got back to Toth with that suggested amount and explained his rationale. Toth confirmed the booster club's approval for payment to Poyer in the amount of $2,750.

Toth testified that she considered Poyer's money as a gift from the booster club and not compensation. She stated that she assumed that if it was pay, it would have to be from the school district's payroll account (3T66-67). Toth maintained that none of the remainder of the SnapRaise money was used for other booster club purposes because the remained funds were in the Board's associated student account and the club could not get access to it (3T77).[4] She indicated that if the money had been deposited initially into the booster club account, the booster club would have written Poyer the check for $2,750. (3T78).

---

[4] Dempsey and Poyer of course could also not get access to the Associated Student Account money after their suspension as they were prohibited from being on school property.

Dempsey testified that, in addition to Assistant Coach Poyer, the boys' soccer team had a second assistant coach who volunteered for the team. Assistant Coach Fred Bartow was not otherwise affiliated with the Belvidere School District and volunteered on a part-time basis. The booster club gave Bartow a gift of $25 at the end of the season. Dempsey explained the disparity between the amount Poyer received ($2,750) and the amount that Bartow received. He maintained that Poyer coached on a full-time basis. Every practice, Poyer worked with his goal-keepers and he also traveled with the team to both their home and away games. Dempsey stated that Bartow, who was not otherwise a district employee, only worked on a part-time basis and was not at every practice and was not at every game. (2T109-110) Dempsey also explained that Bartow had received free ski passes to travel with the ski club, which Dempsey also coaches.

After the booster club approved the money for Poyer, Dempsey filled out the associated student account request form and submitted it, along with an invoice, stating that the purpose of the money was to reimburse Poyer for his time and efforts as the boys' soccer assistant coach. Schiavone printed the system-generated request form which Dempsey signed. Schiavone signed the request form and the check.

Schiavone stated that on a Monday she had had received four checks and companion requests for disbursement forms which required an administrator's signature. One of the four checks was Poyer's check in the amount of $2,750. Schiavone explained that she met Lazzara in front of the basketball court where he was watching a field hockey game. Sitting with Lazzara was Carrubba, Business Administrator Rochelle Tjalma, current and former athletic directors Staples and Karabinus, and Vice-Principal Jesse McKenny. When Carrubba saw her, he laughed and stated, "We know what you're after; you're after signatures." According to Schiavone, she asked all of them, "Who wants to sign?" Carrubba responded, "It's Ed's [Lazzara's] job, he can do it." She handed Lazzara the stack of the four checks and paperwork for his review and signature – the principal signed everything within a couple of minutes. (3T30)

The custodian then delivered Poyer's check to Dempsey. At the end of the soccer season, possibly at the awards banquet, Poyer was presented with the check.[5] (B14; B16; R3; 2T111-112; 2T114-116).

Toth asked Grafer to speak to Tjalma to have the fundraising monies transferred to the right account. Grafer called Tjalma and left a voicemail for her requesting that she write the booster club a check for full amount deposited from

[5] Poyer could not recall exactly when he was handed the check, but he recalled that he was surprised by it.

the fundraiser; and, in turn, the club would send the Board a check to cover the cost of what the club gave to Poyer (3T48). Grafer eventually spoke to Tjalma by phone. Grafer explained the whole situation regarding the SnapRaise funds being incorrectly deposited into the Board's associated student account. Grafer told Tjalma,

> If this is an issue, please cut the check that was given to you; I will, in turn, cut you a check for what was given to Coach Poyer, which we agreed to do as an organization.

Grafer said that Tjalma replied, "I'll get back to you."

That was the last time Grafer heard from the Board Secretary (3T88). Toth testified that the Snap fundraising monies were not transferred back to the club. The club then asked for the remainder of the funds to be returned; that did not happen either.

Schiavone confirmed that of the "$4,000-something" that was put into the soccer account from the Snap fundraiser, the remainder of the money has never been withdrawn or given back to the soccer booster club. The money still remains in the boys' soccer association student account.[6] Expenses for the end-of-season banquet and awards were paid for from the booster club's funds.[7]

---

[6] Schiavone maintained that she would not categorize the student-associated accounts as district funds since the district has not paid into the accounts.

[7] The booster club account is a rollover account in which the end-of-year balance is carried over to the following year.

Dempsey explained that the check to Poyer in 2018 was not the first occasion that a Belvidere sports team offered payment to one of its volunteer coaches. In 2015, when Poyer was a volunteer assistant softball coach, funds were raised and deposited into the student activities account. Lazzara and McInerney were the two signatories on the check for Poyer, the latter being the former custodian of the associated student account. Neither one ever expressed any concerns to Dempsey that it was inappropriate to have dedicated funds to compensate a volunteer assistant coach. Dempsey received the signed check from McInerney and turned it over to Poyer. In 2017, the baseball team raised money and $3,000 was given to the assistant coach. (2T59)

Grafer testified that previously the booster clubs had gifted both the volunteer assistant baseball coach and volunteer pitching coach for the season. She testified that the pitching coach was brought in from another school (3T90).

Sometime in the fall of 2018, there was a conversation among administrators in the hallway of the high school. The conversation included Carrubba, Lazzara, Staples, and Karabinus. Karabinus was asked, "Did Andy Poyer get paid?" Karabinus replied, "I do not know if Andy Poyer got paid. Let me go ask Dan (Dempsey)". The former athletic director went to the gym and asked Dempsey. Dempsey confirmed that Poyer had been paid. (2T49)

Carrubba testified that he became aware of a fundraiser for the boys' soccer team in the fall of 2018 when he received a phone call from newly-appointed Athletic Director Brian Staples. Staples reported to Carrubba that he had received a phone call from a concerned parent who had attended the end-of-season banquet for the soccer team. The parent told Staples that she was upset because the banquet was a potluck and there was no formal place to hold the banquet. The parent relayed to Staples that she understood the proceeds from the fundraiser were going to be used to cover part of the expense of the banquet. The parent asked Staples if the school could take a look at the fundraiser.

Staples testified that the parent also wanted to know why a certain coach received a certain amount of money and questioned how the funds were being distributed (2T7). Staples testified that he spoke to outgoing Athletic Director Karabinus along with the superintendent about the phone call. [8]

The superintendent asked Staples to conduct an investigation into the matter. Staples went to Dempsey and asked him about Poyer receiving money from the fundraiser. Dempsey informed Staples that this type of payment had been done in the past. Staples testified that at first Dempsey made no mention of

[8] Brian Staples replaced Athletic Director Chris Karabinus.

paying the money back; however, sometime later, he told Staples that they would pay the money back if that would help all of this to go away (2T41).

Staples called the members of the boys' soccer booster club – Patty Toth, Patti Grafer and Tracy Linder -- to ask them what they knew about the decision to pay Poyer. He asked the members to email him detailed recollections of what had transpired. Staples stated that he received emails from the boys' soccer booster club[9] and forwarded Toth's, Grafer's and Linder's emails to Carrubba. Staples mentioned that he did not remember speaking with Toth after he received her email. However, on cross-examination, Staples testified that he had spoken to both Toth and Grafer after receipt of their emails (2T21). Staples maintained that he believed the emails to be accurate. (2T14; B25, 26). Staples also collected booster club by-laws and testified that he gave all the information to Superintendent Carrubba.

Booster Club Treasurer Grafer sent an email to Staples on December 17, 2018 regarding the situation with Dempsey and Poyer. Grafer maintained that when she did not receive the 2018 Snap fundraiser proceeds in the form of a check to deposit into the booster club account, she was quite upset and questioned how that had happened. Grafer said that she was informed by Toth

[9] Linder's email was not submitted into evidence.

that Dempsey had deposited the funds into the associated student activities account. Grafer believed that when the SnapRaise account was set up, Poyer mistakenly gave Snap the school's tax ID instead of the booster club's tax ID. She said that the check was made payable to the Belvidere High School when the rightful payee should have been the BHS Soccer Booster Club. Grafer maintained that the funds were raised by the families and belonged to the booster club to use at its discretion – without need for approval from any member of the school administration or school board. Grafer's email (B26) to Staples read in part:

> My name is Patti Grafer and I am the current treasurer for the BHS Soccer Booster Club. I am writing you in regards to the current situation with Coach Dempsey and Coach Poyer.
>
> We decided to try the Snap raise fundraiser like other sports teams have done. Plain and simple. Absolutely nothing wrong or dishonest about that. When I did not receive the proceeds in the form of a check to deposit into the booster club account, I inquired where the check was. I was informed by Patti Toth that Coach Dempsey stated the funds were deposited into the student activities account. I was quite upset and questioned how that happened. Apparently when the snap raise account was set up, mistakenly the tax I.D. from the school was used and not the soccer booster club tax I.D. As to which the coaches have now learned to be an absolute mistake. The check was made payable to the school and not the rightful payee the BHS Soccer Booster club. Those funds were raised by the families and belonged to the booster club to be used at our discretion. Without need for approval by any member of the school or school board. When I discussed this situation, I was told not to worry and that the money was earmarked for soccer and checks would be written out at and per our request. I should have fought them to have our funds returned to us at that time and we would not be here now.

We, AS A BOARD, decided unanimously to purchase senior gifts and decorate for senior night, have a banquet free for all players and families/friends, give gifts to all coaches at the banquet, earmark money for new warm ups and t-shirts for next year and pay Coach Poyer for all his time and dedication. There was no fraud committed and no hidden agenda. We are by no means the first club to pay an assistant coach for all their hard work, time and dedication. I can provide proof of that if needed or requested. ...

When I heard of the wrongful accusations made against Coach Dempsey and Coach Poyer on December 14, I reached out to School business Administrator/Board Secretary Rochelle Tjalma to discuss the financial aspect of this problem. I suggested a very simple resolve. Reimburse the booster club our funds from the Snap fundraiser and I, in turn, would write a check to BHS High School for the monies paid to Coach Poyer.

There is NO wrongdoing or ill intent on the part of the coaches. They did what they believed to be the correct process. I further would like to know how all the people involved with the approval process of paying Coach Poyer are not suspended and being held accountable as well. If this was not permissible how was it approved? ...

In closing, I again would like to emphasize the monies were wrongfully deposited into the student-activities account and belong to the booster club. These funds should be used at OUR discretion, not the schools. There was no misuse of these funds by the coaches – just misplacement of the funds. The soccer booster club will gladly refund the school $2,750 as soon as our monies ($4,797.70) are returned to us.

Patti

On December 18, 2018, Staples spoke to Grafer and thanked her for her email. He told Grafer that the information would hopefully resolve the issue quickly. The athletic director asked Grafer if she could provide the booster club

minutes which addressed the approval of Poyer's pay and payments for gifts, payments, et cetera. Grafer had no further communication from Staples or any member of the District's administration.

Toth's emailed responses to Staples' questions are as follows:

> At no point did Coach Poyer or Coach Dempsey "assume"or "proceed to request money" for Coach Poyer without going through the proper channels to do so. As one of the chairs of our Boys Soccer Club, I was pointedly asked by Coach Dempsey if it were acceptable for him to provide money to Coach Poyer for his assistance as Coach during our season. My reply, without hesitation,was OF COURSE!! ... In addition, the Senior Night events/gifts were purchased for the boys. The banquet for our boys was also paid for in full for both familiesand players.
>
> Most of the info (on the Snap Raise form) isprepopulated.
>
> On a personal note, I must say, I am appalled at the domino effect that has transpired over the course of several days. The reputation and integrity of the Head Coach and teacher in your district for over 25 years, is now, in question. He asked us, the Booster Club representatives, he did not assume nor decide on his own to pay Coach Poyer! He went through the proper channels, and got the administration to sign off as well, that was required.
>
> In addition, I am equally appalled that a coach, who VOLUNTEERS his time cannot be recognized by a booster club that has raised their funds for the betterment of their own organization, in this case our boys' soccer team. ... Coach Poyer showed up every day! Every practice! Every game! Every meeting! Every Screening. Coaching, Advising. Helping. Even in the absence of Coach Dempsey a few times. This is having a direct impact on our team!!! I don't care about soccer balls and beautiful warm ups suits, I care about our players getting the best of the best. ... We may not have the best of seasons, but these coaches brought out the best intheir players. A man of few words, my son said it best

during his Captain speech at the banquet ... he thanked ALL his coaches for always being there for him and believing in him since he began playing on the varsity team his freshman year - for helping him become not only a better player, but a better person - not just on the field, but off the field as well. For teaching him the meaning of respect as a player, as a Captain - giving it and receiving it.

You can't put a price tag on that. ... It should be noted here as well that Coach Dempsey had earmarked some of the money raised this year for attire for next year as well. Coaches make a difference. Doesn't matter if they are paid or volunteer. Belvidere needs to get their heads out of the sand. ...

... But, if the need is take good men down – like Coach Dempsey and Coach Poyer - AND then go so far as to question the paying of a volunteer coach, then it will not be just boys soccer! Our sports program(s) APPRECIATE the dedication of all their coaches. ...

... Families are the ones raising the monies, not the school. ... What they don't understand is the monies raised are carried over year to year. As a committee AND with the input of our coaches, we stand by the money we spent: Coach Poyer, Senior Night, Banquet and the knowledge of ear marked funds for next year based upon request from Coach Dempsey for either new warm ups and/or team shirts. (B25)

Sincerely,
Patty Toth

On March 6, 2019, Grafer forwarded the email that she sent to Staples to Board President Shawn McInerney. She told McInerney that she had sent the email to Staples on December 17 and was not convinced that her email was ever received or if McInerney had time to review her comments. Grafter informed

McInerney that her email did not include the fact that the soccer booster club had documentation regarding its approval to pay Coach Poyer. In addition, she stressed the importance of McInerney and the board members reaching out to both her and Toth to access the documentation. (B26)

By email of March 6, 2019, Toth also forwarded her email sent to Staples in December to Board President McInerney. Toth's email to McInerney provides in relative part, as follows: (B25)

> The below is the letter I sent to Staples back in December. After much thought and consideration, I am not fully convinced one or all of you have seen this letter. ... I do believe you should reach out to Patti Grafer and Tracy Linder for their letters as well. In addition, we also have emails throughout the season with exchanges regarding how monies collected would be spent, and where, and lastly and most importantly, the email exchange of Coach Dempsey asking us permission for approving pay for Coach Poyer's time spent with the players during the season. I would also like to note here that the total monies collected from that one email fundraiser – you will see by clicking the below link, the total monies raised NOT the money amount we received after the company took its cut. A PORTION of the final money received actually went to Coach Poyer and the remaining funds from that fundraiser is STILL IN THE SCHOOL ACTIVITIES FUND when it should have been put into the boys' booster club fund. I do know that Patti Grafer reached out to Shelly Taljma to have that money put back into our correct account, but I will leave that for Patti to discuss.
>
> I respectfully withheld reading it at a public forum based on advisement and basically being shut down by the board attorney. ... But in order to understand what fully transpired, I felt sending this out was the route to take.
>
> Patti Toth

Staples initially could not understand why, if the booster cub raised the money, it had not deposited the funds into its own account and written checks to distribute the money itself. According to Staples, after he read exhibits B7 and B8, he came to believe that the coaching staff had raised the money.[10] Moreover, Staples asked other coaches if they had a similar practice of giving gifts to volunteer coaches to which they responded, "yes". The director acknowledged that Dempsey had told him that the volunteer assistant baseball coach had received a $3,000 payment in the past (2T23).

According to Staples, during his conversation with Linder about her email in response to his questions, she told him, (2T45)

> We had no idea that it was going to be used to compensate Poyer. We were made aware of it, but didn't have an opinion on it. If it had gone in our booster club account, I can assure you the amount would have been reflective of what the other coaches received.

Staples testified that Dempsey informed him about his decision to pay Poyer $2,750 -- which was in line with what the baseball coach give his assistant coach the year before. He stated that the baseball team has a booster club and that other teams had used SnapRaise to raise funds. Staples maintained that Poyer knew when he accepted the volunteer coaching position that he would not

---

[10] Staples testified that he never received the top email in exhibit B26 which is comments from Grafer sent to Board President McInerney.

be compensated by the Board of Education; however, Staples believed that Poyer already knew by this point that he would receive compensation at the end of the season from the fundraiser. (2T26) However, there is no direct evidence in the record which supports this claim.

Staples was aware that Carrubba was concerned with the disparity in the amount of money that Dempsey recommended the booster club approve to pay Poyer, as opposed to Assistant Coach Bartow. (2T76)

Staples turned over exhibit B7 and B8 to Carrubba, B7 is a copy of Poyer's email to the soccer team members regarding the Snap fundraiser. The second page contained the sentence concerning Poyer's expectations that all of the players would show effort and their support by participating in the fundraiser. Carrubba testified that he was troubled by this as it appeared to exploit the relationship between coach and student. B8 is the email to student athletes and Snap fundraiser contributors detailing some of the things the funds might provide and thanking people for their support. It contains a personal note which ends with "Coach Poyer, 8/18/18." Carrubba felt that this document deceived donors about where the funds would be going. The superintendent observed that he did not see any reference in either email that referred to the booster club.

As part of the superintendent's examination into the associated student accounts, Carrubba learned that a similar check for the amount of $2,500 was

issued to Poyer in May of 2015 from the girls' softball account. Carrubba maintained that in 2015, Poyer was a volunteer girls' softball coach. Exhibit B20 is an associated student account check request dated May 22, 2015 from Dempsey to the Belvidere High School and payable to Poyer in the amount of $2,500.[11] The request form is annotated as: "Softball Coach Instructor's Fee." Carrubba maintained that Poyer was not entitled to an instructor's fee since he was a volunteer coach. The superintendent stated that he examined the three-year ledger and the money was disbursed as a check to Poyer (B21).

Staples and Carrubba examined associated student accounts soccer account ledger to determine what had happened to the money. They followed the trail of the requisition for a check and then the check itself through the accounts (B14; 1T66). The request was for a check in the amount of $2,750 from the boys' soccer club associated student account and made payable to Poyer. It was learned that both Dempsey and High School Principal Lazzara signed the request (B14). Carrubba testified that once the form is completed, it is submitted to Associated Student Account Custodian Sarah Schiavone. According to Carrubba, the custodian then prints out the form and Lazzara signs it. Carrubba acknowledged that Dempsey and Lazzara signed off on the form both openly and

[11] Dempsey was the girls' head softball coach in 2015.

publicly. Once the form is complete Schiavone writes a check to be signed by Principal Lazzara and herself. (B16) This was done and check #4053 dated November 2 was written as payable to Poyer and signed by Lazzara and Schiavone (B16).

Carrubba agreed that at the time of the check being drafted, that Dempsey had, to the best of Carrubba's knowledge, followed the procedure set forth in the district's policies and did so openly.

Carrubba maintained that neither Dempsey nor Poyer requested permission from him or anyone else in the district's chain of command, to raise the money, deposit the money, and withdraw the money for the purpose that it was used. Carrubba testified that he did not have any reason to believe that Poyer asked Dempsey for the money. Carrubba believed that Dempsey did want to give Poyer some money. The Superintendent stated that he never identified whether any other coaches had paid or given money to volunteer assistant coaches in the past; nor did Carrubba ask the custodian of the associated student account, if she was aware of any other instances within the district where these type of payments occurred. Carrubba testified that he did not take disciplinary action against anyone else who paid a coach or gave money to a coach out of a student funds account.

In 2015, the check for $2,500 to Poyer was signed by Principal Lazzara[12]; in 2018, Lazzara and Schiavone both signed the check for $2,750. Carrubba acknowledged that Lazzara had a letter of reprimand placed in his file – however, no tenure charges were filed and no suspension was mandated. (1T96). Carrubba testified that he had no evidence that Poyer played any role in Dempsey's decision-making process (1T98). The superintendent believed that Dempsey sought approval from specific members of the booster club, but not the entire club.

In the course of Carrubba's investigation, he stated that he had received documents from Toth and Grafer. The superintendent said that the emails he received from Toth and Grafer defended the $2,750 payment to Poyer. Both Toth and Grafer characterized the payment as "pay". Carrubba again stated that Belvidere volunteers do not receive pay; the Board did not authorize the payment to Poyer; and, Poyer never applied for a position with the boys' soccer team for which he would have been paid.

Carrubba testified that the Dempsey and Poyer matter was referred to the Warren County Prosecutor's Office for an investigation. Ultimately, the County determined not to pursue criminal charges.

---

[12] The second signature was illegible.

The Interviews

Carrubba stated that he interviewed both Poyer and Dempsey and made notes contemporaneously with the meetings (B12-13). On December 17, 2018, Carrubba met with Poyer. Other attendees were Principal Lazzara, Athletic Director Brian Staples, and BEA President Judy Black.

Carrubba stated that when he interviewed Dempsey and Poyer, that neither one of them mentioned that Poyer had previously received a check in 2015. In fact, Carrubba maintained that he asked Dempsey if the practice of compensating other coaching volunteers from a student account had occurred in the past – and testified that his question was asked in general, unspecific terms and was not pinned to any one staff employee.

Carrubba initially testified on direct examination that Dempsey had told him that he had never done it. Upon the cross-examination, however, Carrubba, acknowledged that he had asked Dempsey if the policy of giving or paying an assistant coach had happened in the past - - to which Dempsey replied, "Never in soccer, *but did in softball.*" (B12)

The superintendent testified that he asked Dempsey why he thought a contribution should be made to Poyer as compared with the money given to Bartow. Carrubba stated that Dempsey told him that Bartow, one assistant that Carrubba specifically questioned, did not work nearly as much time as Poyer. (1T-

84-85) Dempsey told Carrubba that Poyer went to every practice, every game, and every away game; however, the superintendent does not know that to be fact since Poyer was suspended for three weeks and could not attend every game and every practice. Dempsey told the superintendent that once Poyer had served his suspension and was approved as a volunteer coach, he attended all the home and away games and practices.

Carrubba testified that during the interview, Poyer had indicated that a similar baseball team fundraiser had been conducted in the spring of 2018. (B13) Carrubba maintained that Poyer had told him that the Snap fundraising activity was all Dempsey's idea (1T118). Although Carrubba was convinced that Poyer initiated the $2,750 payment to himself and asked for Dempsey's cooperation, he had no factual proof that Poyer had asked Dempsey to write a check from the account and make it payable to Poyer (1T119).

On January 8, 2019, Carrubba met with Dempsey. In attendance was an attorney from the Weiner Law Group and a New Jersey Education Association attorney. Coach Dempsey told Carrubba that he first heard about SnapRaise in the spring during baseball and softball. Dempsey stated that they used the raised softball funds to purchase a new batting cage, new pants for the team and bats. Dempsey maintained that none of the money went to pay coaches. He said that he had paid a softball volunteer prior to the 2017-18 season; but never paid

soccer coaches. Dempsey noted that there was no booster club for softball. (B12)

When asked by Carrubba as to why he paid Poyer $2,750, Dempsey replied that originally, he was looking at $2,500; however, since $3,000 was paid to a baseball volunteer this past spring, Dempsey just split the difference and paid him $2,750. Dempsey stated that he had discussed this with Patty Toth, a parent of a school soccer player and a member of the soccer booster club. Dempsey said that Poyer was the only one paid because he was the only full-time volunteer. He mentioned that he did not pay Brad Bartow or other volunteer assistants because Bartow was not a full-time volunteer and did not travel to any away games, as Poyer did. Dempsey mentioned that Bartow also receives ski passes when he goes up to Camelback with the Ski Club. (B12)

Carrubba said that Dempsey informed him that the only parents he communicated with prior to the fundraiser was Toth via email, phone calls and verbal conversations, all done in October of 2018. Dempsey told Carrubba that it was Toth's and his decision to gift Poyer the money during the middle of the season. Dempsey stated that the check was requested at the end of the season and the job description was attached to the back to make sure that everything was "clean". Carrubba maintained that Poyer knew nothing of the money until he was given the check. Dempsey told Carrubba that the SnapRaise check was

delivered to the Belvidere school and then was deposited into the associated student account.

Superintendent's Policy Expectations

The superintendent acknowledged that no one from the District administration reviews the District's policies with the faculty unless one of its major policies is updated. Carrubba mentioned the Harassment, Intimidation and Bullying (HIB) policy and that they spent time reviewing the policy with the staff. Carrubba's stated,

> My expectations is certainly when they [the staff] first come into the position that they should at least make themselves aware of the pertinent policies; and second, as we update the policies, which are on our Board agendas every time we do that, that they will make themselves familiar with that.

Carrubba stated that whenever Board policies are updated, they are listed in the Board's meeting agenda. It was Carrubba's expectation that every teaching member and coach should read every Board agenda. Carrubba testified that although his expectation for the staff and coaches was not put in writing, he relayed his expectation to some of the staff through casual conversation. (1T114). The superintendent acknowledged that when the Board updates or changes a policy, that he sends an email to alert the staff and coaches of the change(s).

Carrubba testified that, to his knowledge, Board Policy 1314, "Fundraising by Outside Activities", was never discussed with the teaching staff or coaches as long as he has been superintendent in the District or for seven years. The Board adopted this policy on September 24, 2014, a little over five years ago. (1T113) Carrubba agreed that both Poyer and Dempsey had been employed in the district for some time and that these policies would not have been published when both men were first employed.

Carrubba believed that there were approximately 5,000 plus District-approved policies on the online portal.[13] The superintendent expects the District staff to be familiar with the Board policies that pertain to the employee's position. Carrubba stated that the teachers should know which policies pertain to them since they are marked specifically as "teacher actions" and "student actions". Carrubba acknowledged that he never sent a memo to any teaching staff instructing them to become familiar with the Board's policies, at least as they apply to teaching staff. The superintendent said that its policies reflect, in part, rules of conduct established by the school district.

Carrubba admitted that he never sits down with his staff or has anyone else sit with his staff to review Board policies and/or the Department of Education's

[13] Carrubba was not surprised when counsel told him that there are 412 Board-approved policies in the District.

regulations which the superintendent believes are applicable to the teaching staff. Carrubba stated that he believes there are notebooks in every school building that contain the Board-approved policies (1T93).

Poyer stated that he became aware of the policy 1314, "Fundraising by Outside Activities" only through the superintendent's investigation (B6; 3T106). He maintained that during his time as a coach, no one from the administration – including, the athletic director, the building principal or the superintendent ever went over any Board policies with him (3T107).

Dempsey's and Poyer's Employment Contracts

Each of the teachers and staff in the District have annual employment contracts. Exhibit B18 is a copy of Poyer's employment contract for the 2017-2018 school year (September 1, 2017 through June 30, 2018); Exhibit B19 is a copy of Dempsey's employment contract for the same time period. The text of the two contracts are identical except for the employee's name, salary, and any unique features to each person and/or position. The second paragraph of each contract stipulates to the following:

> The Employee hereby accepts the employment aforesaid and agrees to faithfully do and perform duties under the employment aforesaid, and to observe and enforce the rules prescribed for the government of the school by the Board of Education.

Carrubba stated that the staff is required to enforce and uphold all Board-approved policies. He acknowledged that except for new policies or policies of unusual significance, the Board-approved policies are not discussed at its faculty meetings (1T72). Carrubba stated that the Board's policies could be discussed at professional development days but not specifically.

Dempsey stated that he was not aware that the superintendent anticipates the coaches and staff to be familiar with every Board policy by reviewing the policies online. Dempsey said that no superintendent at the District discussed any District policies or even recommended that staff go onto the website to see the policies. (2T122)

Job Descriptions

Carrubba acknowledged that Dempsey's job description (B1) identifies a requirement for a teacher to "Know and carry out the policies, rules, programs and curriculum of his/her school and the district as it may apply to his/her class".

Dempsey acknowledged that he had never seen his job description (B1). And, there is no record evidence that Poyer was ever provided with his job description.

Alleged Previous Discipline

On February 15, 2017, Carrubba informed Poyer via letter that due to an incident between Poyer and a student on or about February 7, 2017, Poyer was

instructed to attend an anger management course no later than September 1, 2017. Poyer was warned that his failure to attend the course would result in a loss of increment for the 2017-18 school year. The superintendent stated that it would pay for the anger management course. (B24)

Carrubba also called Poyer in for a discussion about Poyer's future handling of volatile student situations. Carrubba advised Poyer that he must use better judgment and he must report such incidents to the school administrators. However, on February 23, 2017 via letter (B24), Poyer was notified of the Board's executive session findings regarding the incident. The Board made the following decision:

- The HIB incident has been overturned by the Board of Education and will be termed a Code of Conduct incident;

- The two day suspension that was served will become an unpaid suspension;

- You will send a written letter of apology to the student;

- You will attend an anger management program in person, selected by the Administration and paid by you. At the conclusion of the program, you will provide written confirmation of your completion, and;

- You are being placed on a one-year co-curricular probation for any coaching positions that you are holding.

Carrubba testified that in fact, the Board had increased Poyer's penalty.[14] The BEA filed a grievance referring to Poyer's additional discipline as "double jeopardy". Following a Board resolution on May 24, the Board issued Poyer a letter rescinding the discipline in its entirety (B24).

Carrubba acknowledged that Poyer had attended the anger management course in a timely fashion; Poyer had served the two-day "unpaid" suspension – which was ultimately paid by the district; and, the district never moved to withhold Poyer's increment. Poyer also complied with the Board's decision and wrote an apologetic letter to the student concerned in the incident. (B24; 1T119-123) Carrubba agreed that Poyer was never insubordinate and followed the directions of the Board of Education at that time.

Suspension with Intent to Terminate

On September 9, 2018, the superintendent served both Dempsey and Poyer with RICE notices (B9; 1T59-60). In exhibit B9, Poyer was advised that on September 12, the Board would be considering an agenda item that concerned his employment and/or the terms and conditions of his employment. Dempsey's RICE notice was not submitted into evidence.

[14] No evidence was provided substantiating the Board's rationale for increasing Poyer's discipline.

The superintendent stated that he recommended on or about December 14, 2018, that both Dempsey and Poyer be terminated. Carrubba testified that he informed Dempsey and Poyer that they were suspended on December 14, 2018, pending the outcome of its investigation by the Board and the administration, regarding boys' athletics. As a result of their suspension, both employees were denied access to school property. (B17) Carrubba maintained that he suspended both employees for 120 days without pay due to their violations of District's policies.

Tenure Charges

On March 18, 2019, tenure charges of unbecoming conduct, insubordination and/or other just cause warranting dismissal and/or reduction in salary, pursuant to N.J.S.A. 18A:28-5 and NJ.S.A. 18A:6-10 et seq were filed against Andrew Poyer and Daniel Dempsey (J1; J2). The tenure charges can be summarized as follows:

The Dempsey Charges:

> Charge 1. (Unbecoming Conduct, Insubordination, and/or Other Just Cause): Dempsey conspired with Poyer so that Poyer could profit from his alleged 'volunteer" service.
>
> Charge 2. (Unbecoming Conduct, Insubordination, and/or Other Just Cause): Dempsey failed to obtain approval for payments to be issued to Poyer for his alleged "volunteer" service.

Charge 3. (Unbecoming Conduct, Insubordination, and/or Other Just Cause): Dempsey, in a possible attempt to conceal wrongdoing, tried to hinder the District's investigation and/or failed to be truthful during the course of the investigation.

Charge 4. (Cumulative): Dempsey's conduct, when viewed in the aggregate, establishes his unfitness to continue to serve as a teaching staff member because he has exhibited a pattern of wrongful behavior, which includes (at a minimum) conspiring with Poyer for Poyer's personal benefit.

The Poyer's Charges

Charge 1. (Unbecoming Conduct, Insubordination, and/or Other Just Cause): Poyer conspired with Dempsey to profit from his alleged "volunteer" service.

Charge 2. (Unbecoming Conduct, Insubordination, and/or Other Just Cause): Poyer failed to obtain approval for payments related to his alleged "volunteer" service.

Charge 3. (Unbecoming Conduct, Insubordination, and/or Other Just Cause): Poyer, in a possible attempt to conceal wrongdoing, tried to hinder the District's investigation and/or failed to be truthful during the course of the investigation.

Charge 4. (Unbecoming Conduct, Insubordination, and/or Other Just Cause): Poyer conducted himself improperly toward student N.A.

Charge 5. (Cumulative): Poyer's conduct, when viewed in the aggregate, establishes his unfitness to continue to serve as a teaching staff member because he has exhibited a pattern of wrongful behavior, which includes (at a minimum) conspiring with Dempsey for his personal benefit and being deceptive with the District during its investigation.

Charge 22 of Superintendent Carrubba's sworn statement of charges against Dempsey, states,

> As part of said investigation, superintendent met with and questioned the Respondent. During said meeting, Respondent was less than truthful, and attempted to hinder the meeting and overall investigation. In fact, Respondent failed to disclose that he previously provided a similar payment to Mr. Poyer, as set forth in paragraph 19 above, for alleged volunteer services during the 2015 softball program.

Dempsey denied that he was less than candid with the superintendent; did not try to hinder his investigation; and did not conspire with Poyer so that he could profit from his alleged volunteer service. He maintained that he did not, at any time, do anything that was not open and pursuant to Board policy as Dempsey understood the Board policy.

The determination to certify the sworn tenure charges to the Commissioner of Education was authorized by a majority vote of the full membership of the Board of Education. (J1; J2) Each Respondent denied many of the Board's allegations. Poyer and Dempsey were both notified that they had the right to submit written statements of position and evidence, under oath, within 15 days. On March 13, the Board of Education convened a closed executive session meeting and voted to file tenure charges against both Dempsey and Poyer.

ANALYSIS

The relevant events which led to the filing of tenure charges against Dempsey and Poyer began in 2018, when Poyer applied for paid position as an assistant coach with the Belvidere girls' soccer team. When he was not appointed to that coaching position, Poyer filed a grievance. On August 13, 2018, while that grievance was pending, Carrubba observed Poyer coaching a boys' soccer scrimmage. After making inquiries, Carrubba learned that Poyer had not obtained approval from the Board to serve as a volunteer coach prior to assuming that role. Carrubba met with both Poyer and Dempsey, accompanied by their respective representatives, to discuss the issue.

Carrubba memorialized the substance of the meetings in separate memos to each of them (B-3; B-4). The memorandum to Dempsey noted that "better judgment will need to be used" (B-4). Subsequently, on September 12, 2018 the Board approved Poyer's request for appointment as a volunteer assistant coach for the boys' soccer team for the 2018-2019 year and, in exchange, Poyer withdrew his grievance. The Board noted that the request for approval was belated as Poyer had already been coaching at least since August 13, 2018 when Carrubba observed him.

Sometime over the summer of 2018, Dempsey and Poyer learned about a fundraising program called SnapRaise from the coach of the Belvidere baseball

team. Like several other sports teams, the boys' soccer team has a Booster Club which functions primarily as a means to raise additional funds for the team. The booster clubs operate independently from the district. The booster club approved the use of SnapRaise to raise money for the soccer team.

Poyer assumed day-to-day responsibility for the SnapRaise fundraiser, and served as primary contact with SnapRaise personnel. Without seeking permission from the school administration, Dempsey and Poyer arranged for a SnapRaise employee to meet with the members of the boys' soccer team after practice on August 20, 2018. Poyer forwarded material about the fundraiser from SnapRaise to the members of the team, including a statement that there was an expectation that every team member would participate (B-7). A second email, which included a "personal message" with "Coach Poyer" at the end was also forwarded; this email stated that donations would be used for "the end of year team banquet, awards, and player trophies" (B-8). The second page of the email made specific suggestions about how specific amounts raised might be used, including team awards, spirit-wear and team snacks.

At the conclusion of the fundraiser, after consultation with Dempsey and Poyer, SnapRaise sent the proceeds by check payable to the Belvidere High School with the district's tax identification number. Dempsey gave the check to

Schiavone, who deposited the check in the student associated account for the boys' soccer team.

Dempsey then contacted Toth, the president of the booster club to discuss what to do with the monies which had been raised. As a result of that discussion, Dempsey followed the District's administrative process to have a check for $2,750 issued and made payable to Poyer. Poyer cashed the check.

As the result of a parent's phg9one call to Athletic Director Staples Carrubba learned that Poyer may have been compensated for his role as volunteer coach. He directed Staples to investigate the claim. Staples presented Carrubba with the information he had gathered, including statements from the Booster Club. Carrubba also interviewed Poyer and Dempsey.

* * *

The Parties' Arguments

The Board argues that Dempsey and Poyer conspired to provide Poyer with compensation for his "volunteer" coaching activities. In furtherance of their plan, the Board maintains, they set up a fundraiser with SnapRaise, without the involvement of the soccer Booster Club, and positioned Poyer as the intermediary between the fundraising firm and the team. Poyer facilitated a solicitation for the fundraiser which the Board maintains was coercive, and violative of the district's Code of Ethics. In addition, the Board argues, additional communications to the

team families and supporters fraudulently stated the purposes for which the monies raised were to be used.

The Board argues that Poyer and Dempsey wrongly deposited the proceeds from the fundraiser into an associated student account, then caused a check to be issued to Poyer from the account, creating potential audit and legal problems for the district. If the monies constituted pay, the Board maintains, then the Board was obligated to withheld taxes and pay employment taxes; and if it was a gift, public funds were used in an inappropriate fashion.

The Board also argues that both men hindered the district's investigation into their activities by failing to be truthful and attempting to conceal their actions. The Board urges that Dempsey and Poyer violated multiple Board policies, which they were obliged to know and follow by the virtue of their job descriptions and employment contracts. The Board maintains that it had just cause, based on the course of conduct of both employers, as well as their lack of remorse for their actions, to dismiss both Dempsey and Poyer from employment. In addition, the Board contends that due to a prior discipline resulting from an incident with a student, Poyer's penalty should be considered in the context of progressive discipline.

The Union maintains that the Board has failed to meet its burden of proving just cause for the dismissal of Dempsey and Poyer. The Union argues that neither

Dempsey nor Poyer has any prior discipline in their record. The Union further urges that the Superintendent's credibility is impaired by his action in leaving out critical material relating to the Board's rescission of any disciplinary sanction against Poyer when transmitting the charges to the Commissioner of Education, casting doubt on his motivation for pursuing the charges, as well as his testimony in this proceeding. Additionally, the Union maintains that Dempsey and Poyer did not hinder the investigation, but rather answered the questions which they were asked in a forthright and truthful manner. The Union urges that the District failed to conduct a proper and impartial investigation, and did not consider the statements of Toth and Grafer, which were provided to Staples and eventually to Carrubba and the Board.

The Union notes that the proceeds from the SnapRaise fundraiser were deposited in an associated student account, and although that was a mistake, it was a harmless one. Both Dempsey and Poyer were unaware that the monies should not have been placed in the district's account, but Dempsey's actions in requesting the check and providing it to Poyer were above board, and consistent with what he had done in the past. The Union urges that Dempsey consulted with and obtained approval from the Booster Club President before he requested the issuance of the check, and made a rational decision about how much to give

Poyer based on the relative time and efforts of Poyer and other volunteer coaches, as well as gifts made to other assistant coaches.

The Union argues that there was no collusion between Dempsey and Poyer to provide money for Poyer's activities as a volunteer coach, and there was no theft of funds, or fraud committed by either employee. The Union maintains that no discipline is warranted, the charges should be dismissed, and both Dempsey and Poyer should be returned to their teaching and coaching positions. Finally, the Union argues that Dempsey should also be provided with the stipend he would have earned as a coach during the period of his suspension; Poyer, as an assistant coach was not entitled to a stipend from the district, as fully explained above.

DISCUSSION

Charge I

Both Dempsey and Poyer were charged with multiple counts of Unbecoming Conduct, Insubordination, and/or Other Just Cause (J-1 and J-2). Count 1 of Charge I against Poyer specifies that Poyer was aware that he would not be paid for his services as a volunteer coach, that he organized a fundraiser and misrepresented the use to which the funds raised would be applied, and then accepted money for his coaching activities.

Count 2 alleges that Poyer also accepted money for his 2015 service as a volunteer coach for the girls' softball team from the associated student account. At that time, Dempsey was the coach of the girls' softball team (J1).

Charge I against Dempsey is supported by two counts which are identical to Counts 1 and 2 in the Poyer charges, and need not be repeated here (J2).

At the heart of the Board's charges is the allegation that Dempsey and Poyer conceived a plan to provide payment to Poyer for his service as a volunteer coach for the boys' soccer team (J1, Count 1; J2, Count 1). In the Board's view of events, the purpose of the Respondents' actions in conducting a fundraiser was to raise money for Poyer to be paid. The record does not support this assertion, and I decline to infer such a motivation in the absence of any evidence in the record, either direct or circumstantial, of such an objective based on the analysis provided below. Green v. Trenton Psychiatric Hosp., 2006 N.J. AGEN LEXIS 733 (N.J. Adm. 2006).

The record reflects that booster clubs raise funds for athletic teams in order to provide things which are not within the district's budget. Dempsey testified that he learned about SnapRaise from Belvidere baseball coach Feldman, and the record reflects that SnapRaise had previously conducted fundraisers for other teams, including baseball and girls' softball, prior to their activities with the boys' soccer team. It is undisputed that on August 16 2018, Dempsey informed then

Athletic Director Karabinus that a fundraiser was being conducted through SnapRaise. I find that this constitutes notice to the administration, since in his capacity as coach, Dempsey would be responsible to report to the athletic director (2T56). The record is unclear about when the booster club knew about the fundraiser, but since Toth and Grafer had sons on the team, they were on notice at least from the time that they received the email fundraiser solicitations which were sent to team members. Both Toth and Grafer maintained that they were aware of and approved of the fundraiser (B25 and 26).

The record also reflects that Poyer took primary responsibility for organizing and facilitating the fundraiser. He signed the contract with SnapRaise, served as the point of contact for them, allowed an email message about participation in the fundraiser with "Coach Poyer" at the signature line to be disseminated, and arranged for a SnapRaise representative to address the team. Poyer's actions, however, are consistent with the goal of the booster club to raise funds to support the team, and are not inconsistent with his role as volunteer coach.

Count 1 of Charge I recites that the solicitation for the fundraiser stated that the donations would be used "towards...[the team's] end of the year... banquet, awards, and player trophies." Count 1 further recites that the solicitation stated that donations would "be used to cover the cost necessary to

run a high school program, ...[and] ensure that...[the] athletes get the proper equipment to perform." The allegation is that donations were solicited under false pretenses, because the only money actually distributed from the fundraiser went to Poyer. Carrubba believed the fundraising solicitation was fraudulent in that it specified the things which would be supported by the funds raised, which did not include the payments to volunteer coaches.

Poyer testified that he did not read the solicitations from SnapRaise, including that portion of the email describing what purposes the proceeds would be used for and which ended with a personal message from "Coach Poyer, 8/18/18." (B-8). Additionally, Carrubba felt that the sentence in the solicitation stating Poyer's expectation that "all players would show effort and support by participating in the fundraiser" exploited the relationship between teacher and student, in violation of Board Policy 4112.3 (Code of Ethics).

The pertinent portion of Board Policy 4112.3 provides that:

> In fulfilling our obligations to the student, we ...
> 7. Avoid exploiting our professional relationship with any student.

It was a lapse of judgment for Poyer to allow solicitations from SnapRaise to be sent out with a message which purported to be from him without reviewing the content. However, the unrebutted testimony is that the majority of the information on the solicitation was boilerplate supplied by SnapRaise, and it is

unclear that Poyer had an opportunity to make changes in the emails but certainly he could have insisted on such a review. I do not find the statement about expected participation and the need for effort and support by the team to be unduly coercive. Carrubba's concern about the potential conflicts with a teacher's official duties and his/her role as a coach will always be present when one individual occupies both roles. There is nothing in the language of the solicitations, or in the record, that Poyer took any actions which would indicate to the team members that the level of their participation in the fundraiser would be tied in any way to any academic or other assessment which Poyer might make about any individual member.

I do not find that Poyer's failure to review the fundraising documents constitutes conduct which would warrant any disciplinary sanction pursuant to Board Policy 4112.3 (Code of Ethics).

The Board's assertion that the solicitations were fraudulent because the only monies distributed from the fundraiser went to Poyer ignores a significant fact -- after the funds were deposited in the associated student account, the booster club had no access to them. Once they were suspended and barred from school property, neither did Dempsey or Poyer. The fundraising materials stated that the funds would be used for an end of year banquet, awards and player trophies. The record reflects that booster club monies were used for those

purposes; however the funds came from those already available to the booster club from their rollover account, since the Board had assumed control of the monies raised in 2018, despite having been advised by Grafer that the Board was holding funds which belonged to the booster club. I also note that Dempsey had raised with Toth in the same conversation about the monies for Poyer's efforts the possibility of purchasing either new warmups or team shirts (B25).

The Board's position also ignores the fact that the boys on the soccer team got the benefit of Poyer's time, efforts and support. The booster club appreciated Poyer's contributions to the team, as Toth indicated, and determined to express their gratitude in the form of a monetary gift. Had they had access to the funds they raised, they might well have also purchased the warmups and/or team shirts that Dempsey alluded to in his conversation with Toth.

The district's action in preventing the booster club from utilizing the proceeds of the fundraiser clearly made it impossible for the club to use those funds in accordance with any of the stated purposes for which they were raised. Although it is true that monetary gifts for members of the coaching staff is not included in the enumerated potential uses for the monies raised in the solicitations, the language that donations would "be used to cover the cost necessary to run a high school program" appears broad enough to include gifts to

the coaches (B8). I do not find that the funds raised were the result of a fraudulent solicitation.

The Board also argues that Dempsey and Poyer violated Board Policy 1314 (Fundraising By Outside Organizations) when they permitted a SnapRaise representative to make a presentation to the boys' soccer team without first obtaining the permission of the Superintendent, and further when they deposited the proceeds of the fundraiser in the associated student account.

The pertinent parts of Board Policy 1314 provide as follows:

> No person or organization may solicit funds on school property without prior permission from the Superintendent.
>
> * * *
>
> Funds solicited by organizations, not sponsored by the district, are not to be deposited in any regular or special accounts of the district. The Board disclaims all responsibility for the protection of or accounting for such funds. (B6)

Carrubba testified that Dempsey and Poyer were expected to be aware of and required to follow Board policies by virtue of their job descriptions and employment contracts. Dempsey's and Poyer's employment contracts require that they:

> faithfully do and perform all duties under the employment aforesaid, and to observe and enforce the rules prescribed for the government of the school by the Board of Education (B18).

Neither Dempsey nor Poyer could recall having seen their job

descriptions (B1; B2).

The question of whether Dempsey and Poyer could reasonably be expected to be familiar with all Board policies, and specifically with Board Policy 1314, must be considered in view of the number and scope of the Board's polices. Carrubba testified that the administration does not review policies with the faculty unless a major policy is updated. Carrubba also testified that there were approximately 5,000 District policies on the online portal, and stated that to his knowledge Policy 1314 was never discussed with teaching staff or coaches during his seven-year tenure as Superintendent. In fact, as Carrubba conceded, Board Policy 1314 was adopted on September 2, 2014, well after Dempsey and Poyer were hired.

Board Policy 1314 does not pertain directly to teaching. However, the requirement contained in the Policy that permission from the administration be obtained when a person or organization solicits on school grounds is a matter of common sense. Whenever a non-employee comes to a school, whether it is a SnapRaise representative speaking to a sports team, or Neil DeGrasse Tyson meeting with the Science Club, security concerns apply. Dempsey and Poyer should have known, as experienced teachers, of the need for such permission regardless of Board Policy 1314. Such permission was not obtained. Although Poyer had assumed the primary responsibility for administration of the SnapRaise

fundraiser, I infer that Dempsey would have been aware of the scheduled presence of a SnapRaise representative to address the team after a practice. Dempsey and Poyer thus violated Board Policy 1314 when they permitted a SnapRaise representative to address the boys' soccer team without providing notice to the administration.

There is no evidence, however, that either Dempsey or Poyer knew, or should reasonably be expected to have known, of that provision of Board Policy 1314 which provides that funds "[solicited] by or organizations, not sponsored by the district, are not to be deposited in any regular or special accounts of the district." This prohibition is not one that is a matter of common knowledge. Indeed, based on the fact that Schiavone testified that she was unaware of the Policy, it is evident that even those whose duties involved the payment of funds from school accounts were not award of its existence. I infer that High School Principal Lazzara was apparently also unaware of this policy or was ignoring it when he signed requests and checks to be drawn on the associated student account for the boys' soccer team. The failure of the district to establish that the policy was ever highlighted or disseminated to faculty or coaching staff, or that either Dempsey or Poyer had received the policy, is clearly a mitigating factor. I do not find that either Dempsey or Poyer violated Board Policy 3453 (School

Activity Funds) in conducting the fundraiser or by depositing the proceeds of the fundraiser in the ASA account.

The allegation that Dempsey and Poyer committed fraud because the stated purposes for which the funds were raised are at odds with the purposes for which they were used is problematic. The fundraiser proceeds were solicited by SnapRaise for the Booster Club for their use and disbursement. The record amply reflects that the clubs exist to raise additional funding for sports teams which they support. If there were questions about or objections to how the monies raised were spent, the Booster Club, not Poyer and Dempsey were responsible to respond. While Poyer may have effectively managed and supervised the fundraiser, he did so on behalf of the Club.

However, in taking on that responsibility, Poyer should have sought review and approval of the fundraising materials from the club, rather than simply assuming that they were correct and acceptable to the club. To the extent that he failed to do so, he exercised faulty judgment. There is simply no evidence that he committed or was a party to fraudulent fundraising efforts. Poyer did not convert the proceeds of the fundraiser to his own use by having SnapRaise direct the check to him, nor did he solicit monies from either Dempsey or the booster club.

Dempsey appears to have had no direct involvement in the administration of the fundraising drive. While he, like Poyer, should have exercised better judgment by referring the content of the solicitations to the club, his failure to do so is mitigated to a significant degree by his knowledge that SnapRaise had conducted multiple fundraisers for other sports at Belvidere without any reported problems. He did not conceal the fundraiser from the administration, and, in fact, informed the athletic director at or near the inception of fundraising efforts. Although Carrubba testified that some Board members had concerns with prior SnapRaise solicitations, there is nothing in the record that indicates that those concerns were shared with coaches or with the then athletic director.

The proceeds of the fundraiser were sent via check made out to the school district, at the direction of Poyer and with the approval of Dempsey; the check was then mistakenly deposited by Dempsey into a district-controlled student activity account. Dempsey then followed standard Board procedures to request a check for Poyer, after getting approval from Toth to do so.

If, as the Board posits, Dempsey and Poyer devised a scheme to raise funds to compensate Poyer, they could have effectuated that plan by providing the funds to the booster club, as they should have, and having the club provide the check to Poyer. Dempsey's actions in handling the proceeds of the fundraiser were transparent in every respect. Dempsey credibly testified that Poyer never

asked him for money for his coaching assistance. Poyer credibly testified that he was surprised to get the check. Even if Poyer had entertained a hope that he might receive some sort of monetary gratuity for his efforts, the fact is that he had no entitlement to such an honorarium, and he could not know that it would be forthcoming.

Count 2 of Charge 1, which is essentially identical in both complaints, specifies that Dempsey and Poyer conspired during the spring of 2015 to provide Poyer with payment in the amount of $2,500 for his services as volunteer coach of the girls' softball team. Dempsey was the coach of the girls' softball team at that time.

The facts surrounding the 2015 payment to Poyer are minimal. The record reflects that on May 22, 2015 Dempsey submitted a check request to the high school administration in the amount of $2,500, payable to Poyer with the annotation "Softball Coach Instructor's Fee" (B20). The check to Poyer was signed by Principal Lazzara and countersigned by another individual whose signature is illegible, but I infer that it may have been the then custodian of accounts, Sylvia McInerney.[15]

[15] It is noted that Ms. McInerney and Board President Shawn McInerney share the same last name and may be related in some way.

Poyer was apparently not the only assistant coach who was compensated. In 2018, Coach Feldman arranged for compensation for his volunteer assistant baseball coach in the amount of $3,000. The record does not indicate whether that payment was from a booster club account or from a student associated account. Grafer testified, and stated in an email that booster clubs had provided gifts to both the volunteer baseball coach and the volunteer pitching coach in the past (3T-90). Staples testified that he asked other coaches if they had a practice of providing gifts to volunteer coaches, and was advised that they had done so.

There is no evidence that Dempsey and Poyer conspired to provide this payment to Poyer in 2015. Dempsey utilized the administrative process in place to request a check, made a correct annotation on the check reflecting the purpose of the check, and sent it through the rest of the process. The appropriate signatures were obtained, including that of Lazzara. There is nothing in the record which indicates that any action was taken with respect to the 2018 payment to Feldman's assistant coach.

The handbook Just Cause: The Seven Tests, Adolph Koven and Susan Smith, BNA (2006) outlines and discusses the seven commonly used tests to determine whether discipline was for just cause. The tests are: notice or rule; reasonable rules and orders; investigation; fairness of investigation; proof; equal treatment; and penalty.

For the purposes of evaluating this allegation, test six, "Equal Treatment" is instructive. The test questions whether the employer applied its rules, order and penalties even-handedly and without discrimination to all employees. In this context, the test refers to work rules, and the need for enforcement in a consistent manner unless a reasonable or valid basis exists for a variation in treatment. There is evidence in the record that Belvidere volunteer assistant coaches have been provided in the past with monetary and other gifts in recognition of their contributions to the teams they have coached. In view of what is apparently a sustained practice of such monetary recognition for volunteer coaching of sports teams, the Board has not established that it has a uniform practice of prohibiting such remuneration. In fact, the record reflects that Lazzara's multiple approvals of such payments constitutes de facto permission by the district to issue such payments. An employer cannot approve conduct and then seek to punish an employee for engaging in the same conduct it has ratified. It does not appear that either Dempsey or Poyer could have known that the Board would object to such gifts, especially in light of the administration's prior acquiescence to the same practice. It also appears that the Board's objection to Poyer's receipt of both the 2015 and 2018 checks is inconsistent with the treatment of other volunteer coaches who received monetary gifts. Further, the Board waited almost four years after the 2015

payment to Poyer before it decided to include this event in the tenure charges. This is clearly a mitigating factor against finding wrongdoing on Dempsey's or Poyer's part concerning the 2015 payment.

The Board has sustained its burden of proving that Dempsey and Poyer engaged in Unbecoming Conduct, Insubordination and/or Other Just Cause by violating Board Policy 1314 when they permitted a SnapRaise representative to address the team without obtaining permission from the district administration to do so. The Board has not sustained its burden of proving any other element of Charge I of J1 and Charge I of J2, so all other allegations of the charges are dismissed.

Charge II

Dempsey is alleged in Charge II to have engaged in Unbecoming Conduct, Insubordination and/or Other Just Cause by failing to obtain the approval of the Board or the Administration to issue monetary payment to Poyer for his services as a volunteer coach. Count 1 refers to the 2018-2019 school year, and Count 2 refers to the 2015 school year. Poyer's Charge II, Counts 1 and 2, parallel those against Dempsey, but are based on Poyer's alleged failure to obtain permission to accept the checks.

The money used to provide the 2018 check to Poyer did not come from public funds; they were funds raised on behalf of the boys' soccer booster club.

Teams which have booster clubs are not supposed to have student associated accounts. However, there was a student associated account for boys' soccer. There is nothing in this record which explains this anomaly. At the point when the booster club fundraiser proceeds were deposited in the student associated account by Dempsey and Poyer, there was a bilateral mistake -- the coaches deposited funds which did not belong to the school district, and the district accepted funds which did not belong to it and placed them in an account which should not have existed.

When Booster Club President Toth became aware that the club's fundraiser money had been mistakenly deposited in a school account, she asked Club Treasurer Patty Grafer to contact Board Secretary Rachelle Tjalma to ask that the money be returned to the club. Grafer testified that she contacted Tjalma and asked that the money be given back to the club, which would in turn reimburse the school account for the $2,750 check given to Poyer (3T-48). Schiavone confirmed that as of the date of her testimony, the proceeds from the SnapRaise fundraiser have still not been given to the booster club and remain in the associated student account.

The significance of these facts is that there is no dispute that the monies which were used to fund the 2018 check to Poyer belong to the booster club, and should not have been placed in the district account. The booster club is

independent from, and outside the control of the district. The club had the right to disburse the funds it raised, and is accountable to the donors, not to the district, for what is done with those funds. Dempsey suggested to Toth that some funds be given to Poyer for his work, and that either new warmups and/or team shirts should also be considered (B25). He got approval from the booster club to use the money they raised. He had no obligation or reason to ask permission from the district to request funds from them, because he knew that the money was not the district's to disburse. I note that due to the district's retention of the funds, and Dempsey's suspension, he was prevented from taking any steps to effectuate his request for new warmups and/or team shirts.

However, Dempsey clearly did not appreciate the significance of the mistake which occurred when the wrong taxpayer ID and payee was provided to SnapRaise, and compounded the error in depositing the monies in a district account. He proceeded to follow the administrative procedures he had utilized in the past; filling out the district form to request a check, giving it to Schiavone, who then provided the check for signature to the high school principal -- an authorized signatory -- ironically, in the presence of Carrubba. In a sense, Dempsey did ask for approval to issue the check from the administration when Lazzara signed the check, and he received it.

The charge that Poyer failed to seek approval to accept the 2018 check is misguided. The unrebutted testimony is that Poyer was surprised by the check, and did not anticipate it. For the reasons explained fully with respect to Charge I against Dempsey and Poyer, I do not credit the assertion that they colluded to provide compensation for Poyer from the outset. Moreover, the monies were not funds which belonged to the district, so it is simply illogical to think that Poyer had an obligation to seek permission from the Board or the administration to accept a gift from the booster club. For the reasons articulated above in the discussion of Charge I with respect to the 2015 check to Poyer, I do not find that he had a responsibility to seek approval to accept those funds from the district.

The Board has failed to meet its burden of proving that Dempsey and Poyer engaged in Unbecoming Conduct, Insubordination, and/or Other Just Cause) with regard to Charge II. Charge II against Dempsey and against Poyer are dismissed (J1 and J2, Charge II).

Charge III

Dempsey is charged with Unbecoming Conduct, Insubordination and/or Other Just Cause by attempting to hinder the district's investigation and/or failing to be truthful with during the course of an investigation in a possible attempt to conceal wrongdoing. Count 1 specifies that when Dempsey met with Carrubba during the investigation, Dempsey concealed the fact that he had previously

issued a $2,500 check to Poyer for his volunteer services during the 2015 softball season (J2).

Poyer is also charged with Unbecoming Conduct, Insubordination and/or Other Just Cause by attempting to hinder the investigation, and/or failing to be truthful during the course of an investigation in a possible attempt to conceal wrongdoing. Count 1 specifies that when questioned by Carrubba during the investigation, Poyer concealed the fact that he had received a check for $2,500 as a volunteer coach during the 2015 softball season, when Dempsey served as the head coach (J1).

Carrubba testified that during the course of the investigation of the 2018 check to Poyer, he met with both Poyer and Dempsey separately, and took contemporaneous notes at each meeting (B12-13). Carrubba testified that during his interviews with Poyer and Dempsey, neither mentioned the 2015 check to Poyer.

Carrubba also testified initially that Dempsey told him that he had never compensated coaches in the past -- however, he later modified his answer in response to cross-examination when he stated that he had asked Dempsey if the practice of giving or paying an assistant coach had happened in the past that Dempsey replied that it had not occurred in soccer, but it did in softball. I cannot account for the variance between Carrubba's initial testimony and his

contemporaneous notes (B12). His acknowledgment under cross examination that Dempsey had indeed responded that payments to assistant softball coaches had occurred in the past, but not to assistant soccer coaches appears to negate the charge that Dempsey failed to be truthful during his investigatory meeting with Carrubba.

Dempsey was asked by Carrubba about the rationale for the amount of the payment to Poyer, as compared to the gift given to another volunteer assistant, and Dempsey explained that Poyer had been present at practices and both home and away games, while other assistants had not. Dempsey also explained how he arrived at the amount of the check given to Poyer, and noted that a baseball volunteer coach received $3,000 in the spring. There is nothing in the record which supports the allegation that Dempsey either hindered the investigation or was less than truthful when questioned by Carrubba.

Poyer met with Carrubba on December 17, 2018. Carrubba's contemporaneous notes of that meeting do not reflect that he asked Poyer about any previous payments he received as an assistant coach, or specifically if he had ever received such payments (B13). His testimony at the arbitration also shows that he denied asking Poyer about prior payments. I cannot account for the difference between Carrubba's testimony and his contemporaneous notes, however I believe that the notes are accurate since they were, by Carrubba's own

account, made at a time when his recollection of the meeting was clear. Poyer was participating in an interview about the circumstances surrounding the 2018 payment, and that issue is naturally the one on which Poyer would be expected to focus. In the absence of a direct question about any prior payments as an assistant coach, and an untruthful answer from Poyer, there is no evidence that he hindered the investigation or was untruthful in response to Carrubba's questions.

I note that the investigation itself does not appear to have been conducted in an objective fashion. In Just Cause: The Seven Tests, supra, test four, Fairness of Investigation, is focused on whether the employer conducted the investigation fairly and objectively. Staples began the investigation at Carrubba's direction. He questioned Dempsey, who confirmed the 2018 check for Poyer, and told Staples that the same type of payment had been made in the past. Staples called Toth, Grafer and Linder to ask about their knowledge of the decision to provide Poyer with monies for his coaching, and asked each of them to send him emails with their detailed recollections of what had transpired; he testified that he believed the emails to be accurate (2T14; B-25 and 26). Staples forwarded the emails and the booster club bylaws to Carrubba. He also provided Carrubba with the email solicitations from the fundraiser (B7 and 8). Stapes and Carrubba also examined the associated student accounts, and learned that Poyer had received a check in

2015, and traced the process by which the 2018 check had been requested and issued. As described above, Carrubba also conducted investigatory interviews with Poyer and Dempsey.

It does not appear that the emails from Toth and Grafer were taken into consideration by either Carrubba or the Board, or that there was any recognition by the administration of the district's own shortcomings with respect to the creation and maintenance of appropriate accounts for teams with and without booster clubs, or of its failure to return the funds raised by the booster club to that organization.

The Board has failed to meet its burden of proving that Dempsey or Poyer engaged in Unbecoming Conduct, Insubordination and/or Other Just Cause by hindering the district's investigation, or by failing to be truthful when questioned during the course of the investigation in a possible attempt to conceal wrongdoing. Charge III against Dempsey and Poyer is dismissed (J1 and J2).

Charge IV (Dempsey)

Dempsey is charged with engaging in a pattern of misconduct based upon the charges against him discussed above, which establish his unfitness to continue as a member of the teaching staff. In view of the disposition of the preceding charges, no discussion of this count is necessary. The Board has failed to meet its burden of proving that Dempsey has engaged in a pattern of misconduct which

renders him unfit to continue as a member of the teaching staff. Charge IV is dismissed.

Charge V (Poyer)

As noted previously, Charge IV against Poyer was withdrawn by the Board. Poyer is charged with engaging in a pattern of misconduct based upon the charges against him discussed above, which would establish his unfitness to continue as a member of the teaching staff. In view of the disposition of these preceding charges, no discussion of this count is necessary. The Board has failed to meet its burden of proving that Poyer has engaged in a pattern or misconduct which renders him unfit to continue as a member or the teaching staff, Charge V is dismissed.

The Board maintains that despite its withdrawal of Charge IV of the tenure charges against Poyer that the actions which were set forth therein may be considered for the purposes of progressive discipline. The Union disputes that discipline consistent with West New York v. Bock, 38 N.J. 500, 523 (1962) occurred. The question is resolved by the Board's action on May 24, 2017, memorialized in the minutes of the Executive Session, rescinding the Board's sanctions against Poyer (B4). Having rescinded the discipline, the Board cannot invoke it for the purposes of arguing that it be considered for any purpose, including progressive discipline.

The Board has produced no evidence that Dempsey violated Board Policy 4112.3, Code of Ethics, or Policy 4119.22, Conduct and Dress, as enumerated in paragraph 4 of the Facts Common to All Charges of the tenure charges against him (J2).

The Board has produced no evidence that Poyer violated Board Policy 4119,22, Conduct and Dress, Policy 4119.24, Corporal Punishment, Policy 4119.25, Liability of Staff for Student Welfare, Policy 5131.4, Harassment, Intimidation and Bullying, or Policy 5142, Pupil Safety, as enumerated in paragraph 4 of the Facts Common to all Charges of the tenure charges against him (J1).

CONCLUSION

I conclude that the Board has failed to meet its burden of proving that the tenure charges brought against Daniel Dempsey and Andrew Poyer amounted to sufficient cause for termination. Dempsey and Poyer shall be issued written reprimands for their violations of Board Policy 1314 in permitting an outside fundraiser to address the boys' soccer team without first obtaining permission. Here, both employees shall be reinstated to their teaching positions with full back pay. Dempsey shall be reinstated to his position as the boys' soccer coach.

AWARD

Belvidere School District is directed to return Daniel Dempsey and Andrew Poyer to their tenured teaching positions, with full back pay for the period of their unpaid suspensions, less any mitigation based upon earnings during the period of their suspension. The Board is also directed to return Dempsey to his stipended position as the boys' soccer coach for the 2020-2021 school year.[16] The Board is directed to also make Dempsey whole for the loss of any coaching stipends to which he would have been entitled during the period of his suspension. I retain jurisdiction as to remedy.

[16] I decline to return Poyer to his position as assistant soccer coach because this position is not contractually entitled to a stipend; it is a volunteer position and subject to the Board's annual approval of volunteers.

I further direct that the Board issue written reprimands to Dempsey and Poyer for their violation of Board Policy 1314 (Fundraising by Outside Organizations).

Susan W. Osborn

Susan Wood Osborn
Arbitrator

DATED: January 13, 2020
Trenton, New Jersey

State of New Jersey }
County of Mercer }

On this 13th day of January 13, 2020 before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Pamela J. Sutton-Browning

PAMELA J SUTTON-BROWNING
Commission # 50074695
Notary Public, State of New Jersey
My Commission Expires
January 11, 2023

New Jersey Commissioner of Education

Final Decision

T.B., on behalf of minor children, I.B., H.H., and S.H.,

Petitioner,

v.

Board of Education of the Township of Ewing, Mercer County,

Respondent.

Synopsis

Pro Se petitioner appealed the determination of the respondent Board that her children were not domiciled in Ewing and therefore not legally entitled to a free public education in the Ewing School District (District). Petitioner further appealed the tuition assessment levied upon her for the time the children were deemed ineligible to attend school in the District.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1(a), public schools are free to any person over five and under twenty-five years of age who is domiciled within the school district; T.B. has met her burden of proof to show that she shares custody of S.H. and H.H. with their father, Sa.H., and that Sa.H. is domiciled at an address on Conway Avenue in Ewing; accordingly, S.H. and H.H. were entitled to a free public education in Ewing during the 2018-2019 school year; however, T.B. failed to meet her burden to show that she and I.B. were domiciled at a Ewing address during the 2018-2019 school year. Therefore, as to I.B., the ALJ concluded that the Board demonstrated entitlement to tuition reimbursement in the amount of $13,714.50 for I.B.'s attendance on 150 days during the 2018-2019 school year. Accordingly, the ALJ granted the Board's assessment of tuition for I.B. for the 2018-2019 school year in the amount of $13,714.50, but denied the Board's assessment of tuition for S.H. and H.H.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petitioner was ordered to reimburse the District for tuition costs in the amount of $13,714.50. 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.

January 22, 2020

28-20

OAL Dkt. No. EDU 4106-19
Agency Dkt. No. 32-2/19

New Jersey Commissioner of Education

Final Decision

T.B., on behalf of minor children, I.B., H.H. and S.H.,

Petitioner,

v.

Board of Education of the Township of Ewing, Mercer County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the petitioner failed to demonstrate that she resided in the District during the 2018-2019 school year and that I.B. had a right to attend school in the District. Further, the Board has demonstrated an entitlement to tuition reimbursement in the amount of $13,714.50 for the 150 days that I.B. attended school in the District during the 2018-2019 school year. With respect to S.H. and H.H., the Commissioner is also in accord with the ALJ's determination that there is sufficient evidence in the record to demonstrate that S.H. and H.H. resided in Ewing Township and were entitled to attend school in the District during the 2018-2019 school year.

[1] The record does not include a transcript of the August 30, 2019 hearing at the OAL.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petitioner is ordered to reimburse the District for tuition costs in the amount of $13,714.50.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 1/22/20
Date of Mailing: 1/23/20

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04106-19
AGENCY DKT. NO. 32-2/19

T.B. on behalf of minor children,
I.B., H.H. and S.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

T.B., petitioner, pro se

Joseph I. Roselle, Esq., for respondent (Schenck, Price, Smith and King, LLP, attorneys)

Record Closed: November 4, 2019 Decided: December 19, 2019

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.B., appeals the determination of the Ewing Township Board of Education (Board or respondent) that her children, I.B., S.H., and H.H. were not

domiciled in Ewing and not legally entitled to a free public education in the Ewing School District (District). Petitioner also appeals the resulting tuition assessment for the time the children were deemed ineligible to attend school in the District.

PROCEDURAL HISTORY

By letter, dated January 30, 2019, the Board advised petitioner of its residency hearing determination. The petitioner timely filed a petition of appeal and the Board filed its Answer and Affirmative Defenses. Thereafter, the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 25, 2019, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was held on August 30, 2019,[1] and the record remained open until September 27, 2019, to allow the parties to submit written summations. On October 17, 2019, the record was reopened for clarification purposes and the parties were given additional time for respondent to produce documentation of the address to which the children were registered to attend school and for petitioner to produce proof of residency. The record reclosed on November 4, 2019, following receipt and review of the post hearing submissions.

FACTUAL DISCUSSION AND FINDINGS

Testimony

The following is a summary of the relevant and material testimony given at hearing.

For respondent:

Pete Manetto, (Manetto) is a Residency Investigator for the District. He has held this position for twenty years. He is a retired police officer and private detective. Manetto testified that he conducted a residency investigation of I.B., S.H., and H.H. and

[1] Prior hearing dates scheduled for May 9, 2019, June 25, 2019, and August 21, 2019 were adjourned due to witness unavailability and/or medical issues.

prepared a report on same. R-1. He conducted a total of twenty-two (22) surveillances beginning in October 16, 2018. Two (2) surveillances, conducted on October 16, 2018, and December 13, 2018, were initiated at 14xx Parkside Ave., Unit 1x,[2] (Parkside Avenue), Ewing New Jersey. The subjects were not found at that address on either occasion.

Surveillance was also initiated at 15x Girard Avenue, Trenton, New Jersey (Trenton location). Twelve (12)[3] surveillances were conducted at the Trenton location beginning on October 18, 2018, and ending on November 26, 2018. During eight (8) of the surveillances conducted at the Trenton location, S.H. and H.H. were observed exiting the location and being driven by an adult black female to a District school or were later confirmed to have been in school. Manetto testified that according to New Jersey Motor Vehicle Commission (NJMVC) records, the "subject" vehicle, a 2013 black Volvo, NJMVC registration number NJN7xxx,[4] is the property of T.B. The address of record for the subject vehicle is 15x Girard Avenue (the Trenton location). During five (5) of the surveillances conducted at the Trenton location, I.B. was observed exiting the location and being driven by the same individual in the subject vehicle to a different District school or later confirmed to have been in school. Neither the subjects nor the subject vehicle were observed during the remaining surveillances at the Trenton location.

Manetto conducted two (2) surveillances at 4x W. Cleveland Avenue, Morrisville, Pennsylvania. Neither the subjects nor the subject vehicle were observed at that location.

Manetto also conducted one surveillance at a District bus stop located at Grafton and Conway streets. This surveillance was initiated based on information that S.H. and H.H. were being dropped off by a District school bus, proceeding to 2x Conway Avenue,

---

[2] For purposes of confidentiality, complete address information is not listed herein for any of the locations surveilled during the District's residency investigation.

[3] A review of the report reveals that there were eleven surveillances conducted at this location: October 18, 19, 23, 25, and 30, 2018, and November 5, 12, 14 ,19, 21, & 26, 2018.

[4] For purposes of confidentiality, complete vehicle registration information in not listed herein.

Ewing, New Jersey, and then later picked up and driven to an undetermined location. Neither the subjects nor the subject vehicle were observed during that surveillance.

Manetto, also conducted five (5) after-school surveillances at 2x Conway Avenue, Ewing, New Jersey, beginning on December 19, 2018, and ending on January 16, 2019. On each of these occasions, two individuals fitting the description of S.H. and H.H. were observed exiting the school bus and proceeding to 2x Conway Avenue. Later, the two individuals exited the location and were driven by unidentified person(s) towards the area of Lower Ferry Road. Manetto explained that due to traffic conditions, he lost sight of the vehicles observed at that location. During one of these surveillances, Manetto followed the vehicle transporting the two individuals from that location to the Scudders Falls Bridge and observed it heading towards Pennsylvania. That vehicle, a Lexus SUV, was registered to "M.C."[5]

Manetto took seven (7) photographs, of the subject individuals and/or the subject vehicle at the Trenton location. R-1, Photo legend and attachments. The photographs were taken in low light.

On June 16, 2019, Manetto conducted a supplemental surveillance at 1x Conway Avenue, Ewing. [6] The subjects were not observed during that surveillance.

Based on his investigation, Manetto concluded that the subjects did not reside in Ewing.

Manetto acknowledged several errors in his report including:

- An entry in his November 26, 2018, report noting: "A check with subject's respective schools indicated all in school on time." He explained that this sentence was information copied from a prior surveillance report entry in this matter.

[5] For purposes of confidentiality, M.C's full name is not used. The address to which this vehicle is registered is 13xx Parkside Avenue in Ewing.

[6] This surveillance is not reflected in Manetto's report, R-1.

- An entry in his December 12, 2018, report referencing surveillance location in the area of Conway and "Gladstone." The correct location is "Grafton."

- An entry in his January 7, 2019, report containing the same incorrect reference to "Gladstone."

George Cahill, (Cahill), is the Attendance Officer for the District. He conducted a tuition assessment calculation in this matter. R-2. I.B., S.H., and H.H. each attended 150 days of school in the District during the 2018-2019 school year.[7] Cahill's calculation for S.H. and H.H. is as follows: students in grades one through five cost the District $14,948 for a full year/180 days. This equals $83.05 per day. The 150 days attended by S.H. and H.H., multiplied by the daily rate of $83.05 equals $12,457 per child or a total of $24,915. Cahill's calculation for I.B. is as follows: students in grades six through eight cost the District $16,457 for a full year/180 days. This equals $91.43 per day. The 150 days attended by I.B., multiplied by the daily rate of $91.43 equals $13,714.50. The total tuition assessed for all three children is $38,629.50.

For petitioner:

T.B. is the mother of I.B. (a girl), S.H., and H.H. (both boys). She testified that she shares custody of the boys with Sa.H., their father, and L.H., their aunt/Sa.H's sister. T.B. and Sa.H. went to court to address custody issues. See. P-1.[8] L.H. lives at 1x Conway Avenue in Ewing. See, P-8 & R-5. L.H. has lived at this address for approximately four years. Sa.H. lives with L.H. at 1x Conway Avenue. The boys are with their father the majority of the week and with T.B. mainly on the weekends--Friday to Sunday. The boys stay with T.B. during the summer.

[7] The number of school days attended was calculated from the time the Board initiated its residency investigation.

[8] P-1 is an August 23, 2016, Superior Court of New Jersey, Family Part Order in the matter of L.H v. Sa. H. The order addresses visitation and notes in relevant part on page 2, item #23, "The plaintiff/ [L.H.] withdraws her application. The parties consent to the plaintiff/[L.H.] and the defendant/[T.B.] having joint legal and residential custody of the minor children, [H.H. and S.H.] The parties consent to the defendant/[T.B.] having liberal and reasonable parenting time as agreed upon by the parties.

2x Conway Avenue, Ewing, New Jersey, is the address of L.H's neighbor. The boys go to that address after school because L.H. does not get home from work by the time the boys finish school. T.B. does not know the schedule that Sa.H. or his sister worked out for picking the boys up after school. She does not know M.C., the person to whom the Lexus used to pick up the two individuals from 2x Conway Avenue, was registered. L.H. went to the Board hearing and brought the joint custody document but was not permitted to testify and/or told she was not needed.

T.B. testified that she has lived at the following Ewing addresses:

- 5x Dunmore Avenue, she was living at this address when she went to court with Sa.H. [August 23, 2016.] P-1;

- 1x Ronnet Drive, from there, T.B. moved in with her mother; and

- 14xx Parkside Avenue, her mother's address.

I.B. is the only child who should be registered for school at Parkside Avenue. The boys should both be registered for school at 1x Conway Avenue.

The Trenton location is T.B.'s grandmother's address. T.B. took a Family and Medical Leave Act (FMLA) leave to care for her grandmother, "C.B." P-7[9]. On the dates T.B. was observed at the Trenton location, she was there caring for her grandmother while her aunt was away. T.B. was not at her grandmother's house every day.

T.B's younger sister lived at 4x W. Cleveland Avenue, Morrisville, Pennsylvania. The children never lived at that address. They were not living in Pennsylvania.

In June 2019, T.B. moved to 9xx Poplar Court, Bensalem, Pennsylvania. As of the date of the August 30, 2019, OAL hearing, T.B. had not notified the District of her change of address. T.B. testified that I.B. would not be attending school in the District

[9] October 23, 2018, letter approving petitioner for an intermittent leave of absence to care for her grandmother, C.B., from September 4, 2018, through January 1, 2019.

during the 2019-2020 school year. T.B. testified that I.B. was having problems in the District and would be attending school in Hamilton, New Jersey.

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp, 53 N.J. Super. 282, 287 (App. Div. 1958).

Having had an opportunity to hear the testimony of the witnesses and to observe their demeanor during the hearing, I accept the testimony of investigator Manetto as credible. His testimony as to his actions taken during the course of the investigation including his observations of I.B., S.H., and H.H. and the subject vehicle was straight forward and reasonable. While he acknowledged several errors in his report, these errors were relatively minor and/or administrative in nature and do not affect the reliability of his observations or his testimony.

Similarly, George Cahill's testimony regarding his calculation of the tuition assessment for I.B., S.H., and H.H. was straight forward and reasonable, thus I accept it as credible.

As to petitioner, portions of her testimony relating to her joint custody of S.H. and H.H. and the in-District residence of L.H. was reasonable and supported by the competent documentary evidence in the record. Thus, I accept that portion of her testimony as credible. T.B. testified that the boys stayed with their father during the majority of the week and were with her, mainly on the weekends. While this testimony was called into question by Manetto's observations of the boys at the Trenton location

on eight (8) occasions, these limited observations, are insufficient to refute petitioner's testimony and the documentary evidence regarding the custody arrangement. They are also insufficient to refute petitioner's testimony regarding where the boys were living.

In contrast however, T.B.'s testimony regarding her residence/domicile at her mother's Parkside Avenue address, was not fully supported and/or was contradicted by the sparse competent residency evidence presented. As an initial matter, petitioner did not dispute nor explain Manetto's testimony and report indicating that the subject vehicle was registered to T.B. at the Trenton location.

Additionally, T.B.'s explanation that her presence at the Trenton location was due to her FMLA leave to care for her grandmother was contradicted by the fact that the October 23, 2018, leave approval letter sent by or on behalf of her employer was addressed to T.B. at the Trenton location. P-7[10] This letter supports that T.B. was living at the Trenton location during the 2018-2019 school year and not simply there to temporarily care for her grandmother while on leave.

Similarly, petitioner testified that she moved to Bensalem, Pennsylvania in June 2019. Despite this, as part of her post-hearing submission of proof of residency, petitioner provided two October 29, 2019, letters from Navient, Department of Education Loan Servicing regarding: "important loan information" for 2018 and 2017, addressed to her at Parkside Avenue. Aside from the fact that the letters were sent during the 2019-2020 school year, the letters were sent to petitioner after a time she acknowledges moving from the Parkside Avenue address.[11] Thus, the letters do not support her claim that she was living at that address during the 2018-2019 school year. Rather, they create further doubt as to the truthfulness of petitioner's testimony regarding her residency/domicile during that time.

For these reasons, I do not accept petitioner's testimony regarding her residency at Parkside Avenue during the 2018-2019 school year as credible.

---

[10] See copy of envelope/mailing information accompanying the October 23, 2018, letter provided by petitioner as part of her post-hearing proof of residency.

[11] Petitioner testified she moved to Bensalem, Pennsylvania in June 2019.

Accordingly, based upon the testimonial and documentary evidence presented, I **FIND** the following as **FACT:**

Pursuant to an August 23, 2016, Family Part Order, the petitioner shares joint legal and residential custody of her two children, S.H. and H.H, with Sa.H., their father, and L.H., their aunt/the father's sister. Pursuant to this Order, petitioner is to have liberal and reasonable parenting time as agreed upon by the parties.

The August 2016 Family Part Order does not designate the school district of attendance for S.H. and H.H.

L.H. resides/is domiciled at 1x Conway Avenue, Ewing, New Jersey, and was so during the 2018-2019 school year.

During the 2018-2019 school year, I.B. attended middle school in the District. During that time, S.H. and H.H. attended elementary school in the District.

Investigator Manetto conducted a residency investigation of I.B, S.H., and H.H. During the course of the investigation, beginning on October 16, 2018, through January 16, 2019, Manetto conducted twenty-one surveillances at five separation locations in Ewing and Trenton, New Jersey, and Morrisville, Pennsylvania. In June 2019, Manetto conducted one supplemental surveillance. The location of that surveillance was 1x Conway Avenue in Ewing, New Jersey (L.H.'s address).

Petitioner's grandmother, C.B., lives at 15x Girard Avenue, Trenton, New Jersey.

Petitioner was approved for an intermittent FMLA/NJ-FLA leave from her employment to care for her grandmother beginning on September 4, 2018, and running through January 1, 2019.

Manetto conducted eleven surveillances at the Trenton location beginning on October 18, 2018, through November 26, 2019. Of the surveillances conducted at that

location, S.H. and H.H. were observed there on eight occasions. Of the surveillances conducted at this location, I.B. was observed there on five occasions.

On the occasions that the children were observed at the Trenton location they were seen being transported by a black female, in a 2013 Volvo, registered to/owned by petitioner. On these occasions, the children were transported to a District school or later confirmed to have been in school. The address on record, with the New Jersey Motor Vehicle Commission, for the 2013 Volvo is 15x Girard Avenue, Trenton.

Surveillance photos taken by Manetto at the Trenton location on October 25, 2018, and November 14, 2018, are of poor quality and are not self-explanatory. Neither the subject vehicle nor the individuals are clearly identifiable absent Manetto's testimony and/or photo legend contained within his report.

The Parkside Avenue address belonging to petitioner's mother, was surveilled twice during the course of the investigation. On those two occasions, October 16, 2018, and December 13, 2018, no activity was observed.

The tuition assessed for S.H. and H.H.'s attendance of 150 days of school in the District, during the 2018-2019 school year, is $12,457 per child or a total of $24,915 for both.

The tuition assessed for I.B.'s attendance of 150 days of school in the District during the 2018-2019 school year is $13.714.50.

LEGAL ANALYSIS AND CONCLUSION

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend

school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). A person may have multiple residences but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. Id.

In M.K. v. Bd. of Educ. of the Bridgewater-Raritan Reg'l Sch. Dist., 2019 N.J. Super. Unpub. LEXIS 1515, the Appellate Division noted that it was legally possible that the petitioner therein and her child could have been found to have had two simultaneous residences, although only one domicile. Id. 6. The court concluded that, "[t]he real question is not where [the child] resides. But where is he domiciled. And that question is answered by examining where [his parents] are domiciled. See NJAC 6A:22-3.1(a)(1)."

The regulations contemplate that parents may not reside in the same school district. N.J.A.C. 6A:22-3.1(a)1.i provides, "When a student's parents are domiciled in different school districts, and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody." The regulations also contemplate that a student may live with both of his parents an equal amount of time. N.J.A.C. 6A:22-3.1(a)1.ii provides:

> When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or

> written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date.

Here, the Board argues that petitioner has failed to meet her burden of proof that she resided/was domiciled in the District or that her children were entitled to a free education there. The Board also argues that petitioner failed to credibly refute the investigation report or its findings.

At the conclusion of the August 30, 2019, OAL hearing in this matter, the undersigned gave petitioner an opportunity to submit post-hearing proof of her residency at the Parkside Avenue address. Thereafter, on October 17, 2019, the record was reopened for clarification purposes and petitioner was provided an additional opportunity to provide proof of her residency. In total, the only proof of residency produced by the petitioner consisted of the following:

- An August 13 – September 12, 2018, phone bill from Verizon. P-2

- A February 13 – March 12, 2019, phone bill from Verizon. Id.

- An October 29, 2019, letter from Navient, Department of Education Loan Servicing regarding: important tax information for 2018, and an October 29, 2019 letter from Navient, Department of Education Loan Servicing regarding: important tax information for 2017. P-3.

- A copy of an envelope from the Ewing Public Schools to the Parent of I.B., date stamped May 28, 2019, a copy of an envelope from Central Registration Office to T.B., date stamped June 16, 2019. P-4.

- An October 28, 2019, letter from T.B.'s mother, F.B-H., stating that T.B. and I.B. lived with her at the Parkside Avenue address during the 2018-2019 school year. P-5.

This information is insufficient to meet petitioner's burden of proof to establish residency/domicile in the District during the 2018-2019 school year. As an initial matter the two bills from Verizon are for wireless service.[12] As such, the bills could be forwarded to any address and do not demonstrate residency or domicile at the Parkside Avenue address during the 2018-2019 school year.

Next, for the reasons previously set forth in the credibility determination herein, the two October 2019 letters addressed to petitioner from Navient do not establish residency or domicile at the Parkside Avenue address during the 2018-2019 school year.

Similarly, the copies of the envelopes mailed by the District to T.B./the parent of I.B., do not establish residency or domicile at the Parkside Avenue address during the 2018-2019 school year, but rather reflect only address information provided to the District.

Finally, the letter from petitioner's mother, F.B-H., stating that petitioner and I.B. lived with her at the Parkside Avenue address during the 2018-2019 school year does not constitute competent, reliable, unbiased evidence sufficient to establish residency or domicile at that location. Aside from being hearsay, as the mother of T.B. and grandmother of I.B., F.B-H. has an interest in the outcome of this matter, thus her statement is made with motive and bias.

In sum, the sparse evidence produced by petitioner does not establish residency or domicile in the District during the 2018-2019 school year. Nor is it sufficient to overcome petitioner's failure to refute the testimony and investigative finding that her vehicle was registered to the Trenton location. Nor does the documentation overcome the fact that the October 2018 FMLA approval letter was mailed to petitioner at the Trenton location.

[12] The bills direct recipients with questions to "vzw.com." A Google search of this address brings the searcher to Verizonwireless.com.

For the reasons set forth herein, I **CONCLUDE** that petitioner has failed to meet her burden of proof that she resided/was domiciled in the District during the 2018-2019 school year and that I.B. had a right to a free education there. Therefore, as to I.B., I **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of $13,714.50, for the 150 days attended during the 2018-2019 school year.

As to S.H. and H.H., petitioner has through her testimony and the competent evidence in the record established that she shares joint custody of them with their father and L.H. L.H. resides/is domiciled at 2x Conway Avenue, in Ewing. The investigation conducted over the course of twenty-one days beginning on October 16, 2018, and continuing through January 16, 2019, in which S.H. and H.H. were observed at the Trenton location eleven times is insufficient to determine that they were domiciled at the Trenton location or to overcome petitioner's testimony that they stayed with their father the majority of the week. Similarly, the investigative findings that individuals fitting the description of S.H. and H.H. were on six occasions transported from 2x Conway Avenue, in the direction of the New Jersey/Pennsylvania border is wholly insufficient to overcome petitioner's testimony or to establish domicile or residency in Pennsylvania. Moreover, L.H.'s address was surveilled only one time, and at the end of the school year. The fact that the boys were not observed there on that single occasion is similarly insufficient overcome petitioner's testimony or to establish that they were not residing/domiciled there. Finally, T.B.'s testimony that the boys lived with L.H. is supported by the October 29, 2019, letter of L.H. in which she confirms that she shares custody of S.H. and H.H. and that they have lived with her for several years. While the statement is hearsay from an interested party, the investigative findings as to S.H. and H.H. are insufficient to overcome same.

For the reasons set forth herein, I **CONCLUDE** that there is sufficient evidence to demonstrate that S.H. and H.H. resided/were domiciled in the District during the 2018-2019 school year. Thus, I **CONCLUDE** that the Board is not entitled to tuition reimbursement for S.H. or H.H. during the 2018-2019 school year.

Finally, as part of respondent's October 29, 2019, post hearing submission and response, counsel for the District noted that despite petitioner's testimony at hearing that I.B. would not be attending Ewing schools in the 2019-2020 school year, she remains enrolled in and is attending school there. Respondent therefore requested that the undersign consider I.B.'s attendance in the District during the current school year when issuing this Initial Decision. Additionally, respondent also provided emails relating to supplemental surveillances conducted by investigator Manetto on October 4, and 14, 2019. As respondent's residency determination related to the children's attendance in the District during the 2018-2019 school year, and the hearing in this matter addressed only facts and evidence relating to their attendance during that school year, I decline at this time to consider information relating to the 2019-2020 school year. If respondent contends there is reason to believe that the children are not domiciled in the District during the current school year, it should conduct a thorough investigation and render a new residency determination.

ORDER

Based on the foregoing, I hereby **ORDER** that the Board's assessment of tuition for I.B. during the 2018-2019 school year in the amount of $13.714.50 is **GRANTED**. I further **ORDER** that the Board's tuition assessment for S.H. and H.H. during the 2018-2019 school year is **DENIED**.

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

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

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

December 19, 2019
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 12/19/19

Date Mailed to Parties: 12/19/19

/vj

APPENDIX

List of Witnesses

For petitioner:

T.B.

For respondent:

Pete Manetto, Investigator

George Cahill, Residency Officer

List of Exhibits

For petitioner:

P-1 Order of Superior Court of NJ, Family Part in L. H. v. H.S., Docket No# FD-11-001XXX-16, with attachment NJ Uniform Support Notices.

P-2[13] Verizon bills addressed to T.B. for billing period August to September, 2018, and February to March, 2019.

P-3 Two letters to T.B. from Navient, Department of Education Loan Servicing, October 29, 2019;

P-4 Copy of envelope from Ewing Public School addressed to "the Parent of [I.B], May 28, 2019; copy of envelope from Central Registration Office, Ewing Public Schools to T.B., June 17, 2019.

P-5 Letter from F.B-H to whom it may concern, October 28, 2019.

P-6[14] Order of Superior Court of NJ, Family Part—L. H. v. H.S. Docket No# FD-11-001XXX-16.

P-7 Letter from Cigna Leave Solutions with copy of address/mailing

[13] P-2 through P-8 represent petitioner's post hearing submissions.

[14] Duplicate of Order submitted as P-1.

information, October 23, 2018.

P-8 NJ Residential Lease Agreement for L.H., Renewal of Lease for August 2018 to July 2019, and October 29, 2019, letter from L.H. regarding joint custody.

For respondent:

R-1 Investigation report prepared by Pete Manetto with attachments.

R-2 Tuition Assessment Calculation

R-3[15] Ewing public school registration system information for I.B. consisting of: registration information FMS Grade 7, two pages; FMS Grade 8, two pages; student contact information Grade 7, two pages; student contact information Grade 8, two pages; Student Daily Attendance Report SY 2019-20; Student Daily Attendance Report SY 2018-19.

R-4 Ewing public school information for S.H. consisting of: student contact information Grade 4, two pages; student contact information Grade 5, two pages; registration information LES Grade 4, two pages; registration information LES Grade 5, two pages.

R-5 Ewing public school information for H.H. consisting of: student contact information Grade 5, two pages; student contact information Grade 6, one page; registration information LES Grade 5, two pages; registration information LES Grade 6, two pages.

R-6 NJ Residential Lease Agreement August 1, 2016 to July 31, 2017 for L.H., copy of envelope/official change of address information from Comcast to L.H., undated; copy of envelope/addressed to L.H. with postal message regarding: "Notify sender of new address," undated.

R-7 Two emails from Peter Manetto re: Case update report/surveillance conducted on October 4, 2019 and October 14, 2019.

[15] R-3 through R-7 represent respondent's post-hearing submissions.

29-20

OAL Dkt. No. EDU 08998-19
Agency Dkt. No. 55-3/19

New Jersey Commissioner of Education

Final Decision

Mary Leonard,

Petitioner,

v.

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

Respondent.

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

Upon such review, the Commissioner agrees with the Administrative Law Judge that the petition should be dismissed for failure to provide timely responses to discovery requests. Petitioner indicated on a conference call that she had no intention of responding to the Board's discovery requests or replying to the Board's motion to dismiss for failure to answer discovery.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/22/20
Date of Mailing: 1/23/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 08998-19
AGENCY DKT. NO. 55-3/19

MARY LEONARD,
Petitioner,
vs.
BOARD OF EDUCATION OF THE
CITY OF PLAINFIELD, UNION COUNTY,
Respondent.

Mary Leonard, Petitioner, pro se

Amy A. Pujara, Esq., for Respondents, (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, attorneys)

Record Closed: December 18, 2019 Decided: December 19, 2019

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition with the New Jersey Department of Education's Office of Controversies and Disputes on May 29, 2019.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on July 2, 2019, as a contested case.

A prehearing conference was held on July 12, 2019. A prehearing order was entered on July 15, 2019.

The matter was scheduled for hearing on October 16, 2019. Respondent requested that the matter be adjourned to permit it to file a motion to dismiss for failure to provide discovery. The adjournment was granted. Respondent filed a motion to dismiss for failure to provide discovery on October 25, 2019. Petitioner failed to provide a response thereto, or otherwise communicate with the OAL or the attorney for respondent.

The undersigned scheduled a telephone conference with the parties for December 4, 2019, at 12:15 p.m. The telephone conference was initiated by the OAL. Petitioner failed to answer the telephone.

Thereafter the undersigned scheduled a second telephone conference for December 18, 2019 at 3:30 p.m. That conference was held and was done on the record.

FACTUAL DISCUSSION

The prehearing order entered on July 15, 2019 required that all discover be completed on or before August 30, 2019.

Respondent propounded interrogatories and a request for production of documents upon petitioner on August 6, 2019. On September 30, 2019 respondent forwarded a letter to petitioner requesting a response to the discovery request.

Petitioner has not responded to the discovery request of respondent.

Respondent filed a motion for dismissal for failure to answer the discovery request. Petitioner failed to respond to said motion, or otherwise move before the OAL.

During the course of the telephone conference of December 18, 2019, petitioner made it abundantly clear that she had no intention of either providing a response to the discovery request of respondent, or of responding to the motion.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:1-10.5 provides:

> By motion of a party or on his or her own motion, a judge may impose sanctions pursuant to N.J.A.C. 1:1-14.14 and 14.15 for failure to comply with the requirements of this subchapter. Before imposing sanctions, the judge shall provide an opportunity to be heard.

An Administrative law judge has power to impose reasonable monetary sanctions on attorneys as representatives of parties. In re Timofai Sanitation Co., Inc. Discovery Dispute, 252 N.J. Super. 495 (A.D. 1991)

Before an administrative law judge could impose sanctions for violating a discovery order, court was required to conduct evidentiary hearing and make findings of fact. In re Timofai Sanitation Co., Inc. Discovery Dispute, 252 N.J. Super. 495 (A.D. 1991).

N.J.A.C. 1:1-14.14 states:

> **(a)** For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may:
> **1.** Dismiss or grant the motion or application;
> **2.** Suppress a defense or claim;
> **3.** Exclude evidence;
> **4.** Order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or
> **5.** Take other appropriate case-related action.

A prehearing order was entered in this matter on July 15, 2019. The discovery end date set forth in said order was August 30, 2019.

In the instant matter there was no explanation offered as to why discovery went unanswered. The failure to provide requested discovery has caused the adjournment

of the hearing date. It has also caused the instant motion to dismiss to be filed. This, in turn, has caused respondent to incur unnecessary counsel fees.

At the telephone conference of December 18, 2019, the petitioner made it clear she did not intend to either provide discovery or answer the pending motion. The telephone conference was petitioner's "opportunity to be heard" pursuant to N.J.A.C. 1:1-10.5.

Given the above, the undersigned has no choice but to grant the motion to dismiss.

Based upon the above, I **CONCLUDE** that respondent's motion to dismiss should be **GRANTED**.

ORDER

It is hereby **ORDERED** that respondent's motion to dismiss for failure to provide timely responses to discovery requests is **GRANTED**; and,

It is further **ORDERED** that petitioner's 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

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

Thomas R. Betancourt

December 19, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Moving Papers

For Petitioner:

None

For Respondent:

Motion to dismiss for failure to provide discovery
Letter brief in support of motion to dismiss for failure to provide discovery
Certification of Amy A. Pujara, Esq. with Exhibits A and B

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of Tenure Hearing of Ronald Becker:

MONROE TOWNSHIP SCHOOL DISTRICT, GLOUCESTER COUNTY
-And-
RONALD BECKER

Case No. 211-8/19

OPINION AND AWARD

Before:
Edmund Gerber, Arbitrator

Appearances:

For Monroe Township School District Board of Education:
Robert A. Muccilli, Esq.
Capehart Scatchard, P.A.

For the Respondent:
Carol M. Smeltzer, Esq.
Schwartz Law Group, LLC

The Monroe Township School District, Gloucester County, has brought tenure charges against Ronald Becker, an Assistant Principal. I was designated Arbitrator pursuant to the procedures of the State of New Jersey, Department of Education.

Prior to the commencement of the hearings in this matter, the Respondent, Ronald Becker filed a Motion to Dismiss the tenure charges alleging that the Petitioner's Statement of Evidence as sworn to by Interim Superintendent of Schools Dr. Richard Perry was deficient and failed to comply with N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1b1. Specifically, Perry did not witness the alleged incidents forming the basis of these tenure charges nor did he participate in the investigation conducted by the District related to this incident. Further, the District investigators' reports although signed were not sworn to. The Motion was dismissed in a decision issued on October 16, 2019. See Appendix A.

Hearings were conducted on November 20, 2019 and November 25, 2019. Both parties submitted briefs which were received by December 20, 2019.

ISSUE

Did Ronald Becker, a tenured vice principle in the Monroe Township School District engage in unbecoming conduct?

If so, does such unbecoming conduct warrant dismissal from the Board or some lesser penalty?

The charges against Mr. Becker consisted of:

1. On March 29, 2019, Mr. Becker engaged in unbecoming conduct by making the following threat on the life of Aramark employee, John Sebastiano: "If you call me an amigo again, I will fucking kill you."

2. In connection with the March 29, 2019 incident, describing above paragraph 1, Mr. Becker also engaged in unbecoming conduct making the following racist comment: Mr. Becker was upset at being called a "lazy Mexican."

3. Mr. Becker's unbecoming conduct in making the threat on Mr. Sebastiano's life and in making the racist comment violated District Policy 3351, entitled Healthy Workplace Environment and District Policy 3281 entitled Inappropriate Staff Conduct.

TESTIMONY

Ronald Becker is employed as Assistant Principal of Athletics and Activities and has held this position for ten years and has consistently received positive evaluations. He testified that he was never disciplined before, but on cross-examination admitted that he was found to have acted inappropriately with another staff member. His duties include oversight of all game fields and practice fields in the District.

The District contracts out the maintenance of the fields to the Amarark Corporation. Becker was concerned about the condition of the baseball field and the district contracted with a turf specialist to evaluate the fields. A meeting was held to review the turf specialist's recommendations between Aramark's General Manager, John Baer, the District's Facilities Director, Walter Berglund and Becker on March 29, 2019. The three men were meeting on the baseball field when John Sebastiano approached on an all-terrain vehicle. Sebastiano is an employee of Aramark who maintains the playing fields and is Becker's point of contact with Aramark. Becker testified that he had raised concerns about Sebastiano's grounds keeping knowledge with Baer several times in the past.

As Sebastiano approached the group he said, "Hey, it's the three amigos." According to Becker, it was said in a sarcastic and demeaning way. Becker admits that he responded "if you ever call me an amigo again, I will fucking kill you" and said it multiple times. Becker testified when Sebastiano made the comment he thought of the movie "The Three Amigos" where the three characters were fools who were laughed at throughout the movie. Becker testified that he never meant that he wanted to literally "kill" Sebastiano, but the term "kill" was used as a child would use it to mean fight. Becker maintained that in fact he would never fight Sebastiano.

Baer testified that he did not hear what Sebastiano said but heard Becker say "I don't work for you and if you ever call me an amigo again, I will fucking kill you." Bear testified that Becker said this multiple times but there was no physical contact between Becker and Sebastiano. According to Bear, Becker was in a rage and shouting, his face was red and his arm was extended full length and pointed at Sebastiano as he walked towards him yelling at the top of his lungs. The entire incident lasted no more than 90 seconds. Bear acknowledged that Sebastiano later told him that he did not hear what Becker had said.

Berglund testified that he heard Sebastiano's comment about the three amigos and said that it was made in a jovial way. Becker said, "Are you talking to me?" while pointing at Sebastiano and "started going at it." Berglund immediately turned around, walked away, got into his truck and drove away. He didn't hear anything after that because he was walking away to his truck. Berglan had never seen Becker react the way before.

When Acting Superintendent of Schools Richard Perry heard of the incident, he directed two Assistant Superintendents Greg Capello and Lynn Di Pietropolo to investigate this incident. They interviewed Becker and the witnesses to this incident as well as Becker's supervisor Assistant Principal Caroline Yoder.

Yoder was Becker's immediate supervisor at this time. She testified that she first became aware of the incident, when on Monday, April 1, 2019 she spoke with Mr. Bear about what happened. According to Yoder, Bear said that he did not want the matter to go any further, he did not want her to investigate and that he had taken care of the matter. She then talked to Becker about the incident but in light of Bear's assurance that he took care of the matter, she took no further action.

Yoder was subsequently interviewed by the two investigators. Their report indicates that in Yoder's conversations with Becker, Becker said that he was enraged at Sebastiano because he called him a "lazy Mexican." However, Yoder testified that Becker never actually said "lazy Mexican." She only assumed that was what was inferred by Sebastiano when he called the three men the three Amigos. She never saw the movie "Three Amigos" and thought the movie portrayed Mexicans in a disrespectful light. When she told the investigators that Becker was upset at being called "a lazy Mexican" she was referring to the fact he was upset at being called one of the "three Amigos." Yoder testified that she told Dr. Perry that Becker did not literally say he was upset at being called a lazy Mexican. On cross-examination, Yoder acknowledged that she and Becker are friends.

The investigators issued their report on May 22, 2019. They concluded that Becker violated Board Policy 3351, Healthy Workplace Environment and Policy 3281, Inappropriate Staff Conduct as well as Regulation 3150 entitled Discipline which includes, inflictions of abuse such as use of derogatory remarks, insults, verbal or physical conduct that a reasonable person would find threatening, intimidating of humiliating. They recommended by way of discipline that Becker be denied an increment and submit to sensitivity training. The District had Becker submit to a psychiatric evaluation to determine if he had anger management problems. The Psychiatrist's report indicates that Becker did not suffer from such a problem.

Acting Superintendent Perry, after reviewing the investigators' recommendations, determined that the conduct charged against Becker merited the filing of the instant tenure charges for dismissal. He believed Becker's statements were repeated and egregious and was alarmed by Becker's comment that he was upset about being called a lazy Mexican. Perry testified that up to ten percent of the District's students are Hispanics or students of Mexican descent included in that group.

ARGUMENT

The Board argues that the testimony of both Bear and Berglund was credible and consistent in establishing that Becker charged at Sebastiano in an unprovoked rage and threatened to fucking kill him if he ever called him an amigo again. There was no basis or justification for Becker's conduct. Sebastino's three amigos comment was made in a jovial and inoffensive way and Sebastino remained silent through most of the incident. Becker's conduct was unbecoming under any definition and qualifies as unacceptable under Policy 3351 Healthy Workplace Environment. It was verbal abuse, combined with physically aggressive conduct that a reasonable person would find threatening, intimidating or humiliating. The fact that Becker engaged in the conduct against someone who is not an employee of the District does make the conduct less unbecoming or less severe.

The evidence suggests that Becker's actions reveal that he was upset because he believed he was being called a lazy Mexican, a term he considered derogatory. Although Yoder tried to change her story at the hearing, she admitted that she told the Assistant Superintendent investigating the matter that Becker was PO'd (because he was upset at being called a lazy Mexican). Dr. Perry corroborates this; Yoder reported the same thing to him. The District has a significant Hispanic population with many students being of Mexican descent and the "lazy Mexican" comment motivated his actions on March 29.th The comment violated the spirit of Policy 3281, Inappropriate Staff Conduct, as well as the District's reasonable expectation of appropriate conduct from a tenured teaching staff member with direct responsibilities with supervision of students.

Becker's testimony is suspect because he did not tell the truth before this arbitrator. He was asked on direct-examination whether he had any

negative interactions with staff or students in any of the years of employment and he responded he did not. When questioned on cross-examination, Becker admitted that a grievance filed against him by a staff member resulted in a finding that he violated the District's Health Workplace Environment Policy, the same Policy involved in these charges. Becker attempted to deceive the arbitrator. His credibility is compromised in that he was not forth right with this tribunal.

Yoder has been protecting Becker. There is no harm in being someone's friend; however, Yoder never reported the March 29th incident to the Superintendent or Assistant Superintendent despite having knowledge of Mr. Becker's highly aggressive behavior. Becker should be dismissed given his aggravating circumstances surrounding his egregious conduct. Becker's conduct was not provoked by Sebastiano, rather the incident was initiated and escalated by Becker. He reacted suddenly, unpredictably and explosively to an innocuous comment made in a jovial manner. As to the psychiatrist evaluation, the psychiatrist did not observe Becker's enraged conduct nor did he review the evidence presented at the hearing which details the scope and intensity of Becker's behavior that day. Becker's comment involved a threat to kill. This is not simply a case of one employee hurling an insult against another.

The New Jersey Supreme Court has held that "progressive discipline can be bypassed when an employee engages in severe misconduct." In Re Herrmann, 192 N.J. 19, 33 (2007). Progressive discipline is not applicable when misconduct is severe or when it is unbecoming to the employee's position. Particularly when the employee's position involves safety and the misconduct causes risk of harm to persons. Some infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In Re Stallworth, 208 N.J. 182, 196 (2011). The totality of aggravating circumstances here makes it unnecessary to follow progressive discipline. Becker should be dismissed from his employment. The aggravating factors attendant to his conduct demand imposition of a lengthy suspension without pay in the event Becker is not dismissed.

The Association argues that the Employer bears the burden of proof in a tenure dismissal case. In order to avail, a Board must prove that it has just cause for termination of the employment of a tenured staff member. Just cause requires that the penalty not be disproportionate

given the totality of the circumstances, including mitigating factors. The punishment must fit the crime. Progressive discipline is an integral part of the just cause concept. The charges against Becker state both that he made the statement to Sebastiano "if you call me an amigo again, I will fucking kill you" and that he made a racist comment, telling Yoder that he was upset being called a lazy Mexican. The two incidents, constitute a violation of District principles. The Petitioner did not call Sebastiano as a witness although he was the recipient of Becker's remarks on March 29th. Nor did the Petitioner call the Assistant Superintendents Capello and DiPietropolo despite the fact that they investigated the allegations, on which the tenure charges were based and issued a report of their investigative findings and recommendations. Further, they did not call Caroline Yoder, despite the fact she is the only person with first hand knowledge of the racist comment allegedly made by Becker.

In Hoskins-Nnakwe v. State Operated School District of Newark (Agency Dkt. No. 125-6/17 (Decided 1/17) there were allegations of unbecoming conduct against a teacher including a teacher made disparaging and hurtful comments to students, used derogatory word like "stupid when referring to students, yelled at students, and spoke negatively about their ability to speak English fluently." The tenured charges were dismissed in their entirety primarily because neither the students who submitted written statements about the teacher's conduct nor the principal who instructed the students to prepare the written statements were presented by the school district to testify in the proceedings. The District did not provide a reason why these persons could not testify. Since they were not presented as witnesses, the teacher did not have an opportunity to cross-examine them. In the decision dismissing the tenure charges, the arbitrator noted "the District relied primarily on hearsay evidence to carry its burden of proving these charges." In the present case, neither the affected person Sebastino nor the persons who investigated the allegations against Becker testified.

Becker was unable to cross-examine Sebastino as to what, if anything, he heard on March 29th or anything else. Nor was Becker able to examine the Assistant Superintendents as to exactly how they conducted their investigation. The failure of the District to present Sebastino and the Assistant Superintendents at the hearing without any justification for their absence constitutes a violation of Becker's due process rights and accordingly the tenure charges against him must be dismissed.

In a tenure proceeding, "the nature and gravity of the offenses under all circumstances involved, as well as any evidence as to provocation, extenuation or aggravation and any harm or injuries effect which the teacher's conduct had on the maintenance of discipline and proper administration of the school system" must be considered. In Re Fulcomer, 93 NJ Super. 404, 422 (App. Div. 1967). Other factors to be considered include the impact on the teacher's teaching career, Respondent's teaching record and teaching ability and whether the Respondent had been disciplined in any manner by any Board prior to the date of the incidents involved in the charge. Tenure dismissal is reserved for the most serious of offenses committed by tenured teaching staff members typically involving a pattern of unbecoming conduct over an extended period of time and often involving inappropriate conduct towards a student (citations omitted). Conversely, tenure dismissal is not an appropriate remedy for single instances of lesser offenses not involving students. I/M/O Tenure Hearing of Hoskins-Nnakwe, *supra*. where a teacher verbally abused security guards, a reprimand was found to be appropriate remedy); I/M/O Tenure Hearing of Brenda Bruni v. Bernards Tp. A teacher fled the scene after being pulled over by police for speeding, a two-month suspension without pay found to be appropriate, 2/19/18 Dkt. No. 42-18 ; and In the Matter of the Arbitration of John McEntee, Jr. v. State Operated School District of Paterson, Dkt No. 374-17 (12/27/17) re a tenured staff member engaged in inappropriate interaction with vice-principal on one occasion including becoming verbally and physically aggressive a written warning found to be appropriate penalty). I/M/O Tenure Charges of Bruce Basetti, 8/23/19, Dkt. No. 75-4/19, the Petitioner Penns Grove-Carneys Point School District sought termination of a tenured teacher's employment, alleging unbecoming conduct; alleging that on one occasion in the classroom in the presence of a 7th grade student, the teacher said to himself something to the effect of "I'm done with these niggers or I'm not trying to deal with these niggers" while walking away from certain students who were disruptive. The charges allege that the use of any racial ephitate by a teacher is intolerable. There is no place in a school district for such conduct." The arbitrator dismissed the tenure charges in their entirety and imposed no penalty since the charges were based on a single incident committed by a teacher with a 14-year unblemished record of service in the school district. The arbitrator held, in part, as follows: "the Arbitrator rejects the Board's contention that Mr. Basetti cannot continue in his employment in a spotless record of 14 years with good evaluations. Balancing all these

factors, a discharge is too severe or appropriate for the offense." Basetti did not engage in unbecoming conduct and Basetti is not a racist.

On the basis of the decisions cited above, termination of Becker's employment is not warranted. If any discipline is warranted at all, such discipline should be limited to a written warning or reprimand. The charges in the present case pertain to a single verbal dispute for which Becker immediately apologized. Becker's conduct had no impact on the maintenance of discipline or improper administration of the school. Becker's termination would have a devastating impact upon his career.

DISCUSSION

There is no question that Becker made the statement, "call me amigo again and I'll fucking kill you." Accordingly, the Respondent's argument that the District's failure to call certain witnesses is fatal to its case is without merit.

There is no justification for Becker's outburst under any circumstances. However, the Board failed to prove its second allegation that Becker actually said he became upset because he was called a lazy Mexican. Yoder testified that she used that term when talking to the investigators because she misunderstood the nature of the movie the Three Amigos; she inferred that Becker was upset because he was called a lazy Mexican. Yoder testified that Becker never used that term. The Board has tried to discredit Yoder's testimony, claiming that Yoder is lying to protect Becker, who is a friend. While Yoder may have had a reason to lie, such a possibility does not establish that she did testify falsely under oath. The burden is on the District to prove each of its allegations, I find it failed to prove that Becker said that he was called a "lazy Mexican."

There is a dispute in the testimony between Berglund and Becker as to the tone in which Sebastino used the term "the Three Amigos". While Berglund heard the phrase as jovial manner, joviality might be perceived as sarcasm. Regardless, Becker's conduct under the circumstances was inexcusable. However, Superintendent Perry's decision to bring tenure charges against Becker was based at least in part on the "dirty Mexican" comment which Perry believed was alarming. However since it has not

been shown that Becker ever used the term "dirty Mexican" a major reason for the tenure charges has not been established.

Given Becker's ten year history of good evaluations and minimal prior disciplinary record[1], Becker's outburst, however egregious, is too isolated of an instance to warrant the loss of tenure. Becker underwent a psychiatric evaluation which did not find that Becker has anger management problems. This isolated, one-time outburst under these circumstances does not rise to an offense so unacceptable that a denial of tenure is warranted.

Nonetheless, Becker has to understand that this type of outburst is completely unacceptable. None of the arbitration awards cited by the respondent where discipline was reduced to a reprimand concerned conduct as serious as that of Becker's. For example, discipline was reduced to a reprimand in In the John McEntee, Jr. v. School District of Paterson *supra.* In that matter, a teacher and a vice-principal engaged in a heated exchange with raised voices and aggressive posturing but there were no overt threats of violence. By contrast Becker threatened to fucking kill Sebastiano. Such an overt threat cannot be minimized. Becker must reflect on the nature of this outburst . Becker shall serve a 30-day suspension as a direct consequence of his conduct.

AWARD

The Monroe Township School District failed to establish that Ronald Becker should be denied Tenure.

However Ronald Becker shall be suspended for a period of thirty (30) days

Edmund G. Gerber, Arbitrator
January 8, 2019

[1] While there is some testimony concerning a charge brought against Becker concerning a staff member, which Becker failed to acknowledge on direct testimony it is unclear from the record how serious his conduct was and I cannot assume that it was anything but a minor misstatement on his part which I find to be of minor importance.

STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of

TENURE HEARING of RONALD BECKER/
SCHOOL DISTRICT OF THE TOWNSHIP
OF MORRIS, GLOUCESTER COUNTY

DECISION ON MOTION
TO DISMISS

Agency DKt. No. 211-8/19

Before:
Edmund Gerber, Arbitrator

Appearances:
For the Respondent:
Carol Smeltzer, Esq.
New Jersey Principals and Supervisors Association

For the Petitioner:
Robert A. Muccilli, Esq.
Capehart and Scatchard, P.A.

The Respondent, Robert Becker, having filed a Motion to Dismiss the Tenure Charges against him, seeks to require the Petitioner, the Monroe Township Board of Education, to reinstate him to his position as Assistant Principal of Athletics/Activities with full back pay and benefits.

Specifically, the Respondent argues that the Statement of Evidence, sworn to by the Interim Superintendent of Schools Dr. Richard Perry and submitted by the Petitioner in support of the tenure charges, is deficient and fails to comply with N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(b) (1). Dr. Perry did not witness the alleged incidents forming the basis of these tenure charges, nor did he participate in the investigation conducted by district personnel related to this incident. Rather, in his sworn Statement of Evidence, he relied upon signed but not sworn to reports of school district investigators. The Respondent argues that, since these reports were not sworn to, the Statement of Evidence is fatally flawed.

APPENDIX A

N.J.S.A. 18A:6-11 states, in pertinent part, that:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the Secretary of the Board in writing, and a written Statement of Evidence under oath to support such charge shall be presented to the Board. The Board of Education shall forthwith provide such employee with a copy of the charge, a copy of the Statement of Evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. ...

N.J.A.C. 6A:3-5.1(b) (1) states that:

> In all instances of the filing and certification of tenure charges, except charges filed against a teacher, principal, assistant principal or vice principal for reasons of inefficiency pursuant to N.J.S.A. 18A:6-17.3, the following procedures and timelines shall be observed:
>
> 1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the Secretary of the District Board of Education or with the State District Superintendent, accompanied by a supporting Statement of Evidence, both of which shall be executed under oath by the person(s) instituting such charges.

The Respondent relies on three prior arbitration decisions.

In IMO Kevin Karp/Barnegat Township Board of Education Dkt. No. 102-4/16 (5, 20/16) the undersigned dismissed a tenure charge where the Statement of Evidence solely relied upon unsigned reports of the administration members who conducted the investigation. The decision rested upon the fact that the statement of evidence relied solely on unsigned documents, not whether such reports were sworn to.

In IMO Trongone/School District of Gloucester City Dkt. No. 173-6/16 (9/16/16) the Statement of Evidence relied upon an unsigned investigator's report. Although the Arbitrator did note that the report was not sworn to, I am not persuaded that that fact was persuasive in the Arbitrator's decision.

In IMO Brett Fetty/Camden County Technical School Dkt. No. 173-7/19 (9/3/19) the Arbitrator in dismissing the school districts tenure charge did admonish the district that if it sought to re-file its tenure charges it would be expected to submit sworn statements in support of its charge. But that was in response to the conduct of the district which first relied upon anonymous statements in its

Statement of Evidence. Then, after the respondent filed a motion to dismiss, the district attempted to amend its charge by submitting the names of staff member who made anonymous statements. Such facts do not exist here.

All these cases turn on the fact that unsigned statements are simply not probative and have little if any value as evidence. Accordingly a sworn Statement of the Evidence based solely upon unsigned statements is essentially meaningless. By contrast, the signed reports referenced by the Statement of Evidence in the instant matter though not sworn are signed and may very well have evidentiary value.[1] Here, the facts alleged by the Petitioner are clear and are supported by signed statements.

N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(b) (1) do not say that every relevant fact alleged by a petitioner must be supported by a sworn statement. Rather, the statue and regulations only require a sworn Statement of the Evidence by the petitioner. Such a statement demonstrates the petitioner has reasonable grounds to believe the allegations of the tenure charge are true. The Statement of Evidence of Richard Perry submitted by the Petitioner satisfies that requirement

The Motion to Dismiss Is denied.

Edmund Gerber, Arbitrator
October 16, 2019

[1] Hearsay evidence is admissible in administrative hearings, subject to the *residuum rule.*

32-20 LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

January 24, 2020

Vallinah O'Neal, *pro se*
4 Mercury Road
Edison, New Jersey 08817

Alyssa K. Weinstein, Esq.
Scarinci Hollenbeck
One River Centre
331 Newman Springs Road
Building 3, Suite 310
Red Bank, New Jersey 07701

Re: *Vallinah O'Neal, on behalf of Octavian Bell v. Board of Education of the Township of Edison, Middlesex County, Agency Dkt. No. 107-5/19*

Dear Parties:

I have reviewed the petition of appeal, as well as the materials filed in connection with the Board's motion to dismiss the petition in the above-referenced matter. Upon review of the submissions, I have determined to dismiss this matter for failure to state a claim upon which relief may be granted.

Petitioner contends that her now-22-year-old son who suffers from autism did not receive his high school diploma, despite having graduation pictures and school identification cards indicating his graduation year as 2015. Petitioner claims that by law, her son was supposed to receive his diploma at age 17. The Board advises that, while Octavian Bell completed his 12th grade year in June 2015, he only earned 115 of the 120 credits required by *N.J.A.C.* 6A:8-5.1 for graduation, including only 15 of the required 20 English Language Arts credits. The Board points out that Mr. Bell's insufficient credits were due in large part to his 62 absences during the 2014-15 school year and his "Incomplete" grades in Language Arts, Math and History. The Board explains that Mr. Bell was permitted to continue attending school for the 2015-16 school year, but did not attend any days, and petitioner disenrolled him on October 8, 2015.

The Commissioner notes that despite petitioner's claims, requirements for graduation are governed by *N.J.A.C.* 6A:8-5.1 *et seq.* There is no requirement that a student automatically receive a diploma at age 17, nor do identification cards or cap and gown school pictures indicate that a diploma has been earned. As such, petitioner has failed to state a claim upon which relief may be granted.

Accordingly, the Board's motion to dismiss the petition is GRANTED, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/JKH/BCM

VIA E-MAIL ONLY

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

New Jersey Commissioner of Education

Final Decision

A.M.-V. and D.V. on behalf of minor child, M.V.

Petitioners,

v.

Board of Education of the Borough of Hasbrouck Heights, Bergen County,

Respondent.

Synopsis

Pro se petitioners alleged that the respondent Board violated its Policy 2260, Affirmative Action Program for School and Classroom Practices, by failing to respond to petitioners' complaint within 45 calendar days. Policy 2260 governs the equal and bias-free access for all students to school facilities, courses, activities and services regardless of race, creed, color, national origin, etc. Petitioners' Affirmative Action complaint alleged that the Board was not responsive to emails and had instituted a communication protocol to temporarily block petitioners' emails, but did not allege any act by the District that is applicable or relevant to District Policy 2260. The Board filed a motion to dismiss in lieu of an answer to the petition.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in dispute in this case, and the matter is ripe for summary decision; the issue here is whether the Board violated its Policy 2260, Affirmative Action Program for School and Classroom Practices; the Affirmative Action complaint does not allege an actual violation of the District's Affirmative Action Policy, but instead alleges that the Board did not render its decision on the petitioners' appeal within the forty-five day time frame found in the policy; however, the language found in the policy states that the Board will render a written decision no later than forty-five calendar days after the appeal is filed, or the date the hearing was held, whichever occurred later; as the Board's written decision in this matter was issued on the same day as the Board hearing, it was filed well within forty-five days from the date of the hearing; further, the petitioners' complaint did not allege an actual violation of Policy 2260; rather, petitioners were upset with the manner and speed with which their voluminous emails and telephone calls to District staff were answered, and with the communication protocol itself, which was put into place due to the excessive and aggressive nature of petitioners' communications with District staff; nothing in Policy 2260 would prevent the District from imposing a communication protocol unless the protocol was based on one or more of the protected characteristics enumerated in the Policy; the communication protocol imposed on petitioners was not, however, put in place because of any protected characteristic, nor do petitioners allege that it was. The ALJ granted the Board's motion for summary decision and ordered the petitioners' appeal dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case, and the petition was 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.

January 23, 2020

33-20

OAL Dkt. No. EDU 14556-19
Agency Dkt. No. 237-9/19

New Jersey Commissioner of Education

Final Decision

A.M.-V. and D.V., on behalf of minor child, M.V.,

Petitioners,

v.

Board of Education of the Borough of Hasbrouck Heights, Bergen County,

Respondent.

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

Upon such review, the Commissioner agrees with the Administrative Law Judge that the Board did not violate Board Policy 2260 "Affirmative Action Program for School and Classroom Practices" in instituting a communication protocol limiting communications between petitioners and District employees. The protocol was not based on any protected characteristic of petitioners – such as race, gender, or socioeconomic status – and was instead put into place due to the excessive and aggressive nature of petitioners' communications with District staff. Additionally, the Board's written decision was timely rendered in accordance with Board Policy 2260, as it is dated the same day as the Board hearing.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/20
Date of Mailing: 1/24/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 14556-19
AGENCY DKT. NO. 237-9/19

A.M-V. AND D.V. ON BEHALF OF M.V.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, BERGEN COUNTY,
Respondents.

A.M-V. and D.V., parents of M.V., Petitioners, pro se

Jessica Kleen, Esq., for Respondent (Machado Law Group attorneys)

Record Closed: December 10, 2019 Decided: December 19, 2019

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a pro se Petition of Appeal, dated September 10, 2019, with New Jersey Department of Education, Office of Controversies and Disputes, alleging that Respondent violated its Affirmative Action Policy.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on October 10, 2019, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

A prehearing conference was held on October 29, 2019, and a prehearing order, dated October 31, 2019, was entered by the undersigned.

Respondent filed a motion for summary decision in lieu of an answer to the petition of appeal with the Office of Controversies and Disputes on September 30, 2019. Pursuant to the prehearing order, Petitioners filed their reply thereto with the OAL on November 1, 2019. Respondent was given to December 10, 2019 to file any reply. No reply was filed and the record was closed on December 10, 2019.

FACTUAL DISCUSSION

1. Petitioners filed a petition alleging that the District Respondent violated District Policy 2260, Affirmative Action Program for School and Classroom Practices, by failing to respond to their complaint within 45 calendar days.

2. District Policy and Regulation 2260 governs the equal and bias-free access for all students to all school facilities, courses, programs, activities, and services, regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, gender identity or expression, religion, disability, or socioeconomic status. (Messery Cert., Ex. A)

3. Petitioners had filed an Affirmative Action Complaint with Respondent on July 11, 2019, alleging that Respondent was not responsive to emails and that Respondent had instituted a communication protocol to temporarily block Petitioners' emails. (Petitioners' reply to motion)

4. The Petition and the Affirmative Action Complaint do not allege any act by the District that is applicable or relevant to the District Policy and Regulation 2260. (Messery Cert., Ex. A)

5. The Petitioners underlying complaint concerns the District's use of a communication protocol which temporarily blocked the Petitioners' ability to email

certain District staff due to the excessive and aggressive nature of Petitioners' emails to said District staff.

6. Petitioners use of email was excessive and often redundant. A review of the Petitioners' reply to the instant motion documents the extraordinary number of emails sent. (See also Gibbons Cert.)

7. Same had resulted in several teachers feeling threatened and/or harassed by the Petitioners and caused disruptions to the orderly operation of the school.

8. The Communication Protocol was only in place at the end of the 2018-2019 school year and was removed at the beginning of the 2019-2020 school year.

9. During the duration of the Communication Protocol, the Petitioners were permitted to email Dr. Helfant - the Superintendent, Ms. Messery - the Business Administrator, Ms. Gibbons - the Director of Special Education and the entire Board of Education.

10. Due to a technical issue some or all Board members may have been unintentionally blocked for a short period of time. Same was quickly resolved.

11. Petitioners could not email individual teachers during the duration of the Communication Protocol. Petitioners could communicate with the teachers through classroom programs, such as Google and Dojo, as well as by phone and in-person meetings.

12. Every phone call from the Petitioners was returned by the District within an appropriate amount of time. Although some phone calls may not have been returned on the same day, same is not required of staff, unless the call is of an urgent nature.

13. In July of 2019, the Petitioners requested an investigation regarding the Communication Protocol by filing an Affirmative Action Complaint.

14. In response, Lincoln School Principal, Mr. Colangelo, performed an investigation regarding the matter and found same not to violate the District's Affirmative Action Plan.

15. Thereafter, on or about July 22, 2019, the Petitioners requested a meeting with the Board regarding their complaint. (Messery Cert., Ex. B)

16. The following day, on or about July 23, 2019, in response to same, the District proposed a meeting between the Board and the Petitioners on July 25, 2019 at 6:15 p.m. However, on or about July 24, 2019, due to a scheduling conflict, same was rescheduled by the Board to August 29, 2019 at 4:30 p.m. (Messery Cert., Ex. C)

17. On or about July 24, 2019, the Petitioners stated that they will not be able to attend the August 29, 2019 meeting. (Messery Cert., Ex. D)

18. In response, on the same date, the District proposed for the Board to meet with the Petitioners on Thursday, September 26, 2019 at 6:15 p.m. (Messery Cert., Ex. E)

19. Petitioners responded that they are also unable to attend the September 26, 2019 meeting. (Messery Cert., Ex. F)

20. The Board was scheduled to issue a determination regarding the Petitioners' complaint at the August 29, 2019 Board meeting. However, same was postponed until the following Board meeting, on September 26, 2019, due to the unavailability of all Board members at said meeting, and in light of the Petitioners request that all Board members be present when issuing a determination. (Messery Cert., Ex. G)

21. The District, on or about September 26, 2019, as requested by the Petitioners, issued a written decision regarding the complaint filed by the Petitioners. (Messery Cert., Ex. H)

22. The Board voted to deny the appeal. (Messery Cert., Ex. H)

23. The Board determined that there is no information to suggest that the temporary Communication Protocol was put in place because of any discriminatory reason based on race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, gender identity or expression, religion, disability, or socioeconomic status. (Messery Cert., Ex. H)

24. The Board further decided that the information supports a finding that the Communication Protocol was put into place due to the excessive and aggressive nature of Petitioners emails to District staff. (Messery Cert., Ex. H)

25. Within their decision, the Board also noted that there is no legal right to email District staff, and the Board has the obligation and authority to take steps to ensure the safe and orderly operations of the schools. (Messery Cert., Ex. H)

26. The Board further found that at the time that the Petitioners were required to follow the Communication Protocol, their emails were excessive, caused disruptions to the orderly operation of the school, and were unnecessary in order for Petitioners to have access to their child and his educational programming. (Messery Cert., Ex. H)

27. A copy of the Board's decision has been provided to the Petitioners.

28. A review of both Petitioners' Affirmative Action Complaint and the Petition Petitioners do not allege an actual violation of the District's Affirmative Action policy. Rather, Petitioners are upset with the manner and speed with which their voluminous emails are answered; with the speed with which their telephone calls are answered; and, with the communication protocol initiated by the District.

29. The Board rendered its written decision of Petitioners' appeal to the Board on September 26, 2019. (Messery Cert., Ex. H)

30. Petitioners filed their appeal of the Superintendent's denial of their Affirmative Action Complaint via email on July 22, 2019. (Messery Cert., Ex. B)

31. Forty-five days from July 22, 2019 is September 5, 2019.

32. The Board's Affirmative Action Policy requires the Board to render a written decision of an appeal within forty-five days after the appeal is filed or the hearing held, whichever is later. (Messery Cert., Ex. A)

33. The hearing on the appeal was held on September 26, 2019, and the written decision on the appeal was the same date. (Messery Cert., Ex. H)

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

The issue herein is whether or not the Board violated its own policy: District Policy 2260, Affirmative Action Program for School and Classroom Practices.

Neither the Affirmative Action Complaint nor the petition filed with OSEP allege an actual violation of the District's Affirmative Action Policy, other than alleging the Board did not render its decision on Petitioners' appeal within the forty-five day time frame found in the Policy.

While it is true the written decision was not within forty-five days from the date the appeal was filed, it was well within forty-five days from the date of the hearing. In fact, the written decision is dated the day of the hearing. This is undisputed.

District Policy 2260, Affirmative Action Program for School and Classroom Practices, at C.10 of the District Regulations states:

> The Board will render a written decision no later than forty-five calendar days after the appeal was filed or the hearing held, **whichever occurred later**. Copies of the decision will be given to all parties. (emphasis added)

Further, nothing in District Policy 2260 would prevent the District from imposing a communication protocol unless said protocol was based upon race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, gender identity or expression, religion, disability, or socioeconomic status. The communication protocol imposed by the District was not put in place because of any of the above, nor do the Petitioners allege it was.

Based upon the above, I **CONCLUDE** there are no genuine issues of material facts and Respondent is entitled to prevail as a matter of law.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **GRANTED**; and

It is further **ORDERED** that Petitioners' pro se Petition of Appeal is dismissed with prejudice.

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

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

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

December 19, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

List of Moving Papers

For Petitioner:

Response to motion for summary decision with attachments

For Respondent:

Brief in Support of Motion for Summary Decision

Certification of Jessica Kleen, Esq., with Exhibits 1 through 3

Certification of Janine Gribbin, Director of Special Services

Certification of Dina Messery, School Business Administrator, with Exhibits A through H

Target 01/17/20 Due 02/03/20

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

33 Washington Street
Newark, NJ 07102
(973) 648-6008

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on December 20, 2019



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 14556-19
AGENCY DKT. NO. 237-9/19

A.M-V. AND D.V. ON BEHALF OF M.V.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, BERGEN COUNTY,
Respondents.

A.M-V. and D.V., parents of M.V., Petitioners, pro se

Jessica Kleen, Esq., for Respondent (Machado Law Group attorneys)

Record Closed: December 10, 2019 Decided: December 19, 2019

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a pro se Petition of Appeal, dated September 10, 2019, with New Jersey Department of Education, Office of Controversies and Disputes, alleging that Respondent violated its Affirmative Action Policy.

certain District staff due to the excessive and aggressive nature of Petitioners' emails to said District staff.

6. Petitioners use of email was excessive and often redundant. A review of the Petitioners' reply to the instant motion documents the extraordinary number of emails sent. (See also Gibbons Cert.)

7. Same had resulted in several teachers feeling threatened and/or harassed by the Petitioners and caused disruptions to the orderly operation of the school.

8. The Communication Protocol was only in place at the end of the 2018-2019 school year and was removed at the beginning of the 2019-2020 school year.

9. During the duration of the Communication Protocol, the Petitioners were permitted to email Dr. Helfant - the Superintendent, Ms. Messery - the Business Administrator, Ms. Gibbons - the Director of Special Education and the entire Board of Education.

10. Due to a technical issue some or all Board members may have been unintentionally blocked for a short period of time. Same was quickly resolved.

11. Petitioners could not email individual teachers during the duration of the Communication Protocol. Petitioners could communicate with the teachers through classroom programs, such as Google and Dojo, as well as by phone and in-person meetings.

12. Every phone call from the Petitioners was returned by the District within an appropriate amount of time. Although some phone calls may not have been returned on the same day, same is not required of staff, unless the call is of an urgent nature.

13. In July of 2019, the Petitioners requested an investigation regarding the Communication Protocol by filing an Affirmative Action Complaint.

14. In response, Lincoln School Principal, Mr. Colangelo, performed an investigation regarding the matter and found same not to violate the District's Affirmative Action Plan.

24. The Board further decided that the information supports a finding that the Communication Protocol was put into place due to the excessive and aggressive nature of Petitioners emails to District staff. (Messery Cert., Ex. H)

25. Within their decision, the Board also noted that there is no legal right to email District staff, and the Board has the obligation and authority to take steps to ensure the safe and orderly operations of the schools. (Messery Cert., Ex. H)

26. The Board further found that at the time that the Petitioners were required to follow the Communication Protocol, their emails were excessive, caused disruptions to the orderly operation of the school, and were unnecessary in order for Petitioners to have access to their child and his educational programming. (Messery Cert., Ex. H)

27. A copy of the Board's decision has been provided to the Petitioners.

28. A review of both Petitioners' Affirmative Action Complaint and the Petition Petitioners do not allege an actual violation of the District's Affirmative Action policy. Rather, Petitioners are upset with the manner and speed with which their voluminous emails are answered; with the speed with which their telephone calls are answered; and, with the communication protocol initiated by the District.

29. The Board rendered its written decision of Petitioners' appeal to the Board on September 26, 2019. (Messery Cert., Ex. H)

30. Petitioners filed their appeal of the Superintendent's denial of their Affirmative Action Complaint via email on July 22, 2019. (Messery Cert., Ex. B)

31. Forty-five days from July 22, 2019 is September 5, 2019.

32. The Board's Affirmative Action Policy requires the Board to render a written decision of an appeal within forty-five days after the appeal is filed or the hearing held, whichever is later. (Messery Cert., Ex. A)

33. The hearing on the appeal was held on September 26, 2019, and the written decision on the appeal was the same date. (Messery Cert., Ex. H)

District Policy 2260, Affirmative Action Program for School and Classroom Practices, at C.10 of the District Regulations states:

> The Board will render a written decision no later than forty-five calendar days after the appeal was filed or the hearing held, **whichever occurred later**. Copies of the decision will be given to all parties. (emphasis added)

Further, nothing in District Policy 2260 would prevent the District from imposing a communication protocol unless said protocol was based upon race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, gender identity or expression, religion, disability, or socioeconomic status. The communication protocol imposed by the District was not put in place because of any of the above, nor do the Petitioners allege it was.

Based upon the above, I **CONCLUDE** there are no genuine issues of material facts and Respondent is entitled to prevail as a matter of law.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **GRANTED**; and

It is further **ORDERED** that Petitioners' pro se Petition of Appeal is dismissed with prejudice.

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

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

APPENDIX

List of Moving Papers

For Petitioner:

Response to motion for summary decision with attachments

For Respondent:

Brief in Support of Motion for Summary Decision

Certification of Jessica Kleen, Esq., with Exhibits 1 through 3

Certification of Janine Gribbin, Director of Special Services

Certification of Dina Messery, School Business Administrator, with Exhibits A through H

34-20

OAL Dkt. No. EDU 06616-19
Agency Dkt. No. 70-4/19

New Jersey Commissioner of Education

Final Decision

Thomasina Jones,

Petitioner,

v.

Board of Education of the City of Bridgeton, Cumberland County,

Respondent.

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

Paragraph 2 of the Agreement references certain actions to be taken by the parties within ten (10) calendar days of receipt of an executed version of the within release. This time frame has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/20
Date of Mailing: 1/24/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06616-19
AGENCY DKT. NO. 70-4/19

THOMASINA JONES,
Petitioner,
v.
CITY OF BRIDGETON BOARD OF EDUCATION, CUMBERLAND COUNTY,
Respondent.

Robert P. Merenich, Esq., for petitioner (Gemmel, Todd and Merenich, attorneys)

Albert K. Marmero, Esq., for respondent (Grace, Marmero, and Associates, L.L.P., attorneys)

Record Closed: December 2, 2019 Decided: December 12, 2019

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on May 15, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document and the attached minutes of the Bridgeton Board of Education Public Action Meeting held on October 8, 2019.

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

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

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

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

12/12/19
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 12-19-19

Date Mailed to Parties: 12-19-19

JSK/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on November 18, 2019

RECEIVED
2019 NOV 18 A 10:49
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

GENERAL RELEASE

1. For good and valuable consideration in the amount of Three Hundred Seventy Five Thousand Dollars ($375,000.00) (the "settlement sum"), and other sufficient consideration stated below, and intending to be legally bound hereby, Dr. THOMASINA JONES, her agents, attorneys, personal representatives, beneficiaries, heirs, successors and assigns (collectively referred to as "Jones" or "plaintiff"), hereby releases and forever discharges the CITY OF BRIDGETON BOARD OF EDUCATION and ANGELIA EDWARDS, its past, current and future board of education members, officers, directors, trustees, board of trustees/directors, shareholders, partners, members, administrators, employees, agents, attorneys, personal representatives, insurance carriers including but not limited to SUMMIT RISK SERVICES, parent, affiliated and/or subsidiary companies, predecessors, successors and assigns (collectively referred to as "Defendant") from any and all claims, demands, damages, sums of money, costs, expenses, attorneys' fees, actions, rights, causes of action, agreements, promises, obligations or liabilities of any kind whatsoever, whether known or unknown, fixed or contingent, suspected or unsuspected, which Jones ever had, now has or hereafter can, shall or may have against any of them for or upon any matter, cause or thing whatsoever from the beginning of the world to the day and date of this Release, including, but not limited to each claim or matter which was asserted or which could have been asserted by Jones relating to her employment with the Defendant and all claims/causes of action which were asserted or which could have been asserted by Jones in her lawsuit filed in the Superior Court of New Jersey, Docketed as No. CUM-L-110-19 and in the Commissioner of Education for the State of New Jersey, Docketed as OAL: EDU 06616-2019 S and/or for any other reason whatsoever (hereinafter the "claims").

2. The settlement sum will be paid as follows: $375,000.00 to "Dr. Thomasina Jones and Gemmel Todd & Merenich, P.A" within ten (10) calendar days of receipt of an executed version of this Release. Jones shall supply Defendant with a typed IRS Form W-9 in conjunction with the Settlement Payment to be made by Defendant. Jones shall be issued an IRS Form 1099 in connection with the payment. Except as otherwise provided herein, Jones agrees to be solely responsible for and legally bound to make payment of the taxes which any taxing authority determines are owed by Jones on the payments noted above. In the event that any claim is made against Jones for taxes, penalties and/or interest due with respect to the payments noted above, except as otherwise provided within this Agreement, Jones agrees to indemnify and hold Defendant harmless against any liability for such taxes, penalties and/or interest which may be due as a result of Jones failure to pay appropriate taxes on such payments. Nothing herein shall be construed to render Jones responsible for any employment taxes, insurance or related payments subsequently determined to be the sole responsibility of the Defendant.

Plaintiff and/or her counsel shall cause to be filed with the Court any and all required documents to withdraw and/or dismiss the claims with prejudice and without costs. Jones understands and agrees that she would not otherwise be entitled to the consideration provided to her as set forth in paragraph above and that her Release of Defendant includes, but is not limited

to, any claims which have been asserted or could have been asserted now under any Federal, State or Local Laws or Ordinances as amended, including, but not limited to, any claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1991, 42 U.S.C. §2000(e) et seq. ("Title VII"), 42 U.S.C. §1981, 42 U.S.C. §1983, The Americans with Disabilities Act, 42 U.S.C. §12,101 et seq. ("ADA"), The Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. ("ADEA"), all applicable New Jersey Statutes governing discrimination in employment, defamation, overtime compensation, the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq ("CEPA"), the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq ("NJLAD"), The New Jersey Civil Rights Act, N.J.S.A. 10:6-2 et seq ("NJCRA"), the New Jersey Family Medical Leave Act, N.J.S.A. 34:11B-1, et seq ("NJFMLA"), The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), The Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), The Equal Pay Act, 29 U.S.C. § 206(d)(1) ("EPA"), The Family and Medical Leave Act, ("FMLA") any and all Employee/Whistle blower Protection Acts, any applicable Local Ordinance, any contracts between Jones and the Defendant including but not limited to any claims arising from any tenure rights which may have accrued in in Plaintiff's employment with Defendant, all claims for breach of the covenant of good faith and fair dealing and any other law or right created by statutes, regulation or common law now or hereafter recognized, of any nature whatsoever and all claims for counsel fees and costs. Jones understands that by signing this Release, she foregoes any and all rights to sue Defendant and/or to pursue appeals from any adverse judgment for any cause or liability arising on or before the date of this Release for retaliation, race, gender, age, national origin, disability and/or religious discrimination, hostile work environment, sexual harassment, sexual orientation, gender stereotyping any claims under applicable New Jersey laws or ordinances, Title VII, ADA, ERISA, FLSA, EPA, CEPA, NJLAD, NJCRA, NJFMLA, FMLA, whistle blower and/or employee protection statutes, retaliation, contract, tort, defamation, invasion of privacy, negligence and for any other reason whatsoever. Jones covenants that, as of the date of her execution of this Release/Agreement, other than any injury which she has already disclosed which includes emotional distress and anxiety with medical and psychological treatment for same, she does not suffer from any injury or illness related to her employment with Defendant, including any injury compensable under the Workers Compensation Act and that her earning capacity is not impaired by any work-related injury or illness. However, notwithstanding the provisions of this paragraph, it is understood and agreed that Jones is not waiving ordinary claims for accrued and vested benefits under any applicable qualified plan(s).

3. Jones hereby acknowledges that she has been advised in writing to seek the advice of counsel prior to signing this Release and that she has obtained the advice of competent, private counsel to advise her in the negotiation and consummation of this Settlement of the claims. Jones also acknowledges that she has been given a reasonable period of time to review this Release and that she has taken all of the time she needs or wants to review the Release. Accordingly, Plaintiff agrees that she has entered into this Release and Settlement of the claims knowingly and voluntarily.

4. Except for the inclusion of same in the amount referenced in the proceeding paragraphs above, Jones and Defendant shall pay their own expenses, including, without limitation, court costs, legal and expert fees, incurred in the prosecution and defense of the claims and incurred in the negotiation, preparation and execution of the Release. Jones specifically acknowledges that her case, having been brought on whistle blowing allegations under CEPA, she is not entitled to an award of attorneys' fees as a prevailing plaintiff under CEPA in addition to the Settlement Sum provided in Paragraph One (1). Plaintiff specifically acknowledges the Settlement Sum is inclusive of legal fees and costs in the amount of $126,132.38 incurred in the prosecution of her CEPA claim.

5. In addition to specifically and unconditionally releasing Defendant from any and all claims which arose up to and including the date of this Release, Jones further acknowledges with respect to her release of claims under the Age Discrimination in Employment Act, as amended, and the Older Workers Benefit Protection Act, as amended, (collectively "ADEA") that:

(a) I have waived my claims knowingly and voluntarily in exchange for the consideration, compensation and benefits provided in accordance with this Release, and that I would not otherwise have been entitled to such consideration, compensation and benefits.

(b) I am advised by this Section 5(b) by Defendant to consult with an attorney in connection with this Release and before signing the Release and I have consulted with my attorney of choice.

(c) I have been given a period of a full twenty-one (21) days to review and consider signing the original version of this Release. I understand and acknowledge that I am not required to use that full 21-day period before signing this Release, and that if I elect to sign the Release in less than that time, I do so voluntarily in order to obtain the benefits of the Release sooner.

(d) I understand that I may revoke my waiver of claims under the ADEA for a period of seven (7) days following the date I sign this Release and that my waiver of ADEA claims will not become effective until the seven-day revocation period has expired.

(e) If I revoke my waiver of ADEA claims in accordance with Section 5(d) above, I will not be entitled to any of the compensation or consideration detailed herein in accordance with the Release.

(f) I acknowledge and understand that Defendant agrees that the Release provided by me does not include a release for claims under the ADEA for employment matters arising after the date I sign the Release.

(g) I acknowledge and agree that this Release complies in all respects with Section 7(f) of the ADEA, that is, the waiver provisions of the Older Workers Benefit Protection Act.

6. Jones affirmatively acknowledges and warrants that she has not filed any other complaint or claim against the Defendant with any local, state or federal court regarding her employment

with the Defendant and that she will not do so in the future unless it is based on an alleged breach of this Agreement or for any conduct of Defendants which may take place after the execution of this Agreement. Jones understands that nothing in this Release bars her from assisting in an investigation of a charge or complaint of unlawful employment discrimination by an Agency. If any Agency or court has now assumed or later assumes jurisdiction of any complaint or charge on behalf of Jones against the Defendant, Jones will disclaim entitlement to any relief for her personal benefit or the benefit of her heirs or assigns.

7. This Release will not become effective or be enforceable, and Jones will not be entitled to any compensation, consideration or benefits as detailed herein, until Jones has provided this signed Release to Defendant's counsel, the seven-day revocation period has expired and Jones has not revoked this Release during the seven-day revocation period. To be effective, any such revocation must be in writing and delivered to Albert Marmero, Esquire –GRACE MARMERO & ASSOCIATES, 44 Euclid Street, Woodbury, NJ 08096; by the close of business on the seventh day after signing the Release, and such revocation must expressly state Jones's intention to revoke such Release. If Jones revokes this Release, she will not be entitled to any compensation, consideration or benefits detailed in this Release. If Jones does not timely revoke such Release, the eighth day following her signing of the Release shall be deemed the "Effective Date" of the Release. Jones acknowledges and agrees that this Agreement is subject to a vote of approval by the Defendant's Board of Education.

8. It is agreed and understood that the merits, claims and any allegations of the parties and all other matters which have or might have existed as of the date of the filing of Jones's Complaint or have been asserted under any federal, state or local law, decision, ordinance, regulation or contract remain disputed, and the agreement to resolve or settle any disputes or the claim is made on the understanding that in entering a settlement no party concedes the merits of the other party's claims or defenses. Accordingly, the agreement to settle the claim constitutes a compromise and shall not be construed as or offered in any forum or proceeding as evidence of any admission of or acknowledgment of liability or fault of Defendant. Further, it is specifically understood that Defendant denies any and all liability or violation of law in connection with any of the aforesaid claims or matters, or any other matters involving or implicating Jones.

9. Jones affirms she is not a Medicare or Medicaid Beneficiary (defined as any claimant for whom Medicare has paid Conditional Payments for the treatment of injuries arising out of or related to the Released Matters) as of the date of this Agreement and no conditional payment has been made to or in his/her behalf by Medicare or Medicaid. Jones further represents that she is not enrolled in a Medicare program and was not enrolled at the time of her employment or anytime thereafter through the date of this Agreement. Jones further represents and warrants that no Medicaid payments have been made to or on behalf of Jones and that no liens, claims, demands, subrogated interests, or causes of action of any nature or character exist or have been asserted arising from her employment with Defendant. Jones further agrees that she, and not Defendant

shall be responsible for satisfying all such liens, claims, demands, subrogated interests, or causes of action that may exist or have been asserted or that may in the future exist or be asserted.

It is understood and agreed that the information provided below will be provided to The Centers for Medicare and Medicaid Services pursuant to The Medicare, Medicaid and SCHIP Extension Act of 2007.

Full Name as it appears on your Social Security Card:

Thomasina Jones

Social Security Number: 143-64-1015

Address:

974 Landis Avenue
Pittsgrove, NJ 08318

Date of Birth: 7/24/63

Medicare Health Insurance Claim Number (HICN) (if applicable):

Gender:

Female

10. This Release shall be governed by and construed in accordance with the laws of the State of New Jersey with the exception of its choice of law principles, and except as preempted by federal law. Should any provision of this Release be determined by any court to be illegal, invalid or unenforceable, the validity of the remaining parts, terms or provisions shall not be effected and the illegal, invalid or unenforceable part, term, or provision will be deemed not to be a part of this Release. The language of all parts of this agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties hereto.

11. While the settlement sum is not classified as a tenure buy out but instead a release of all Plaintiff's claims as described above, Jones agrees that she shall not, at any time in the future, seek, nor accept, any matter of employment with the Bridgeton Board of Education. Jones agrees that she is waiving and relinquishing any and all tenure rights for which she had attained while employed with Defendant for any and all positions including but not limited to Superintendent and Assistant Superintendent. Defendant waives any contractually and/or legally required notice period for Jones to end her employment with Defendant. Jones also agrees that she is waiving, and releasing the City of Bridgeton Board of Education from, any and all claims related to accrued sick time and vacation time, if any.

12. It is further understood that the terms of this settlement and release shall not be affirmatively disclosed to any person or entity unless as otherwise required by law. This requirement shall not prohibit the parties from disclosure to their accountants, financial advisors, and/or attorneys. Jones agrees that neither she nor her spouse, partner, immediate family members,

dependents, heirs, executives, administrators, predecessors, successors, assignees, attorneys, or representatives will publish, publicize or disseminate, or cause to be published, publicized or disseminated, to the news, social media, communications media or any agent thereof, or to any online/internet based forum, or to any employees, friends or any other third party, any of the following: the amount of the Settlement Payment described herein, any offers or counteroffers leading to the Settlement Payment, and/or any of the terms or conditions of this Agreement. The only exception to this Paragraph 12 is that Jones may share the amount of the Settlement Payment with her spouse, attorney and/or tax preparer for tax purposes.

13. Jones acknowledges that this Agreement may be subject to disclosure pursuant to New Jersey's Open Public Records Act and that Defendant has no legal authority to negotiate or bargain away any of the statutory requirements of the Open Public Records Act. Jones acknowledges and agrees that whether or not Defendant is required to disclose this Agreement pursuant to the Open Public Records Act in no way diminishes Jones's obligations pursuant to Paragraph 12.

14. Defendant agrees that, if contacted by any third party for a reference, Defendant shall only provide Jones's dates of employment, positions held and salary information. Jones shall refer all third parties seeking reference checks to Defendant's Superintendent.

15. Jones agrees not to defame, disparage, or demean Defendant in any manner whatsoever to third parties including, but not limited to print media, electronic media, television, radio and public social networking websites. Jones further agrees that she will not take any action to impair the good will, business reputation, or good name of Defendant. Similarly, Defendant agrees not to defame, disparage, or demean the Jones to third parties in any manner whatsoever. Mutual non-disparagement

16. This Release may be signed in counterparts and each of which shall be considered an original for all purposes, and all of which taken together shall constitute one and the same written agreement.

17. Entire Agreement. This Agreement represents the sole and entire agreement between the Parties. This Agreement supersedes all prior agreements, representations or understandings, oral or written, express or implied, with respect to the subject matter hereof.

18. Modification and Waiver. No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement.

PLEASE READ THIS AGREEMENT AND CAREFULLY CONSIDER ALL OF ITS PROVISIONS BEFORE SIGNING IT. THIS AGREEMENT CONTAINS A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS, INCLUDING THOSE UNDER THE EQUAL PAY ACT, WHISTLE BLOWER AND EMPLOYEE PROTECTION ACTS, THE

FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT, FEDERAL ANTIDISCRIMINATION LAWS, THE FAIR LABOR STANDARDS ACT, THE FAMILY AND MEDICAL LEAVE ACT, STATE OVERTIME COMPENSATION LAWS, THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT, THE NEW JERSEY CIVIL RIGHTS ACT, THE NEW JERSEY FAMILY MEDICAL LEAVE ACT AND OTHER FEDERAL, STATE AND LOCAL LAWS PROHIBITING DISCRIMINATION, HARASSMENT, DISCRIMINATION IN PAYMENT OR COMPENSATION OR DISCHARGE FROM EMPLOYMENT.

JONES FURTHER STATES THAT SHE IS SIGNING THIS RELEASE COMPLETELY WILLINGLY AND VOLUNTARILY AND THERE IS NO MEDICAL OR OTHER CONDITION THAT WOULD PREVENT HER FROM DOING SO. NO ONE HAS DONE ANYTHING TO FORCE OR PRESSURE HER TO SIGN THIS RELEASE. IF SHE ASSERTS OTHERWISE IN THE FUTURE SHE WILL NOT THEN BE TRUTHFUL.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the undersigned has executed this Release this _____ day of October 2019.

Witness:

Dr. Thomasina Jones

STATE OF New Jersey :

:ss.:

COUNTY OF Atlantic :

I CERTIFY that on October 9, 2019, Thomasina Jones came before me and acknowledged under oath, to my satisfaction, that this person is named in and personally signed this document and signed, sealed and delivered this document as his/her act or deed.

Robert P. Merrick
Attorney-At-Law

RECEIVED
2019 NOV 18 A 10:49
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BRIDGETON BOARD OF EDUCATION
PUBLIC ACTION MEETING
October 8, 2019

The public action meeting of the Bridgeton Board of Education was called to order at 6:00 p.m. by Ms. Todd. Board Members present were Ashlee Todd, Dulce Gomez, Erica Mosley, Mary Peterson, Marian King, Albert Morgan, Angelia Edwards, Tyrone Williams and Mr. Kenny Smith Bey Jr.. Also in attendance were Dr. H. Victor Gilson, Interim Superintendent, Mrs. Nicole Albanese, School Business Administrator, Mr. Maurice Tyndell, Director of Human Resources, and Mr. Al Marmero, Board Solicitor. Prayer was offered by Mr. Morgan.

Information: 1.5 OPEN PUBLIC MEETING STATEMENT
The New Jersey Open Public Meeting Law was enacted to insure the right of the public to have advance notice of and to attend the meetings of the public bodies at which any business affecting their interests is discussed or acted upon. Bridgeton Board of Education has caused notice of this meeting to be published by having the date, time and place thereof posted on the electronic picture board in the Thomas C. Lane, IV Administration Building, posted on the district website and advertised in South Jersey Times, Bridgeton and The Press of Atlantic City, Pleasantville, on July 18, 2019.

PUBLIC PARTICIPATION- Rhonda Carney, former employee, addressed the board regarding her termination four years ago. Ms. Carney stated her recollection of the events surrounding her release and that she expressed that she did not believe that is was fair.

Action: 1.7 RESOLUTIONS
Motion by Mr. Williams, second by Mrs. Peterson approving the following resolution:
Authorizing Disposal of Surplus Property.
Motion carried, roll call vote 9-0

Action: 1.8 RESOLUTIONS
Motion by Ms. Peterson second by Kenny Smith Bey approving THE MEMORANDUM OF AGREEMENT, SALARY GUIDES AND SUCCESSOR COLLECTIVE NEGOTIATIONS AGREEMENT BETWEEN THE BRIDGETON BOARD OF EDUCATION AND THE TEAMSTERS LOCAL 676 BRIDGETON BOARD OF EDUCATION CUSTODIANS.
Motion carried, roll call vote 9-0.

Action: 1.9 RESOLUTIONS
Motion by Mr. Williams second by Mr. Smith Bey, approving THE MEMORANDUM OF AGREEMENT, SALARIES IN HOURLY RATE CHART AND SUCCESSOR COLLECTIVE NEGOTIATIONS AGREEMENT BETWEEN THE BRIDGETON BOARD OF EDUCATION AND THE TEAMSTERS LOCAL 676 BRIDGETON BOARD OF EDUCATION BUS DRIVERS.
Motion carried, roll call vote 9-0

RECEIVED
2019 NOV 5 P 4:32
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Action: 12.10 Approval of Amended Board Meeting Schedule
Motion by Mr. Williams, second by Mr. SMithBey approving the amended 2019-2020 Board Meeting Schedule as attached.
Motion carried, roll call vote was 8-1, with Mr. Morgan abstaining.

Action: 12.11 Family Involvement Conference (Formerly Item 3.2)
Motion by Ms. Mosley, Second by Mr. SmithBey approving Donna Bard, Parent Liaison of Indian Avenue School, to attend the Family Involvement Conference on October 27-29, 2019 in Harrisburg, PA. This conference is based on the premise that active family involvement in the education process is the key to effective schools and student achievement.
Total Cost = $919.71
Registration - $425.00
Transportation - $52.00
Lodging - $442.71
Motion carried, roll call vote was 9-0.

Action: 12.12 Motion by Ms. Peterson, second by Mr. Williams approving Pathstone Corporation to use the BHS Stadium for Outreach event/soccer game on Wednesday, November 27, 2019 from 5:30-8:30 PM. Custodial and security fees will be charged. An appropriate insurance certificate is on file. Approval is granted contingent on the understanding that school activities take precedence. If a school facility is required for a school activity, board approval is revoked.(11.1 b.)
Motion carried, roll call vote was 8-0-1, with Ms. Gomez abstaining.

Action: 12.13 Approval of Settlement. Motion by Ms. Peterson, second by Ms. King approving the general release in the settlement of a lawsuit from the former Superintendent of Schools.
Motion carried, roll call vote was 6-1-1, with Mr. SmithBey voting no, Mr. Williams abstaining and Ms. Edwards did not participate in the vote.

13.OTHER BOARD ACTION ITEMS
Motion by Mr. Williams, second by Ms. Peterson approving Second Reading and Approval of Revised Policy 5141.21

ADMINISTERING MEDICATION

The board shall not be responsible for the diagnosis and treatment of student illness. The administration of medication to a student during school hours will be permitted only when failure to take such medicine would jeopardize the health of the student, or the student would not be able to attend school if the medicine were not made available to him/her during school hours.
For purposes of this policy, "medication" shall include all medicines prescribed by a physician for the particular student or medications prescribed by the district physician on standing orders. ~~including~~ Medications shall include emergency medication in the event of bee stings, medication for asthma, diabetes, adrenal insufficiency or other medical diagnosis requiring medication during the school day, opioid antidote, and all non-prescription "over the counter" medication (see policy 5141).

RECEIVED
2019 DEC -2 A 11:58
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Motion carried, roll call vote was 8-1, with Mr. Morgan abstaining.

Action: 12.11 Family Involvement Conference (Formerly Item 3.2) Motion by Ms. Mosley, Second by Mr. SmithBey approving Donna Bard, Parent Liaison of Indian Avenue School, to attend the Family Involvement Conference on October 27-29, 2019 in Harrisburg, PA. This conference is based on the premise that active family involvement in the education process is the key to effective schools and student achievement.
Total Cost = $919.71
Registration - $425.00
Transportation - $52.00
Lodging - $442.71
Motion carried, roll call vote was 9-0.

Action: 12.12 Motion by Ms. Peterson, second by Mr. Williams approving Pathstone Corporation to use the BHS Stadium for Outreach event/soccer game on Wednesday, November 27, 2019 from 5:30-8:30 PM. Custodial and security fees will be charged. An appropriate insurance certificate is on file. Approval is granted contingent on the understanding that school activities take precedence. If a school facility is required for a school activity, board approval is revoked.(11.1 b.)
Motion carried, roll call vote was 8-0-1, with Ms. Gomez abstaining.

Action: 12.13 Approval of Settlement. Motion by Ms. Peterson, second by Ms. King approving the general release in the settlement of a lawsuit from the former Superintendent of Schools.
Motion carried, roll call vote was 6-1-1, with Mr. SmithBey voting no, Mr. Williams abstaining and Ms. Edwards did not participate in the vote.

13.OTHER BOARD ACTION ITEMS
Motion by Mr. Williams, second by Ms. Peterson approving Second Reading and Approval of Revised Policy 5141.21

ADMINISTERING MEDICATION

The board shall not be responsible for the diagnosis and treatment of student illness. The administration of medication to a student during school hours will be permitted only when failure to take

BE IT FURTHER RESOLVED, THAT THIS RESOLUTION BECOME A PART OF THE OFFICIAL MINUTES OF THE BRIDGETON BOARD OF EDUCATION DATED October 8, 2019, AND THAT A CERTIFIED COPY OF THIS RESOLUTION BE PRESENTED TODAY, December 2, 2019.

Nicole M. Abbatiese
School Business Administrator

OAL Dkt. No. EDU 5782-18
Agency Dkt. No. 62-3/18

New Jersey Commissioner of Education

Final Decision

John McAllister and James Gallagher,

Petitioners,

v.

Board of Education of the Borough of Stone Harbor, Cape May County,

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Additionally, the petitioners have failed to present any exceptional circumstances that might justify a finding that a strict adherence to the 90-day rule would result in injustice. *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 590 (1993); *N.J.A.C.* 6A:3-1.16.[2] Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/20
Date of Mailing: 1/24/20

[1] The record does not include a transcript from the hearing held at the OAL on October 24, 2019. Further, the petitioners filed untimely exceptions without requesting an extension; therefore, such exceptions were not considered.

[2] Since the petition of appeal was untimely filed, it was not necessary to evaluate whether the Stone Harbor Board of Education's decision was arbitrary, capricious or unreasonable.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05782-18
AGENCY DKT. NO. 62-3/18

JOHN McALLISTER AND JAMES,
GALLAGHER,
Petitioners,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF STONE HARBOR,
CAPE MAY COUNTY,
Respondent.

John McAllister and **James Gallagher**, petitioners, pro se

James R. Birchmeier, Esq., for respondent (Birchmeier & Powell, LLC, attorneys)

Record Closed: October 24, 2019 Decided: December 9, 2019

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioners, John McAllister and James Gallagher, challenge respondent's, Borough of Stone Harbor Board of Education (the Board) decision to approve the Chief

School Administrator's (Superintendent) contract at a Board of Education meeting convened on November 8, 2017.

PROCEDURAL HISTORY

The original petition of appeal was filed with the Department of Education on March 15, 2018. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 23, 2018. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was conducted on October 24, 2019, and the record closed on that date.

FACTUAL DISCUSSION

On November 8, 2017, the Board voted to rescind the contract of the Superintendent for the period of July 1, 2015, through June 30, 2018, and approve the Superintendent's contract for the period of July 1, 2017, through June 30, 2021. Petitioners were both sitting Board members at the time of the vote and both voted against the action. After the November 8, 2017, Board meeting, petitioners requested a legal opinion from the Board's solicitor to advise whether the action taken was legally permissible. At the next meeting convened on December 13, 2017, the Board's solicitor provided an opinion that the action in question was valid and legally binding. The Board also obtained legal opinions from two additional law firms that contracted to perform various functions for the Board. All three law firms opined that the Board had authority to take the action. (R-2.) In February 2018, petitioners made an inquiry with the Department of Education to determine if the Board had authority to make the changes to the Superintendent's employment contract. On February 27, 2018, petitioners were instructed by the Assistant Commissioner of Field Services, Robert Bumpus (Bumpus) to file a petition of appeal through the Division of Controversies and Disputes at the Department of Education. The petition was mailed from Cape May, New Jersey on March 13, 2018, and received at the Division of Controversies and Disputes on March 15, 2018.

Testimony

John McAllister testified on his own behalf. No attorney for the board of education attended the November 8, 2017 meeting. When the Superintendent's contract was presented to the Board, a motion to go into executive session was made but did not pass. The Board president gave notification in October 2017, that he was not seeking reelection. McAllister feels that the new contract was an attempt by administration to bind the future Board because it was uncertain if the new Board member would support the new contract. The Board attorney did attend the December 13, 2017, meeting and gave the opinion that the Board's action was permissible under the law. The new contract was approved by the Board by a 4-2 vote on November 8, 2017, and no new vote was taken at the December 2017, Board meeting. At the time McAllister received instructions from Bumpus to file the petition, he was unaware that the petition was required to be filed within ninety-days.

James Gallagher also testified on his own behalf and agreed with the testimony of McAllister. Gallagher was concerned why the Board had to take action on the Superintendent's contract in November 2017, if her current contract was not set to expire until June 2018.

Mark Matreale next testified on behalf of petitioners. He was elected to the school board in November 2017, but did not take office until the Board reorganization in January 2018. The Board decision on November 8, 2017, effected his ability to be involved in the decision making process and bound the incoming Board to the new superintendent contract. He was never provided an opportunity to obtain information regarding the new contract.

Linda Fiori testified on behalf of the board. She is now and has been at all times relevant the Business Administrator/Board Secretary for the Board. Stone Harbor and Avalon entered into a shared services agreement wherein they would share the business administrator and the superintendent. All students attend kindergarten through fourth grade in Stone Harbor and fifth through eight grades in Avalon. The current Superintendent began in 2012. In April 2017, the teachers renegotiated their

contract with the Board. It was determined at that time that certain benefits were included in the teacher contract that were not included in the Superintendent's contract. Fiori advised the Superintendent of this and the Superintendent negotiated new contract terms with the Board's personnel committee. The contract revisions were reviewed by the New Jersey School Boards Association (NJSBA) and the county superintendent. The county superintendent is required to sign off on all new and revised contracts proposed between board of educations and their superintendents. The county superintendent approved the proposed contract and Fiori placed a version of the proposed contract on the Board's computer system. The Superintendent's current contract had a term from 2015 through June 30, 2018. The new Superintendent contract had a start date of July 1, 2017, to be consistent with the newly ratified teacher contract. As a result, the motion made at he November 8, 2017, meeting rescinded the currently existing Superintendent contract and approved the new contract retroactively to July 1, 2017. Fiori was not involved in the contract negotiations between the Superintendent and the Board's personnel committee.

Stacey Tracy next testified on behalf of the board. She has been the Superintendent for both Avalon and Stone Harbor School Boards since 2012. Prior to 2012, Ms. Tracy was the Shared Curriculum Supervisor for both districts since 2005. In April 2017, she was advised by Fiori that the benefits for the teachers had changed as a result of the negotiations to their new contract. The county superintendent advised her at that time that it was permissible to open her contract and make changes. She contacted the personnel committee which consisted of the president and vice president of both the Stone Harbor and Avalon Boards. While they were in agreement that changes should be made to the Superintendent's contract in April 2017, a personnel committee meeting was not conducted until September 2017, as the committee members had seasonal obligations that made it difficult to meet during the summer.

The county superintendent approved the new contract terms in a letter, dated October 26, 2017, (R-7) and after a few minor revisions were made, a second time on November 8, 2017. (R-8.) With her consent, discussion regarding the contract were conducted in public session at the Board meeting on November 8, 2017. McAllister asked for clarification as to weather a lame duck board can take action that will

essentially bind the future Board, so Tracy contacted all three of the attorneys that represent the Board. All three attorneys rendered the decision that the Board action approving her new contract was permissible. She was not concerned that her new contract would not pass under the new Board. The timing of the Board action was a result of when the Board received approval from the county superintendent.

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the forgoing as **FACTS.**

LEGAL ANALYSIS AND CONCLUSION

The Board asserts that the petition should be dismissed as a matter of law. The Board took action on the Superintendent's contract at its November 8, 2017, Board meeting. The petition was received at the Department of Education on March 15, 2018, more than ninety-days from the Board action and in violation of N.J.A.C. 6A:3-1.3(i). The ninety-day rule has been strictly followed and applied almost without exception. The rule may be relaxed, however, under exceptional circumstances or if there is a compelling reason to do so. M.N. & E.Y. o/b/o K.N. v. State Operated Sch. Dist. Of Jersey City, OAL Dkt. No. EDU 11136-03 (June 17, 2004), aff'd (Comm. Ed. July 2004). Petitioners assert that they were instructed by the Assistant Commissioner of Field Services, Robert Bumpus (Bumpus) to file a petition of appeal through the Division of Controversies and Disputes at the Department of Education. That instruction did not occur until February 27, 2018. McAllister concedes that at the time of filing the petition, he was unaware of the ninety-day rule.

It is well settled that a petition of appeal before the Commissioner must be brought within ninety-days of receipt of "notice of a final order, ruling or other action by the board which is the subject of the contested case." N.J.A.C. 6A:3-1.3(i). The ninety-day limitation period begins to run once a petitioner learns of the facts that would enable the filing of a claim. Kaprow v. Board of Ed. Of Berkeley Twp., 131 N.J. 572 (1993). In this case, the day that petitioners learned of the facts that would enable the filing of the petition was November 8, 2017. Therefore, the ninety-day limitation period would have

expired on February 6, 2018. Even if, as petitioner argues, the facts that would enable the filing of the petition were not known until December 13, 2017, (the date the Board received the legal opinions from the three law firms) the ninety-day limitation period would have expired on March 13, 2018. Petitioners concede that the petition was placed in the mail on that date and not received and filed by the Department of Education until December 15, 2018, ninety-two-days after the December 13, 2017, Board meeting and 122-days after the Board approved the new contract. There has been no evidence presented during this hearing that shows any exceptional or compelling circumstances to relax the ninety-day rule that has consistently been strictly enforced. See Dreher v. Jersey City Bd. Of Ed., 1987 S.L.D. 1706 aff'd. 1988 S.L.D. 2439 (St. Bd. 1988) (petition filed only two days after the timeline expired was dismissed as untimely); Taylor v. Bd. Of Ed. Of Twp. Of Hardyston, OAL Dkt. No. EDU 1049-05, Agency Dkt. No 366-10/04 (petition filed one week after the timeline expired was dismissed as untimely); Kaprow v. Board of Ed. Of Berkeley Twp., 131 N.J. 572 (1993) (petition filed two weeks after the timeline expired was dismissed as untimely). Therefore, I **CONCLUDE** that the petition filed in this matter is time-barred since it was not filed within the ninety-day limitation period.

It should be noted that petitioners have not meet their burden to show that the actions of the Board were arbitrary and capricious. Where there is room for two opinions, action is not considered arbitrary or capricious when exercised honestly and upon due consideration, even though the court may believe that an erroneous conclusion has been reached. Bayshore Sewerage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199 (App. Div. 1973). Petitioners argue that the Board action was inappropriate because the Commissioner has ruled that a "lame duck" board is only empowered to act in certain circumstances and cannot appoint administrators or other employees to positions in which no vacancy exists. Nowak v. Bd. of Ed. Of Borough of Manville, 1976 S.L.D. 43. Nowak does not bind the action taken by this Board. Here, the Board voted to rescind and grant a new contract to the Superintendent retroactive to July 1, 2017. If the Board had acted to award a new contract that did not take effect until after the new Board was formed in January 2018, that would be a case where Nowak would control. The full Board took action on the Superintendent contract. This contract was previously approved by the county superintendent as well as the NJSBA.

After the vote and because of the question presented by petitioners as to whether the Board had authority to approve the contract, administration obtained a legal opinion from three law firms. All three agreed that the action taken was permissible under the law. Based on the above, I **CONCLUDE** that petitioners have not met their burden of demonstrating that the action taken by the full Board on November 8, 2017, was arbitrary, capricious and unreasonable, and that the petition of appeal must be dismissed.

ORDER

It is hereby **ORDERED** that the Board's decision to approve the Chief School Superintendent contract at a Board's meeting convened on November 8, 2017, is **AFFIRMED** and the petition of appeal is **DISMISSED**.

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

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

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

December 9, 2019
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: December 9, 2019.

Date Mailed to Parties: 12-12-19

JSK/dm

APPENDIX

LIST OF WITNESSES

For petitioners:

James Gallagher
John McAllister
Mark Matreale - current School Board Member

For respondent:

Linda Fiori – Business Administrator/Board Secretary
Stacey Tracy – Superintendent/Chief School Administrator

LIST OF EXHIBITS

For petitioners:

P-1 Initial Decision in EDU 03062-16

For respondent:

R-1 November 8, 2017, email from McAllister
R-2 Legal Opinions
R-3 Shared Service Agreement between Avalon BOE and Stone Harbor BOE, dated November 2017
R-4 Minutes of November 8, 2017, School Board Meeting
R-5 Board Secretary notes of November 8, 2017, School Board Meeting
R-6 Minutes of December 13, 2017, School Board Meeting
R-7 Letter, dated October 26, 2017, from County Superintendent approving employment contract

R-8 Letter, dated November 8, 2017, from County Superintendent approving employment contract

R-9 Employment contract approved on November 8, 2017

New Jersey Commissioner of Education

Final Decision

Debra Kwapniewski,

Complainant,

v.

Ryan Curioni, Lodi Board of Education, Bergen County,

Respondent.

Synopsis

The School Ethics Commission (SEC) found that respondent Ryan Curioni, a member of the Board of Education of the Borough of Lodi, violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i) of the School Ethics Act (Act) for posting content on his blog that attacked the complainant, a tenured teacher in the Lodi Public Schools. Respondent was found to have made deliberate, unnecessary and repeated attacks via social media on the complainant, her qualifications, her salary and her general employment in the school district, violating multiple provisions of the Act. Accordingly, the SEC recommended a penalty of suspension for a period of six months. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty.

Upon review, the Commissioner concurred with the penalty recommended by the SEC, finding that the severity, willfulness and frequency of respondent's inappropriate conduct warrant a suspension of six months. Accordingly, the respondent was suspended for six months 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.

January 23, 2020

SEC Dkt. No. C70-17
OAL Dkt. No. EEC-01743-18
Agency Dkt. No. 334-12/19

New Jersey Commissioner of Education

Final Decision

Debra Kwapniewski,

Complainant,

v.

Ryan Curioni, Board of Education
of the Borough of Lodi, Bergen County,

Respondent.

The record of this matter and the decision of the School Ethics Commission have been reviewed. The Commission found that respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i) of the School Ethics Act for posting content attacking complainant on his blog, and recommended a six-month suspension. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty.[1]

Respondent filed exceptions to the penalty, arguing that the ALJ accepted false and hearsay testimony from complainant and failed to acknowledge evidence submitted by respondent. Respondent contends that the content he posted was on his personal blog and it is protected by his right to free speech. The exceptions do not include any argument specifically seeking a reduction or elimination of the penalty.

[1] Respondent did not appeal the underlying finding of violations to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. The arguments advanced by respondent in his exceptions, which might be appropriate as part of an appeal of the underlying finding of violations of the School Ethics Act, are not persuasive in the context of the Commissioner's final determination on the recommended penalty. The Commissioner agrees with the Commission that the severity, willfulness, and frequency of respondent's inappropriate conduct warrant a suspension of six months.

Accordingly, respondent shall be suspended for six months as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 1/23/20
Date of Mailing: 1/24/20

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

Before the School Ethics Commission
OAL Docket No.: EEC-01743-18
School Ethics Commission Docket No.: C70-17

Final Decision (On Remand)

Debra Kwapniewski,
Complainant

v.

Ryan Curioni,
Lodi Board of Education, Bergen County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on July 27, 2017, by Debra Kwapniewski (Complainant), alleging that Ryan Curioni (Respondent Curioni) and Alfonso Mastrofilipo (Respondent Mastrofilipo), both members of the Lodi Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleges Respondent Curioni violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), *N.J.S.A.* 18A:12-24.1(i) in Count 1, and Respondent Mastrofilipo violated *N.J.S.A.* 18A:12-24.1(f) in Count 2.

At its meeting on November 28, 2017, and after considering the Complaint, Respondent Mastrofilipo's Motion to Dismiss, and Complainant's response to the Motion to Dismiss, the Commission adopted a decision granting the Motion to Dismiss. As a result of the Commission's decision, Respondent Mastrofilipo was dismissed from the above-referenced matter, and no longer considered a named Respondent.

Also at its meeting on November 28, 2017, and as to the allegations regarding Respondent Curioni, the Commission voted to find the Complaint not frivolous and, pursuant to *N.J.A.C.* 6A:28-10.8(a), to transmit the allegations in Count 1 to the Office of Administrative Law (OAL) for a plenary hearing where Complainant would carry the burden to prove the alleged violations of *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), *N.J.S.A.* 18A:12-24.1(i). Of note, the Commission did ***not*** find probable cause for the allegations set forth in the Complaint, but, instead, simply voted to transmit the matter to the OAL. Complainant and Respondent Curioni were advised of the Commission's decision in a letter decision dated December 1, 2017.

After the matter was transmitted to the OAL, Complainant moved for summary decision, seeking an order finding that Respondent violated the Act and imposing an appropriate penalty.

Initial Decision (On Remand) at 2. On September 20, 2018, the Honorable Michael Antoniewicz, Administrative Law Judge (ALJ), denied Complainant's motion. *Id.*

The matter was subsequently transferred to the Honorable Elissa Mizzone Testa, ALJ (ALJ Testa), on September 27, 2018, and a hearing was scheduled for February 13, 2019. *Initial Decision (On Remand)* at 2. On the scheduled hearing date, Respondent failed to appear. *Id.* In light of Respondent's failure to appear, an attempt was made to reach him by telephone and, on the record, "he stated that he was aware of the hearing, that he would not be attending, that he had no objection to ... Complainant putting her proofs on the record, and that he did not wish to have the matter rescheduled." *Id.* Based on Respondent's statement, the hearing was conducted on February 13, 2019, and the record was kept open to allow Complainant to submit a written summation, which was done on April 15, 2019; thereafter, the record was closed. *Id.*

On June 27, 2019, ALJ Testa issued an Initial Decision detailing findings of fact, legal conclusions, and a recommended penalty. *Initial Decision (On Remand)* at 3. At a special meeting on August 30, 2019, and after a thorough review of the record (including ALJ Testa's Initial Decision,) the Commission adopted a decision remanding the matter to the OAL. *Id.* In remanding the matter to the OAL, the Commission did not find that additional fact-finding (or a hearing) was necessary, or that the record needed to be reopened so that the parties could introduce additional evidence. *Id.* Instead, the Commission remanded the matter so that (1) the specific facts in the record which support each violation can be more fully explained and (2) the issue of Respondent's entitlement to "free speech" protections can be more fully analyzed. *Id.*

On October 24, 2019, ALJ Testa issued an Initial Decision (On Remand), and the Commission acknowledged receipt of same; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was December 9, 2019. [1] Prior to December 9, 2019, the Commission requested a forty-five (45) day extension of time to issue its final decision. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until January 23, 2020.

At its meeting on November 19, 2019, the Commission considered the full record in this matter. Thereafter, and at its meeting on December 17, 2019, the Commission voted to adopt ALJ Testa's findings of fact; to adopt the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i); to reject the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(d); and to modify the recommended penalty of suspension for "at least six (6) months" to suspension for six (6) months.

II. Initial Decision

In the Initial Decision (On Remand) dated October 24, 2019, ALJ Testa again noted that Respondent did not appear at the hearing on February 13, 2019, and that no witnesses testified on his behalf. *Initial Decision (On Remand)* at 2, 6. As for Complainant, ALJ Testa found that Complainant credibly testified and, therefore, adopted as **fact**:

[1] Forty-five (45) days after October 24, 2019, was, technically, Sunday, December 8, 2019.

1) Complainant is a resident of Lodi, and has been employed by the Board for eighteen (18) years as a pre-K teacher. *Initial Decision (On Remand)* at 3.

2) Complainant is certified to teach pre-K through eighth grade. *Id.*

3) Complainant became a member of the Lodi Education Association (LEA) when she became employed by the Board. *Id.*

4) Complainant has held several positions with the LEA during her employment with the Board. More specifically, in 2009, Complainant attended Legislative Action Committee meetings; served as recording secretary for two years around 2011; and served on the LEA's negotiating committee team in 2016. *Id.*

5) Complainant testified that, as permitted by the collective negotiations agreement between the Board and the LEA, she "has been released from school" a few times over the years to conduct union business. *Id.*

6) Complainant applied for a job with the Board after the Board became eligible for early-childhood funding, and was hiring early-childhood specialists to fill newly created positions. *Id.* at 4.

7) Complainant was interviewed by the superintendent for her job, and was offered the job after the Board voted to hire her. *Id.*

8) At the time she was hired, Complainant's brother was also employed by the Board, but he was not "involved at all in her gaining employment." *Id.*

9) Complainant was appropriately certified to teach pre-K at the time she was hired by the Board. *Id.*

10) Complainant testified that Respondent is a Board member "who was officially installed in January 2017, and his term is up in January 2020." *Id.*

11) Respondent is currently Board President. *Id.*

12) Complainant first met Respondent at a Board meeting in December 2016, at which Respondent made a statement and Complainant responded to his statement during the public comment portion. *Id.*

13) After this Board meeting, Complainant became aware that Respondent wrote a blog about Lodi, because she appeared on it for the first time. *Id.*

14) Complainant has appeared on Respondent's blog "multiple times" after the December 2016 meeting. *Id.*

15) From May through June 2017, which was the timeframe for the at-issue blogs, Respondent was a Board member, but not yet Board President. *Id.* at 4-5.

16) From May through June 2017, Complainant was a building representative, a member of the negotiating team, and a chairperson of the Government Relations Committee. *Id.* at 5.

17) Complainant identified several posts that appeared on Respondent's blog and which contained inaccurate or misleading information about contract negotiations (and Complainant's salary), referenced Complainant in a negative manner, depicted a picture of the street where Complainant lives, undermined her credibility with members of the LEA, questioned her qualifications for her teaching position, implied she received her position through patronage, questioned her salary and honesty, and referred to her as a "greedy bastard" and "union bully." *Id.* at 4-5, and 9-10.

18) Between May and June 2017, Complainant testified that "about forty people came up to her" and commented on Respondent's blogs about her. *Id.* at 5. The people who made these comments were aware that Respondent was a Board member because "they are members of the school community, Lodi is a relatively small community, and people had direct knowledge that [Respondent] is a member of the Board." *Id.* at 5-6.

19) Complainant testified that "people questioned her salary based on [Respondent's] blog posts, and also whether she got her teaching job by patronage." *Id.* at 6. Complainant further testified that "several people questioned her based on the blog post that compared her salary to that of newer teachers." *Id.*

20) Complainant stated that "she feels the blog posts undermined her credibility with members of the [LEA] because [Respondent's] posts questioned her salary and honesty." *Id.*

Based on the findings of fact as set forth above, ALJ Testa found that, as a general matter, the evidence at the hearing established that, while serving as a member of the Board, Respondent used his blog to "relentlessly attack" Complainant; called Complainant insulting names, claimed she was hired through patronage, questioned her credentials, posted inaccurate statements about her salary, and attacked her moral character; posted photos of Complainant and her property, including her street on which she lives; and repeatedly referenced and attacked Complainant as an employee of the Board. *Id.* at 9.

Therefore, ALJ Testa concluded that Complainant has proven by a preponderance of the competent and credible evidence that Respondent's actions violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i). *Initial Decision (On Remand)* at 13-14. More specifically, and as to the violation of *N.J.S.A.* 18A:12-24.1(a), ALJ Testa noted that Respondent "inaccurately published Complainant's salary" to "negatively impact the opinions of the [LEA] and its members, specifically, [Complainant]." *Id.* at 10. In this way, "[Respondent] attempted to effect changes to salaries and policies that govern salaries through the unethical procedure of targeting [Complainant] and misrepresenting her salary, violating *N.J.S.A.* 18A:12-24.1(a)." *Id.*

Regarding the violation of *N.J.S.A.* 18A:12-24.1(c), ALJ Testa explained that Respondent "inaccurately posted [Complainant's] salary and grossly overstated it by over $20,000." *Initial Decision (On Remand)* at 10. Further, the "Board and [LEA] agree to teacher salaries after duly conducted negotiations," and Respondent "was not a member of the negotiations committee yet acted in a manner unrelated to his duty to develop the general rules and principles that guide the management of the school district." *Id.* In violation of *N.J.S.A.* 18A:12-24.1(c), Respondent's post "contained gross misrepresentations, was meant to interfere with negotiations and 'frame policies and plans' before the 'board has consulted those who will be affected by them.'" *Id.*

As to the violation of *N.J.S.A.* 18A:12-24.1(d), ALJ Testa stated that Respondent became "'directly involved in activities ... that are the responsibility of school personnel or the day to day administration of the school district ... ' due to his involvement with the hiring process." *Initial Decision (On Remand)* at 11. According to ALJ Testa, Respondent "repeatedly discussed the merits of [Complainant's] hiring on his blog," and "relentlessly discussed salaries and overstated [Complainant's] salary." *Id.* ALJ Testa continued, Respondent's "baseless claims may appear to pressure and influence either Board members or the public to make changes to these matters that affect personnel." *Id.*

Regarding the violation of *N.J.S.A.* 18A:12-24.1(e), ALJ Testa found that Respondent, a "sitting Board member, repeatedly and deliberately attacked [Complainant], a teacher hired by the same Board, through numerous blog posts." *Initial Decision (On Remand)* at 11. Not only did he allege that Complainant was unqualified, that she received her job through patronage, he also suggested, among other things, that Complainant was a "greedy bastard" who did not "put children first." *Id.* ALJ Testa found that Respondent's "actions on the blog were beyond the scope of his duties as a Board member, and private action of this kind may compromise the [B]oard." *Id.* ALJ Testa continued, "[i]t is evident that a Board member smearing and verbally attacking a teacher in a publicly accessible forum diminishes the integrity of the Board," and "[t]he aggressive and intense nature of the posts may clearly have 'intimidated the public from coming forward and addressing the Board.'" *Id.*

As to the violation of *N.J.S.A.* 18A:12-24.1(g), ALJ Testa found that Respondent "published a post dated May 28, 2017, that stated the fees paid to the [LEA] went towards supporting favorable politicians." *Initial Decision (On Remand)* at 12. However, this statement was not "backed by evidence and is false," as *N.J.S.A.* 34:13A-5.5(a)-(c) "explicitly prohibits dues paid by non-union members being used for political expenses." *Id.* According to ALJ Testa, this post, therefore, "provid[ed] inaccurate and baseless information." *Id.* Complainant "substantiated the falsity of these claims by testifying that direct political claims are not contributed to by union dues and that a political action committee raises money through direct donations that can be used for specific candidates." *Id.*

Regarding the violation of *N.J.S.A.* 18A:12-24.1(i), ALJ Testa found that Respondent "repeatedly attacked [Complainant] in his blog," including: in one post, he "scornfully referred to Complainant as the Saturday Night Live Charter 'Debbie Downer'"; Respondent "continued to imply she received the job due to her brother's political activities and that she was unqualified for her position"; Respondent also "questioned what [Complainant's] resume looked like when

she was 'handed' the job"; Respondent also suggested that Complainant did not "put children first"; Respondent posted a photo of Complainant's home (and street location) and claimed that she (Complainant) had "an irrational obsession with liberal politicians" and "was all about attention seeking and feeling relevant"; Respondent alleged that Complainant did not want to resolve contract negotiations; Respondent referred to Complainant as a "greedy bastard" and implied she was a "bully;" and Respondent again referred to Complainant as a "union bull[y]" in a subsequent blog post." *Initial Decision (On Remand)* at 12. Despite applying for her position, being interviewed, and then approved by the Board for her position, Respondent "deliberately attacked [Complainant's] qualifications and moral character and this resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties." *Id.* at 12-13. Further, the blog is available to the public, including parents and students within the District, and anyone who reads the blog "would take the inflammatory statements at face value," and this harms Complainant's "reputation and her ability to "properly teach and perform her obligations." *Id.* at 13.

As for Respondent's rights to free speech, ALJ Testa noted that the Commission previously advised in *Advisory Opinion A02-06,* (A02-06), that although a Board member does not "surrender the right that they have as citizens such as freedom of speech when they become members of a school board," they must still comply with the Act. *Initial Decision (On Remand)* at 13. Furthermore, in *Advisory Opinion A26-14,* (A26-14), the Commission advised that the "use of social media would require a disclaimer and that the use of social media may not be published on a social media representing ... you as a Board member." *Id.* In this matter, ALJ Testa found that while Respondent claims to be writing as a private citizen and uses a disclaimer, "it also indisputably represents him as a Board member." *Id.* Therefore, and because Respondent referenced, on several occasions, his status as a Board member (e.g., "...long before I got on the [B]oard" and "[b]efore I got on the [B]oard"), ALJ Testa found that it is "not convincing" that Respondent was speaking "strictly as a private citizen, as demonstrated by his identifying himself as a Board member in at least two blogs." *Id.*

In terms of a penalty, ALJ Testa noted that Respondent should have "taken greater care" than to post inaccurate information and disparaging comments about Complainant on social media. *Id.* at 14. The fact that Respondent was a Board member and not Board President does not "diminish the severity, willfulness," and frequency of his inappropriate conduct. *Id.* In addition, Respondent's decision not to participate in the hearing demonstrates his lack of remorse and lack of acceptance of responsibility for his conduct. *Id.* Therefore, ALJ Testa concluded that a penalty of suspension for no less than six (6) months is warranted. *Id.*

III. Exceptions

On November 4, 2019, Respondent filed **Exceptions** to the Initial Decision (On Remand), and stated that ALJ Testa "did not bother to correct her blatantly false statements beginning with the first sentence of her decision." Respondent also requested that the Commission "reapply [his] previously submitted 'exceptions' to" ALJ Testa's Initial Decision.

In his previously filed Exceptions (on July 7, 2019), Respondent notes that ALJ Testa claims, "The [Commission] issued a Probable Cause Notice ...," but Respondent argues this

statement is not true. Respondent maintains the Commission has never issued a probable cause notice against him and although he notified ALJ Testa "multiple times" that this was not a true statement, she has not made a correction. Respondent also argues that ALJ Testa's decision is not evidence based. Respondent claims that on February 13, 2019, he explained that he runs a family business, that he has repeatedly answered the Complaint, and asked ALJ Testa to refer to the answers that he submitted; however, ALJ Testa replied that she would not consider Respondent's answers or evidence, only the testimony at the hearing. Respondent further argues that contrary to what she said to him, ALJ Testa considered the summation submitted on April 15, 2019, from counsel (Oxfeld), which ALJ Testa used as her decision, in addition to counsel's recommended penalty. Respondent further argues that hearings and decisions should not be based on hearsay. Respondent contends that ALJ Testa's personal opinions or personal observations of demeanor does not make something fact. More specifically, when ALJ Testa notes, "Based upon consideration of testimonial and documentary evidence ... and having the opportunity to observe the demeanor of the witness ... I FIND the above testimony as Fact." Respondent argues this is not fact when "overwhelming evidence shows otherwise." Respondent maintains his posts are accurate as demonstrated in the exhibits, Complainant did get her job through patronage and he obtained her salary information from the 2017-2018 school budget. Respondent contends that Complainant is an "NJEA activist and political operative," who uses the NJEA to file complaints using union dues against anyone who opposes her. Respondent maintains that none of the allegations have to do with his position as a Board member, they are about his personal blog, which does not contain any confidential information, and which he has the right as a citizen to express.

Finally, in his most recent submission, Respondent noted that he is running for re-election (November 5, 2019) against the New Jersey Education Association (NJEA) endorsed slate, and Complainant's brother is the "treasurer." Further, Respondent maintains that Complainant's brother and sister have used ALJ Testa's decision to attack him on social media. Respondent further maintains that the "timing of [ALJ] Testa's decision and her intentional disregard for the evidence and facts give the appearance of political motivation."

Complainant did ***not*** file a reply to Respondent's Exceptions, or file her own Exceptions.

IV. Analysis

Upon careful and independent review of the facts and evidence set forth in the record, the Commission **adopts** ALJ Testa's findings of fact, and **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i). In adopting these legal conclusions, the Commission finds that there is sufficient credible evidence cited in support of each violation of the Code.

Notwithstanding the above, the Commission **rejects** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(d). Although ALJ Testa found that Respondent engaged in the "unethical procedure" of targeting Complainant and repeatedly misrepresenting her salary in an effort to negatively impact the opinions that others had of the LEA and its members, especially Complainant, the Commission finds that these facts are insufficient to support a violation of *N.J.S.A.* 18A:12-24.1(a).

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(1), factual evidence of a violation of ***N.J.S.A.* 18A:12-24.1(a)** shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that Respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that Respondent brought about changes through illegal or unethical procedures. Despite being required by *N.J.A.C.* 6A:28-6.4(a)(1), Complainant has not provided, and the underlying record does not contain, a copy of a final decision(s) from any court of law or other administrative agency demonstrating that Respondent violated a specific law, rule, or regulation when he posted the inaccurate and misleading information on his social media page. Absent such a final decision, and even if the accusations may be actionable in another forum, there is insufficient credible evidence in the record to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(a).

In addition, because Respondent repeatedly discussed the merits of Complainant's hiring on his blog, and relentlessly discussed and misrepresented Complainant's salary, ALJ Testa found that, in violation of ***N.J.S.A.* 18A:12-24.1(d)**, Respondent became "'directly involved in activities ... that are the responsibility of school personnel or the day to day administration of the school district ...' due to his involvement with the hiring process." *Initial Decision (On Remand)* at 11. Although Respondent's posts and comments were clearly inappropriate, and serve as the basis for other violations of the Code, they had no impact on whether Complainant *was actually* hired because, at the time they were made, Complainant was already employed in the District. There was also no factual evidence presented that, as a result of Respondent's accusations, an investigation was conducted by the District or its personnel to ascertain whether Complainant should be removed from her position. Consequently, and because Respondent's posts and comments did not actually impact her hiring (or retention), the Commission finds that there is insufficient credible evidence in the record to support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(d).

V. Decision

For the reasons more fully detailed above, the Commission determines to **adopt** ALJ Testa's findings of fact; to **adopt** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i); and to **reject** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(d).

VI. Penalty

Based upon the conclusion that Respondent violated multiple provisions of the Code, and because she indicated that Respondent should have "taken greater care" than to post inaccurate information and disparaging comments about Complainant on social media, ALJ Testa recommended a penalty of suspension for "not less than six (6) months."

The Commission agrees with ALJ Testa that Respondent's deliberate, unnecessary, and repeated attacks on Complainant, her qualifications, her salary, and her general employment in the District, is worthy of a harsh penalty. The imposition of a harsh penalty is further

necessitated by the fact that, by and large, Respondent's comments and posts about Complainant's qualifications, hiring, and salary were not accurate or truthful. However, and only because it rejected the conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(d), the Commission modifies ALJ Testa's recommended penalty to find that **suspension for six (6) months**, as opposed to suspension for at least six months, is warranted.[2] But for its rejection of the conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(d), the Commission would have recommended a suspension for a much longer duration, and possibly removal.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

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

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

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: December 18, 2019

[2] Although Respondent is still a member of the Board, following the Board's reorganization meeting in January 2020, and because he was not re-elected, Respondent will no longer serve on the Board.

Resolution Adopting Decision in Connection with C70-17

Whereas, at its meeting on November 28, 2017, and pursuant to *N.J.A.C.* 6A:28-10.8(a), the School Ethics Commission (Commission) voted to transmit the allegations relating to Respondent Curioni to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, following a hearing on February 13, 2019, at which Respondent did not appear, the Honorable Elissa Mizzone Testa, Administrative Law Judge (ALJ Testa), issued an Initial Decision dated June 27, 2019; and

Whereas, in the Initial Decision, it was determined that Petitioner had proven, by a preponderance of the competent and credible evidence, that Respondent's actions violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i); and

Whereas, based on these legal conclusions, ALJ Testa recommended a penalty of suspension for no less than six (6) months; and

Whereas, at its meeting on August 30, 2019, and after reviewing and discussing the record at its meeting on July 23, 2019, the Commission voted to adopt a decision remanding the matter to the OAL; and

Whereas, on October 24, 2019, ALJ Testa issued another Initial Decision (On Remand); and

Whereas, in the Initial Decision (On Remand), it was determined that Petitioner had proven, by a preponderance of the competent and credible evidence, that Respondent's actions violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), and *N.J.S.A.* 18A:12-24.1(i); and

Whereas, based on ALJ Testa's legal conclusions, she recommended a penalty of suspension for no less than six (6) months; and

Whereas, on November 4, 2019, Respondent filed Exceptions, but Complainant did not file a reply to Respondent's Exceptions, or otherwise file her own Exceptions; and

Whereas, at its meeting on November 19, 2019, the Commission discussed adopting ALJ Testa's findings of fact; rejecting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(a); adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(c); rejecting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(d); adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e); adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(g); adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(i); and modifying the recommended penalty of suspension for "at least six (6) months" to suspension for six (6) months; and

Whereas, at its meeting on December 17, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on November 19, 2019; and

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

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting on December 17, 2019.

Kathryn A. Whalen, Director
School Ethics Commission

41-20

OAL Dkt. No. EDU 06469-18
Agency Dkt. No. 74-3/18

New Jersey Commissioner of Education

Final Decision

Bancroft Neurohealth,

Petitioner,

v.

New Jersey Department of Education,
Office of Fiscal Policy and Planning,

Respondent.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/20
Date of Mailing: 1/29/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06469-18
AGENCY DKT. NO. 78-3/18

BANCROFT NEUROHEALTH,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL POLICY AND PLANNING,
Respondent.

David B. Rubin, Esq., for petitioner

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

Record Closed: October 25, 2019 Decided: December 30, 2019

BEFORE **SUSAN M. SCAROLA,** ALJ (Ret., on recall):

This matter was transmitted to the Office of Administrative Law on May 7, 2018, 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** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

December 30, 2019
DATE

SUSAN M. SCAROLA, ALJ
(Ret., on recall)

Date Received at Agency: 12-31-19

Date Mailed to Parties: 12-31-19

/cb

RECEIVED
2019 OCT 25 P 1:
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

BANCROFT NEUROHEALTH, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL POLICY AND PLANNING, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Docket No. 74-3/18 OAL Docket No. EDU 06469-2018S SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED AND AGREED by and between Petitioner, Bancroft Neurohealth ("Bancroft"), and Respondent, The New Jersey Department of Education, Office of Fiscal Policy and Planning ("Department") (collectively "The Parties"), that this action is hereby settled upon the following terms:

RECITALS

WHEREAS, N.J.A.C. 6A:23A-18.10 requires Approved Private Schools for Students with Disabilities ("APSSD") to annually submit audited financial statements based on the July 1 to June 30 school year; and

WHEREAS, Bancroft submitted the required audited financial statements for the 2005-2006 school year; and

WHEREAS, the Department reviewed Bancroft's 2005-2006 audited financial statements and identified non-allowable costs of $81,092.73; and

WHEREAS, Bancroft has not submitted the required audited financial statements for any year subsequent to the 2005-2006 school year; and

WHEREAS, Bancroft has submitted draft financial statements for the 2006-2007 through the 2016-2017 school years; and

WHEREAS the Department considered Bancroft's draft financial statements for the 2006-2007 through the 2016-2017 school years and found additional anticipated non-allowable costs; and

WHEREAS the Department has directed Bancroft to file audited financial statements for the 2006-2007 through the 2016-2017 school years; and

WHEREAS the Department recognizes Bancroft's unique situation and the substantial expense Bancroft would incur in preparing and filing audited financial statements for each school year from the 2006-2007 through the 2016-2017 school years, which amount would be an allowable cost; and

WHEREAS the Department notified all school districts that paid tuition to Bancroft between 2005-2006 and 2016-2017 of a potential settlement in this matter and allowed them 30 days to submit any comments to the Department:

NOW THEREFORE, it is hereby agreed by way of this Settlement Agreement ("Agreement") as follows:

1. The Parties acknowledge that the above Recitals are true and correct and are incorporated herein as material to this Agreement.

2. The Department agrees to rely upon the draft financial statements submitted by Bancroft's independent auditor that were not finalized for the 2006-2007 through the 2016-2017 school years.

3. Bancroft agrees that it will file audited financial statements for the 2017-2018 school year and all future years as required by N.J.A.C. 6A:23A-18.10 and in accordance with all applicable regulations and guidance.

4. Bancroft further agrees to accept $1,500,000 as non-allowable costs attributable to the 2005-2006 through the 2016-2017 school years.

   a. The Department has identified the districts that are impacted by this Agreement by reason of having paid tuition to Bancroft during the 2005-2006 through 2016-2017 school years. The amount of the settlement shall be allocated to each district based on the ratio of each sending district board of education's total Average Daily Enrollment ("ADE") in Bancroft

for the 2005-2006 through 2016-2017 school years to Bancroft's total ADE for the same period.

b. Each district shall receive its allocation of the $100,000 due in each year of this agreement until its total allocation is repaid. Bancroft agrees to notify each sending district of this settlement within 90 days and to remit each district's share of the settlement amount through actual remittance or through tuition credits, by June 30 of each school year over the next fifteen school years, beginning in the 2019-2020 school year.

   i. It is understood that the purpose of this allocation is to refund to sending districts a portion of the funds previously paid by those districts in respect of the charges disallowed pursuant to this Agreement, not to bestow a windfall on districts who have not yet paid Bancroft the tuition charges for the years related to the refund and at issue in this matter. In such cases, contracted parties should ascertain any net refund due the sending district and take appropriate measures to implement it.

c. Subject to the obligations set forth in subparagraph (b) above, nothing herein shall affect whatever entitlement Bancroft otherwise would have to collect from sending districts any outstanding tuition charges unrelated to the partial disallowances agreed to herein.

d. Nothing in this agreement shall prohibit Bancroft from prepayment, and a shorter repayment term may be negotiated between Bancroft and any school district.

e. Bancroft's payment of the settlement amounts in each year shall be memorialized in a Note Disclosure in that year's audited financial statements.

f. Under no circumstances shall the amount of settlement be included in allowable costs.

5. Bancroft agrees that, in any given school year, it will only charge the salary and fringe benefits of a Teacher Aide/Medical Specialist to "instructional" if it has (1) submitted the required statement of assurance to the Burlington and/or Camden County Offices of Education as provided for in N.J.A.C. 6A:32-4.2, and (2) maintained sufficient documentation to show that the majority of tasks completed by the Teacher Aide/Medical Specialist are instructional, which should include (a) an accurate job description and (b) an up-to-date contract with the vendor that explicitly identifies the job duties of a

Teacher Aide/Medical Specialist. The Department agrees that, if Bancroft complies with these requirements, it will not disallow the salary or fringe benefits of any such Teacher Aide/Medical Specialist.

6. The Parties stipulate and agree that this Agreement sets forth the complete and full resolution of all issues between them with regard to audited financial statements for the 2005-2006 through the 2016-2017 school years. This Agreement may not be modified or amended except by a written instrument signed by all parties hereto.

7. The Parties hereby agree that this Agreement shall fully dispose of any and all causes of action and claims that the Parties may have against one another relating to audited financial statements for the 2005-2006 through the 2016-2017 school years. In exchange for, and in consideration of, the payments, benefits, and other commitments described above, each party hereby fully releases, acquits, and forever discharges each other party of and from any and all claims, liabilities, causes of action, damages, costs, attorneys' fees, expenses, and compensation whatsoever, of whatever kind or nature, in law, equity or otherwise, whether known or unknown, vested or contingent, suspected or unsuspected, that the party may now have to the date of this Agreement against each other party

related to audited financial statements for the 2005-2006 through the 2016-2017 school years.

8. Petitioners shall file a Stipulation of Dismissal with Prejudice of OAL Docket No. EDU 06469-2018S with the New Jersey Office of Administrative Law on or before October 31, 2019.

9. This Agreement shall not constitute, be interpreted, be construed, or be used as evidence of any admission of fact, law, responsibility, wrongdoing, or liability on the part of the Department or Bancroft and shall not be referred to in any other proceeding by any party other than to enforce the express terms of this Agreement.

10. Nothing in this Agreement shall preclude an action to enforce the terms of this Agreement.

11. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey, including but not limited to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq. The Parties agree that any action to enforce or interpret this Agreement shall only be brought in the Superior Court of New Jersey.

12. The Parties understand and agree to the terms of this Agreement. It is acknowledged that this Agreement has been entered into freely, willingly, and voluntarily, without duress or coercion, and with the opportunity for the Parties to consult with representation of their choosing and at their option.

David B. Rubin
Attorney for Petitioner

By: _____
David B. Rubin, Esq.

Dated: 9/27/19

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

By: _____
Jaclyn M. Frey
Deputy Attorney General

Dated: 9/27/19

RECEIVED
2019 OCT 25 A 10:
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

BANCROFT NEUROHEALTH,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL POLICY AND PLANNING,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Docket No. 74-3/18
OAL Docket No. EDU 06469-2018S

ADDENDUM TO
SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED AND AGREED by and between Petitioner, Bancroft Neurohealth ("Bancroft"), and Respondent, The New Jersey Department of Education, Office of Fiscal Policy and Planning ("Department") (collectively "The Parties"), that the settlement agreement in this action signed by The Parties on September 27, 2019 is hereby amended upon the following terms:

It is hereby agreed by way of this Addendum that Paragraph 3 of the Settlement Agreement shall be amended as follows:

3. Bancroft agrees that it will file audited financial statements for the 2017-2018 school year and all future years as required by N.J.A.C. 6A:23A-18.10 and in accordance with all applicable regulations and guidance, provided, that Bancroft is granted an extension until November 30, 2019, to file its audited financial statements for fiscal years 2018 and 2019 only.

David B. Rubin
Attorney for Petitioner

By: _____
David B. Rubin, Esq.

Dated: 10/17/19

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

By: _____
Jaclyn M. Frey
Deputy Attorney General

Dated: 10/23/19

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF DAVID ZANE

SCHOOL DISTRICT FOR THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY Petitioner	:	Agency Dkt No. 283-10/19
and DAVID ZANE Respondent	:	AWARD APPROVING SETTLEMENT

Before: Carol F. Laskin, Esquire, Arbitrator

APPEARANCES:

For the Petitioner
Dean R. Wittman, Esquire
Zeller and Wieliczko, LLP

For the Respondent
Sanmanthi Dev, Esquire
Capehart Scatchard, P.A.

On October 17, 2019, the Monroe Township Board of Education ("Board") referred certified tenure charges against teaching staff member David Zane ("Respondent" or "Zane"). On November 8, 2019, Zane answered the tenure charge. On November 18, 2019, after review, the Department of Education appointed the undersigned, pursuant to *P.L. 2012, c.26* to hear and evaluate the tenure charges.

The parties, determining to amicably resolve all disputes

without further litigation while achieving the goals of both parties, entered into a Settlement Agreement and General Release on December 19, 2019, attached hereto as Exhibit 1.

On January 13, 2020, the Board submitted a Certification of the Board Minutes executed by Board Administrative/Board Secretary Lisa Schulz, attached hereto as Exhibit 2. Therein, the parties submitted the Settlement Agreement and General Release for my review, seeking approval.

The New Jersey Administrative Code contains procedures for filing Controversies and Disputes with the Commissioner of Education, *N.J.A.C 6A:3-1.1,et seq.* The new *Subchapter 5* applies to *Charges Under the Tenure Employee's Hearing Act. N.J.A.C. N.J.A.C. 6A:3-5.6* addresses *withdrawal, settlement, or mooting of tenure charges.* Section (a), identifies the criteria a panel arbitrator must review prior to approving any settlement, as follows:

> 6A:3-5.6 **Withdrawal, settlement, or mooting of tenure charges**
>
> (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the arbitrator, shall address the following standards established by the State Board of Education in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions (S.L.D.)* 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or

withdrawal;

3. Consent of both the charged and charging parties;

4. Indication the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing the agreement is in the public interest; and

6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

The parties recognized their obligation to comply with this provision and expressed so in explicit terms in the Settlement Agreement and General Release, E-1. Paragraph 10 expresses:

"10. Compliance with N.J.A.C. 6A:3-5.6

The parties agree that settlement of this case is justified by the need for an expeditious and final resolution. As a result of Mr. Zane's acceptance of a suspension without pay, his agreement for salary increment withholding and his agreement to complete an anger management class, the Board will achieve a guaranteed results, in an expeditious manner, at a comparatively low cost and will avoid the uncertainty of litigation before an arbitrator. Additionally, the within matter involves testimony of witnesses, whose interests would be better and permanently served by resolution through this Agreement."

In addition to the above, Respondent also voluntarily consented to a transfer from the position of Spanish Teacher at Williamstown High School to the position of Spanish Teacher at the Williamstown Middle School, E-1, para 3.

Reviewing the instant Settlement Agreement, in light of the Administrative Code, I ***find*** the Board's articulation of the circumstances justifying Settlement persuasively establishes the

Agreement is in the public interest. Accordingly, based upon this review, the attached executed Settlement Agreement is, hereby ***APPROVED.***

DATED: 1/31/2020

Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY:

COUNTY OF CAMDEN:

I CERTIFY that on 1/31/2020 CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

DATED: 1/31/2020

Lynda A Hillpot
NOTARY PUBLIC

Lynda A Hillpot
Notary Public
New Jersey
My Commission Expires 7-2-24
No. 50108025

SETTLEMENT AGREEMENT AND GENERAL RELEASE BETWEEN THE MONROE TOWNSHIP SCHOOL DISTRICT AND DAVID ZANE

WHEREAS, the Monroe Township Board of Education ("Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Monroe Township School District ("School District"); and

WHEREAS, David Zane is employed by the Board as a teacher; and

WHEREAS, on October 1, 2019, Dr. Richard Perry, Superintendent of Schools, filed sworn tenure charges against Mr. Zane together with a sworn statement of evidence in support thereof, and said charges were certified by the Board to the Commissioner of Education on October 17, 2019; and

WHEREAS, the Commissioner of Education transmitted the matter for hearing and determination by an arbitrator; and

WHEREAS, the parties, now wishing to resolve the within matter amicably without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. **Tenure Charges to be Withdrawn**

The Board agrees that upon execution of the within Settlement Agreement and General Release ("Agreement") by the parties, the subject tenure charges shall be moot and shall be deemed to be withdrawn and abandoned by the Board.

2. **Acceptance of Suspension Without Pay**

Mr. Zane, by signing this Agreement, hereby accepts a one hundred and twenty (120) day suspension without pay from October 18, 2019 through February 14, 2020. It being understood that such a suspension shall not change his status as a tenured teacher. Thereafter, Mr. Zane will be placed back on payroll at full salary beginning February 15, 2020. Mr. Zane agrees not to challenge the suspension through the collective bargaining grievance procedure or in any other forum, whether judicial or administrative.

3. **Transfer to Middle School**

Mr. Zane, by his signature on this Agreement, voluntarily consents to a transfer from the position of Spanish teacher at the Williamstown High School to the position of Spanish teacher at the Williamstown Middle School effective February 15, 2020. Mr. Zane agrees

SETTLEMENT AGREEMENT AND GENERAL RELEASE BETWEEN THE MONROE TOWNSHIP SCHOOL DISTRICT AND DAVID ZANE

WHEREAS, the Monroe Township Board of Education ("Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Monroe Township School District ("School District"); and

WHEREAS, David Zane is employed by the Board as a teacher; and

WHEREAS, on October 1, 2019, Dr. Richard Perry, Superintendent of Schools, filed sworn tenure charges against Mr. Zane together with a sworn statement of evidence in support thereof, and said charges were certified by the Board to the Commissioner of Education on October 17, 2019; and

WHEREAS, the Commissioner of Education transmitted the matter for hearing and determination by an arbitrator; and

WHEREAS, the parties, now wishing to resolve the within matter amicably without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. **Tenure Charges to be Withdrawn**

The Board agrees that upon execution of the within Settlement Agreement and General Release ("Agreement") by the parties, the subject tenure charges shall be moot and shall be deemed to be withdrawn and abandoned by the Board.

2. **Acceptance of Suspension Without Pay**

Mr. Zane, by signing this Agreement, hereby accepts a one hundred and twenty (120) day suspension without pay from October 18, 2019 through February 14, 2020. It being understood that such a suspension shall not change his status as a tenured teacher. Thereafter, Mr. Zane will be placed back on payroll at full salary beginning February 15, 2020. Mr. Zane agrees not to challenge the suspension through the collective bargaining grievance procedure or in any other forum, whether judicial or administrative.

3. **Transfer to Middle School**

Mr. Zane, by his signature on this Agreement, voluntarily consents to a transfer from the position of Spanish teacher at the Williamstown High School to the position of Spanish teacher at the Williamstown Middle School effective February 15, 2020. Mr. Zane agrees

not to challenge the transfer through the collective bargaining grievance procedure or in any other forum, whether judicial or administrative.

4. **Agreement Regarding Increment Withholding**

Mr. Zane, by signing this Agreement, hereby agrees to have his salary increment withheld for the 2020-2021 school year pursuant to N.J.S.A. 18A:29-14 and the withholding shall be permanent unless the Board at a future date takes action to restore the increment. It is hereby accepted and understood that the Board has the discretion to restore Mr. Zane's increment at a future time but that such restoration is not mandatory and is left in the sole discretion of the Board. Mr. Zane accepts the increment withholding and agrees not to challenge same through the collective bargaining grievance procedure or in any other forum, whether judicial or administrative.

Mr. Zane understands and agrees that Mr. Zane's salary in the position of Spanish Teacher of the Williamstown Middle School will be $89,170 for the 2020-21 contract year as a result of the increment withholding.

5. **Agreement to Complete Anger Management**

Mr. Zane, by signing this Agreement, hereby agrees to complete an anger management program no later than April 1, 2020. Mr. Zane is permitted to complete the anger management program during the period of his unpaid suspension. Mr. Zane agrees to provide proof of the program's completion to the Superintendent as soon as practicable.

6. **No Admissions**

The parties agree that neither the suspension without pay, the increment withholding or the completion of an anger management program by Mr. Zane, nor the Board's approval of this Agreement, constitute an admission of liability or wrongdoing by either party.

7. **Mutual Release**

In exchange for the above consideration, David Zane, his heirs and assigns hereby irrevocably and unconditionally waives, releases and forever discharges any and all claims or rights whether known or unknown, which he has or may have, personally or officially, individually or collectively, against past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially as well as their successors and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Release and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, Section 1983, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Older Working Benefit Protection 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 Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Civil Rights Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *el seq.*, the Public Employee Retirement System laws, the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1 with regard to civil and criminal actions, for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to as "COBRA") as well as claims arising from any breach of this Agreement. To the extent Mr. Zane pursues any of the exempted claims, the Board's rights to oppose and/or dispute such claims shall be preserved. Mr. Zane represents that he does not have knowledge of any claims or causes of action which would require or implicate the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1

In exchange for the above considerations, the Board hereby releases and forever discharges any and all claims against Mr. Zane which it has as of the date this Agreement is executed. Specifically exempted from this release are any employment claims or causes of action arising directly or indirectly from claims arising from breach of this Agreement. To the extent the Board pursues claims arising from breach of this Agreement, Mr. Zane's rights to oppose and/or dispute such claims shall be preserved.

It is understood that pursuant to this agreement Mr. Zane is to continue as an employee of the Board and therefore nothing herein shall be construed to impact the rights of either party in connection with any future event or occurrence.

8. Public Interest Served

The within settlement will serve the public interest, eliminating potentially costly additional litigation costs.

9. Assent to Terms

The parties hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and they do so without duress, of their own free will and volition.

Mr. Zane understands and acknowledges that he has had the opportunity to consult his attorney, has been advised of his right to take at least twenty-one (21) days to consider whether or not to execute this Agreement and Mr. Zane has decided to waive this right and sign this Agreement in less than twenty-one (21) days. Mr. Zane further agrees that he has

had the opportunity to review this Agreement in its entirety with his attorney, Dean Wittman of Zeller & Wieliczko, LLP.

Mr. Zane may revoke his signature of this Agreement within seven (7) calendar days of signing it by delivering written notice of revocation to Sanmathi Dev, Esq. Capehart & Scatchard, P.A., 8000 Midlantic Drive, Suite 300-S, P.O. Box 5016, Mount Laurel, New Jersey, 08054. If Mr. Zane has not revoked his signature of this Agreement by written notice received within the seven (7) day period, it becomes effective immediately thereafter. In the event of such revocation, this Agreement shall be null and void and the subject tenure proceedings shall be reinstated.

It is understood that this Agreement is subject to formal approval by the Monroe Township Board of Education.

10. Compliance with N.J.A.C. 6A:3-5.6

The parties agree that settlement of this case is justified by the need for an expeditious and final resolution. As a result of Mr. Zane's acceptance of a suspension without pay, his agreement for salary increment withholding and his agreement to complete an anger management class, the Board will achieve a guaranteed result, in an expeditious manner, at a comparatively low cost and will avoid the uncertainty of litigation before an arbitrator. Additionally, the within matter involves testimony of witnesses, whose interests would be better and permanently served by resolution through this Agreement.

The parties further agree that the proposed settlement will serve the public interest. As a result of Mr. Zane's acceptance of a suspension without pay, his agreement for salary increment withholding and his agreement to complete an anger management, the Board will not have to incur any further expenses associated with arbitration of any subsequent action related to this matter.

11. Entire Agreement

This Agreement represents the entire understanding of the parties.

12. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect to the extent that they do not materially impair the consideration upon which the parties have mutually relied.

13. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

14. The Parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures as well as electronic signatures through the use of email or .pdf files will have the same force and effect as original signatures.

15. By signing this Agreement, each signatory represents that he is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Agreement is duly authorized, approved and consented to as to terms.

16. Mr. Zane, by his signature below, acknowledges that he enters into this Agreement voluntarily, and further acknowledges that he has had an opportunity to consult with a representative of his choosing, including an attorney, with respect to this matter and with respect to the terms of this Agreement.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly executed authorized representatives have been set forth on the dates indicated below:

David Zane

Dated: 12-17-19

FOR THE MONROE TOWNSHIP BOARD OF EDUCATION:

Fred Powell, Board President

Dated: 12/19/19

Dr. Richard Perry, Interim Superintendent

Dated: 12/19/19

Monroe Township Public Schools
MAPLE GROVE ADMINISTRATION BUILDING
75 E. ACADEMY STREET
WILLIAMSTOWN, NJ 08094
(856) 629-6400 • Fax (856) 262-2499

RICHARD P. PERRY, JR., Ed. D.
Interim Superintendent of Schools
R. LYNN DiPIETROPOLO
Assistant Superintendent of Schools
LISA SCHULZ
Business Administrator/Board Secretary
JOHN L. BERSH, Ed. D.
Supervisor of Special Services

CERTIFIED BOARD MINUTES

January 13, 2020

At the December 19, 2019 regular meeting of the Monroe Township Board of Education, the Board took the following action:

A motion by Mr. Ayres, seconded by Mrs. Bonmati to recommend approval of the Settlement Agreement and General Release between Monroe Township Board of Education and D.Z. was carried by majority roll call vote with Mr. Torcasio abstaining.

Roll Call Vote:

Mr. Tony Ayres	Yes
Mrs. Therese Bonmati	Yes
Mr. George Caruso	Yes
Dr. Barbara Chamberlain	Yes
Mr. Joseph Rumpf	Yes
Mr. Jeff Simpler	Yes
Mr. Fred Powell	Yes
Mr. Frank Torcasio	Abstain
Mr. Brian Cummiskey	Absent

Lisa Schulz
Business Administrator/Board Secretary

SEAL:

EXHIBIT 2

New Jersey Commissioner of Education

Final Decision

Yolanda Greene,

Petitioner,

v.

Board of Education of the Burch Charter School of Excellence, Essex County,

Respondent.

Synopsis

Pro se petitioner, formerly employed by the respondent Board as a non-tenured vice principal, appealed the non-renewal of her employment and sought reinstatement to the position of vice principal. Petitioner contended that the Board's handling of a grievance filed against her and her subsequent non-renewal were improper. The Board asserted that petitioner's non-renewal was not arbitrary, discriminatory, retaliatory, or capricious, but was based, *inter alia*, on a pattern of parental concerns, staff issues, and petitioner's failure to perform a required racial sensitivity training.

The ALJ found, *inter alia*, that: petitioner was employed by the Board as a vice principal from January 2016 to June 30, 2018; the two pivotal issues in this case concern the propriety of the Board's decisions to compel petitioner to take a cultural sensitivity class as a result of a grievance filed against her and the propriety of the Board's determination not to renew petitioner's employment for the 2018-2019 school year; as to the grievance, the Board's failure to issue a *Rice* notice to petitioner regarding the meeting in which petitioner's appeal of the requirement that she take a sensitivity training class was discussed voids the Board's decision to compel her to take the class; as to the Board's non-renewal of petitioner's employment, a board of education has broad discretionary authority to decide whether non-tenured staff are renewed; here, the petitioner failed to demonstrate that the Board's refusal to renew her contract was arbitrary, capricious or discriminatory. Accordingly, the ALJ voided the Board's determination as to the grievance filed against petitioner, but affirmed the Board's action in non-renewing petitioner's employment for the 2018-2019 school year.

Upon comprehensive review, the Commissioner concurred with the findings and determination of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner noted that a board of education has virtually unlimited discretion in renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. Where a non-tenured staff member challenges a district board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. Petitioner herein has not asserted or proven that the Board violated any constitutional or legislatively-conferred rights. Accordingly, 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.

February 4, 2020

OAL Dkt. Nos. EDU 05122-18 and 10040-18 (consolidated)
Agency Dkt. Nos. 68-3/18 and 146-6/18

New Jersey Commissioner of Education

Final Decision

Yolanda Greene,

Petitioner,

v.

Board of Trustees of the Burch Charter School of Excellence, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by the parties pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed. Neither party filed a reply to the other party's exceptions.

These consolidated matters concern allegations by petitioner, a non-tenured vice principal, that the Board's handling of a grievance filed against her and her subsequent non-renewal were improper. After multiple days of hearings, the Administrative Law Judge (ALJ) found that the Board's decision to require petitioner to attend sensitivity training as a result of the grievance was void, in part because the Board failed to issue a *Rice* notice to petitioner for the meeting during which petitioner's appeal of the Board's decision to require sensitivity training was discussed. The ALJ further found that petitioner failed to demonstrate that the Board's non-renewal was arbitrary, capricious, or unreasonable and thus affirmed the non-renewal.

In her exceptions, petitioner argues that the Board should not have considered the complaints made against her by a parent and by two teachers during their non-renewal exit

interviews because she did not have an opportunity to address those complaints before the Board voted. She contends that because the grievance process was flawed, the Board's consideration of her failure to attend sensitivity training as part of the non-renewal decision was also flawed. Finally, petitioner argues that her non-renewal is contrary to public policy, because the Board failed to adhere to the grievance policy and did not honor her requests for public discussion of her employment matters, which she alleges violated the Open Public Meetings Act (OPMA).

The Board's exceptions largely reiterate its submissions below, arguing that it complied with the grievance policy. The Board further contends that its determination to require petitioner to undergo racial sensitivity training was made at the November 14, 2017 meeting, for which petitioner received a *Rice* notice. According to the Board, it was not obligated to have another discussion or board meeting to address petitioner's appeal of the decision.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's findings and determinations in this matter. Regarding the grievance, an employee is entitled to advance notice when a board of education intends to discuss in closed session a personnel matter that could adversely affect the employee. *Rice v. Union County Reg'l High Sch. Bd. of Educ.*, 155 *N.J. Super.* 64, 73 (App. Div. 1977). Regardless of whether the grievance policy requires the Board to hold another meeting to address an appeal, here the Board did discuss the appeal in closed session and then took action on the appeal by affirming the decision, at a meeting for which they did not issue a *Rice* notice to petitioner. The requirement to undergo sensitivity training can be construed as an adverse employment action – indeed, the Board's actions in sending *Rice* notices to petitioner for the prior meetings discussing the matter suggest that it believed the same – and thus the Board's failure to issue a *Rice* notice for a meeting in

which that requirement was discussed in closed session and then affirmed renders its action void.[1]

With respect to the Board's non-renewal decision, a board of education has virtually unlimited discretion in hiring or renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447, 456 (App. Div. 1982). Here, while petitioner expressed her belief that the non-renewal was discriminatory because the grievant is Caucasian and petitioner is African American, she presented no evidence to support that theory. The two Board members who testified regarding the non-renewal denied any discriminatory motive and provided other reasons for the non-renewal that were not based in any way on petitioner's race.

Moreover, while the Board's requirement that petitioner undergo sensitivity training is void, and thus petitioner's failure to do so should be removed from the Board's consideration regarding non-renewal, the complaints against petitioner by a parent and two teachers provided the Board with additional reasons for the non-renewal decision, as testified to by the Board members. Although petitioner disputes the substance of those complaints, when a non-tenured staff member challenges a board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd* Docket #A-3316-85T6 (App. Div. 1986). Petitioner has not asserted or proven that the Board violated any constitutional or legislatively-conferred right by considering these complaints.

---

[1] Because the failure to send a *Rice* notice renders the Board's decision void, the Commissioner need not reach the other issues regarding the grievance raised by petitioner.

Furthermore, while petitioner is dissatisfied with the nature of the public discussion during the board meetings in which her non-renewal was at issue, the Board has fulfilled its OPMA obligations by providing her with the required *Rice* notices for these meetings and giving her the opportunity to be heard in public. The New Jersey Supreme Court has recognized that the practice of discussing personnel matters during subcommittee meetings in advance of taking public action is common practice and that the OPMA does not contain any requirement about the robustness of the discussion that must take place on a topic. *Kean Fed'n of Teachers v. Morell*, 233 *N.J.* 566, 587-88 (2018). For these reasons, petitioner has not established a violation of a constitutional or legislatively-conferred right and her non-renewal was therefore within the Board's discretion.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board's decision requiring petitioner to undergo sensitivity training is void. The Board's decision not to renew petitioner's contract is affirmed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/20
Date of Mailing: 2/4/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMMENED

INITIAL DECISION

OAL DKT. NO. EDU 05122-18

AGENCY DKT. NO. 68-3/18

YOLANDA GREENE,

Petitioner,

v.

THE BURCH CHARTER SCHOOL OF EXCELLENCE BOARD OF TRUSTEES, ESSEX COUNTY,

Respondent.

OAL DKT. NO. EDU 10040-18

AGENCY DKT. NO. 146-6/18

YOLANDA GREENE,

Petitioner,

v.

THE BURCH CHARTER SCHOOL OF EXCELLENCE BOARD OF TRUSTEES, ESSEX COUNTY,

Respondent.

Yolanda Greene, petitioner, pro se

Elizabeth Butler, Esq., for respondent

Record Closed: October 8, 2019 Decided: November 26, 2019

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Yolanda Greene contests the non-renewal of her employment as a vice-principal by the Burch Charter School at the conclusion of the 2018 school year. She also contests the manner in which her former employer handled a grievance which was filed against her by a former teacher at the school.

On or about March 19, 2018, and June 7, 2018, respectively, Yolanda Greene filed two petitions with the Commissioner of Education.

The first petition alleges that respondent failed to provide her with adequate procedural due process in a grievance that was filed against her by a former teacher. The second petitioner alleges respondent acted in an arbitrary, capricious and discriminatory manner against her in making a determination that she should not be offered a contract for renewal for continued service as a vice principal for the 2018–19 school year.

On or about July 6, 2018, respondent filed Answers to the petitions. The Department of Education transmitted the matter to the Office of Administrative Law for a determination as a contested case. Hearings were conducted on September 18, 2018, October 29, 2018, November 19, 2018, December 4, 2018, February 22, 2019, March 5, 2019, and oral argument was conducted on October 8, 2019.

Based upon a review of the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following pertinent **FACTS** and accept as **FACT** the testimony set forth below:

Petitioner is an African American woman with a bachelor's degree in political science and communications from Rutgers University. She has a master's degree from Nova Southeastern University in curriculum, instruction, and technology. Her prior experience in the field of education includes positions as a classroom teacher, math coach, education supervisor, district administrator, interim director of professional development, and vice principal.

Respondent Burch Charter School is an alternative to public school for select students whose parents want to give them an opportunity to achieve their dreams and goals. The student body, administration, and faculty are diverse, consisting primarily of African American and Hispanic ethnicity.

Lindsay Fink is a Caucasian physical education teacher who was employed by the respondent from 2012-2018, until she left for another position in another school district. On May 17, 2018, Fink was teaching a class when she heard one of her students say something to the effect of "these white teachers." The comments were directed to Fink after she questioned the student who made the remarks as to why the student was not wearing a gym uniform, which is required.

Disturbed by what she heard, in an effort to secure advice as to how to handle the situation, Fink immediately contacted petitioner to determine the appropriate course of action. Petitioner, who was busy at the time handling another matter, told Fink that she could write the student up if she wanted. In the same conversation, petitioner responded to Fink, "you are white, aren't you?" and told Fink she did not believe the student's comment was racially motivated.

Taken aback by what she perceived to be a muted response to what she had just experienced, Ms. Fink testified that she contacted the principal of the school, and the

person to whom Ms. Greene reported to, Theodore Boler. One week after the incident with the student, with no satisfaction that her concerns were being addressed, Ms. Fink filed a grievance against petitioner.

The grievance procedure is memorialized in the Burch Charter School Handbook. At the time of the incident, the 2014 Employee Handbook was in effect, which included a five-step procedure to be used to address complaints and grievances.

Step 1 of the process calls for an informal mediation between the aggrieved party and the accused, overseen by a designated school compliance official, in this case, Patricia Holness, the school social worker and compliance officer.

After meeting with Ms. Fink and the petitioner, Ms. Holness concluded that the matter could not be resolved informally. She then commenced the next step in the process, which was to conduct a formal mediation. The Handbook calls for the entire procedure to be completed within sixty days, unless the person who filed the complaint seeks a written extension. Due to the fact that the matter and subsequent grievance were brought very close to the end of the school year, Ms. Holness concluded the formal mediation would occur in September. (Ms. Fink, who was a ten-month employee, did not want to deal with the matter over the summer when she was not paid to be in school.)

Petitioner contends her due process rights were violated, since the formal mediation was not completed within sixty days of the filing of the grievance, in accordance with the timelines set forth in the Handbook. She did not express this objection at the time both mediations were being conducted.

After school re-opened in September 2017, the Board, at its September 11 meeting, appointed attorney Rashida Hassan to handle the formal mediation. Ms. Hassan was on a pre-approved list for selection as needed. Ms. Hassan is an experienced attorney, with expertise in the area of mediation.

Ms. Hassan testified that she met with the parties separately, but never met with them together. Ms. Fink's position was that before reaching the formal stage of mediation, with an apology or a concession from petitioner that her response was abrupt, Ms. Fink would not have pursued it any further. Ms. Hassan's assessment of Ms. Green was that she was rigid and unwilling to compromise in order to resolve the matter.

Petitioner steadfastly maintained that she did nothing wrong and would do what she did again and saw no harm in her comments to Ms. Fink.

Ms. Hassan then concluded the mediation without a resolution. However, within the report she filed with the Board, she recommended that petitioner consider a cultural-sensitivity training program and acknowledge to Ms. Fink that her comments were inappropriate. For reasons unknown, a copy of the report was not provided to petitioner at the time it was written.

On October 4, 2017, Holness informed petitioner of the mediator's recommendation and told the petitioner it would be discussed at the Board's next meeting on October 16, 2017. The next day, October 5, Mr. Boler sent petitioner the required Rice notice to inform petitioner that something related to her employment would be discussed at the next Board meeting. The discussion of the report was tabled at the October 16 meeting because petitioner had not been provided with a copy of the report. She received the report shortly thereafter.

On November 14, 2017, the Board's personnel services committee reviewed the mediator's report and recommended that it be adopted by the Board as a whole. Later that evening, the entire board met, and after giving petitioner an opportunity to speak, the Board adopted the mediator's report and recommendation.

On November 27, 2017, Mr. Boler informed petitioner in writing that the Board adopted the mediator's report and recommendation, and that, within thirty days she needed to take a racial-sensitivity class and acknowledge that the incident could have

been handled differently. That same day, petitioner exercised her right of appeal to the Board requesting consideration.

At the next board meeting on December 12, 2017, the Board considered the appeal and affirmed its decision. (P-11.)

Heather Martindale is a founding member of the Burch Charter School who got involved as a member of the Board because in her own words "she is passionate about kids." She has been a Board member since the inception of the school over fifteen years ago, and serves on the personnel committee together with Mr. Boler, her sister Paulita Martindale, and Carolyn Hee. The personnel committee is responsible for hiring, significant personnel changes, review, renewals, and salaries.

Ms. Martindale's justification for voting to accept the mediation report and later to not to renew petitioner's contract was based on several factors, including her concern that one parent, who at one time had three children in the school, left the school completely due to what the parent felt was indifference by Ms. Greene to a matter involving her child and another student. According to Ms. Martindale, this was a "big deal" to the Board, since the school has a reputation for listening to parents. Ms. Martindale also considered information she received from another teacher, Ms. Dickerson, who left the school due to unfavorable interactions with Ms. Greene. But this information was never shared with Ms. Greene prior to the vote on non-renewal.

A large part of Ms. Martindale's vote to not renew Ms. Greene's contract was based on her disappointment that Ms. Greene never took the recommended sensitivity class. In February 2018, Ms. Martindale asked Mr. Boler if Ms. Greene had completed the class. And this view of the situation was triggered by Ms. Martindale's belief that the way Ms. Greene handled the situation with Ms. Fink showed a lack of understanding of the feelings of the person she was speaking to. She believed Ms. Greene's behavior was intolerant in relation to that particular situation with Ms. Fink; that it was inappropriate and unprofessional as a person. On March 14, 2018, Mr. Boler reminded petitioner of her obligation to take the sensitivity class.

Prior to making the decision not to renew, Ms. Martindale communicated with Mr. Boler seeking a current review of her performance which was supposed to occur twice a year. Upon reviewing the document, Ms. Martindale expressed her opinion to Mr. Boler that it was incomplete, inappropriate, and unprofessional. The evaluation only consisted of a few bullet points and it did not reflect parent or staff complaints about Ms. Greene. Mr. Boler apparently did not document complaints about Ms. Greene, but they were known to the members of the Board, including petitioner's response to the incident with Ms. Fink.

Another Board member, Beverly Canady is a site director and mental health therapist at a school in a community nearby Burch. She is also the co-director of a grief center. Ms. Canady is a licensed professional counselor and has a Bachelor's Degree in sociology from Rutgers and a master's in counseling from Wichita State University, and a post-master's degree from Caldwell College. She is the Board secretary at Burch and serves on the curriculum committee.

Ms. Canady corroborated the Board's thought process discussed by Ms. Martindale about parent voices not being heard, and the manner in which petitioner spoke to people. She expressed concern about petitioner's response to Ms. Fink as not being consistent with the climate the board believes is important for the school to follow. The culture at Burch, according to Canady, is supposed to be one of teachers and administrators working together. She believes petitioner's comments to Ms. Fink were intolerant, and not consistent with the culture and climate expected of staff at Burch. Ms. Canady was disappointed that a family with three children in the school left due in part to their interactions with Ms. Greene.

Ms. Canady also confirmed as Board secretary that when it came time for Ms. Greene to speak at the public meeting on May 14 concerning her employment status, the minutes reflect she remained silent and waived her right to speak.

The final witness was petitioner Yolanda Greene. She too was a credible witness, but she had a different perspective on the events leading to her non-renewal starting with the incident with Ms. Fink. From her perspective, she called the incident a

"teachable moment." Busy with another matter at the time of Ms. Fink's call, she did not deem the matter serious enough to stop what she was doing to meet with Ms. Fink. She defended herself by explaining her analytical approach to the situation, that it was an opportunity in a school setting to learn more from the student about why they said what they said to Ms. Fink.

A significant portion of Ms. Greene's testimony focused on her concerns and objections to the manner in which the grievance investigation and mediation was handled. But when it came time to address her concerns about the non-renewal process, she indicated that she decided to remain silent at the May 14 meeting where her employment was being discussed, because of the way the Board handled the mediation process. Essentially, she admitted she remained silent and waived her right to speak in public and waived her right to a Donaldson hearing after she was notified that she would not be renewed. When asked why she never took a cultural-sensitivity class, she first offered that she felt that Ms. Fink should also have been told to take a class. She then indicated that even after Mr. Boler reminded her the Board expected her to take a class by the end of March 2018, she had a hard time finding a class on this subject. While most of Ms. Greene's testimony was credible, her excuse for not locating a class on cultural sensitivity over a period of five months does not seem credible. It will never be known if she had done so if a new contract would have been offered.

LEGAL ANALYSIS AND CONCLUSION

In this matter, petitioner was employed by the Burch Charter School from January 2016 to June 30, 2018. The pivotal issues concern the propriety of the Board's decisions to compel petitioner to take a cultural-sensitivity class based on the recommendation of a mediator and the propriety of the board's determination not to renew petitioner's employment for the 2018–19 school year.

Pursuant to N.J.S.A. 18A:6-9, the Commissioner of the Department of Education has jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws. N.J.A.C. 6A:3-1.1 to 1.17. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide

controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1(a).

The Petition requests that the undersigned set aside the Board's adoption of a mediation recommendation to take a cultural-sensitivity class, and to determine that the Board acted in an arbitrary capricious and discriminatory manner in not renewing her contract to serve as a vice principal at the school for the next calendar school year.

"School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal."

From a procedural standpoint, the Board complied with all the statutory requirements governing the non-renewal of a teacher. Petitioner contends that the mediation process to which she was a party was faulty in that it was not completed within sixty days, and the mediator took sides when she made a recommendation in the conclusion of her report that petitioner should undergo cultural-sensitivity training.

After the informal mediation failed to produce a resolution towards the end of the 2017–18 school year, school officials determined that the formal mediation cold not be completed prior to the conclusion of the school year. The Personnel Handbook upon which petitioner relies says the procedure must be completed in sixty days, unless the complainant agrees in writing to extend the time. While it was not done in writing, the Board substantially complied with this provision in that when Ms. Fink was consulted, she did not want to be called in over the summer, as she was only a ten-month employee.

As to petitioner's complaint about process, the Board properly sent a Rice notice to petitioner on October 3, 2017, that something related to her employment was going to be discussed at the next Board meeting. Rice notices do not have to specify what will be discussed, just the fact that something related to an individual's employment will be discussed. Petitioner requested that the mater be discussed in public. When it was

learned that petitioner had not received a copy of the mediator's report, the conversation was tabled until the next month's meeting. Petitioner admits in her own summation that she knew the matter was tabled; that two weeks later she received a copy of the report; and together with another Rice notice that something related to her employment may discussed at the Board's next meeting.

At the November 14 meeting, the Board did in fact discuss and adopt the mediator's report. There was some discussion during the hearing as to whether or not it was appropriate for the mediator to make a recommendation, a fact to which petitioner strongly objected. Petitioner requested and was given an opportunity to speak.

But the fact that it was a recommendation, and not a mandate, does not mean that the mediator exceeded the scope of her authority. Her report to the Board was just that, a recommendation after she determined that Ms. Fink was somewhat flexible in her position, and petitioner was not, and saw nothing wrong with the undisputed remarks that were made to Ms. Fink. Instead of entering into a dialogue with the Board and her immediate supervisor Mr. Boler about the recommendation, petitioner filed an appeal for the Board to reconsider.

At its December 12, 2017, meeting, the Board affirmed its adoption of the mediator's recommendation and report. Petitioner takes issue with this action as she did not receive another Rice notice concerning discussion of the appeal. She indicated that she was present for the first part of the meeting but had no idea her appeal was on the agenda or she would have stayed for the entire meeting and possibly spoken in public again. By the Board's failure to list the appeal as an agenda item, failure to send her a third Rice notice, and voting to affirm its earlier decision without a public discussion, petitioner contends that by affirming its prior decision and rejecting petitioner's appeal, the board was in violation of the open Public Meetings Act, N.J.S.A. 10:4-6 to -21. See also Kean Fed'n of Teachers v. Morrell, 233 N.J. 566 (2018); Caldwell v. Lambrou, 161 N.J. Super. 284 (App. Div. 1978).

During the October 8 argument, school counsel was asked whether the mediator exceeded her authority by including a recommendation in her report which was

ultimately adopted by the board. Counsel indicated that this was acceptable under the revised manual which was put in place in October 2018. But as petitioner correctly pointed out, the manual under which the grievance process was commenced was in place effective 2014. She objects to the combination of an adopted mediation recommendation, as well as the fact that the board met a third time to discuss something related to her employment status, without another Rice notice and without it being included on the agenda for the meeting.

As to petitioner's complaint that she did not receive procedural due process in connection with the grievance mediation process, I agree in part as to the contention that though not intentionally, to some extent the mediator exceeded her authority by making a recommendation as to only one of the parties, and the resulting adoption of the recommendation as to only one of the parties, and rejection of the appeal without a Rice notice and agenda item was flawed. This is further evident by virtue of the fact that the grievance procedure also required the compliance officer to submit a report to the board if the formal mediation failed to achieve a resolution, which was not submitted.

Therefore, I **CONCLUDE** that while the informal mediation process and part of the formal mediation process followed the necessary protocol, the incorporation of a recommendation by the mediator as to only one of the one of the parties (in this case the petitioner), the resulting adoption, and the discussion of petitioner's appeal at the December 2017 meeting without a new Rice notice and the Board's failure to include the appeal as an agenda item were flawed. To the extent that a Board directive was issued to petitioner arising from the mediation, as well as the fact that Step 5 in the grievance process was not followed by failing to issue a final report from the compliance officer, this aspect of the relief sought by petitioner is **GRANTED**, and I **CONCLUDE** the action of the Board in adopting and implementing the mediator's recommendation which essentially determined petitioner was at fault is deemed **VOID**.

Turning to the issue of non-renewal, petitioner contends in this matter that when respondent determined in May 2018 that her employment would not be extended, the Board's actions were arbitrary, capricious, unreasonable and discriminatory. The caselaw in this area is well settled.

Boards have broad discretionary authority to decide whether a teacher, or in this case a vice principal should or should not be re-engaged. Donaldson v. N. Wildwood Bd. of Educ., 65 N.J. 236 (1974). No obligation exists on the part of board to renew non-tenured teachers. Wyckoff Twp. Bd. of Educ. v. Wyckoff Educ. Ass'n, 168 N.J. Super. 497 (App. Div. 1979).

There are some limits and procedural safeguards afforded to school employees when their employment status is due to be considered. A board of education is required to send a "Rice notice" any time it has placed on its agenda any matters involving the employment, evaluation appointment, evaluation of performance or discipline. N.J.S.A. 10:4-12(b)(8). This provides the affected employee with an opportunity to decide whether they desire a public discussion and prepare and present an appropriate request in writing. See Rice v. Union Cty. Reg' High Sch. Bd. of Educ., 155 N.J. Super. 64 (App. Div. 1977).

On May 8, 2018, the Board issued another Rice notice to petitioner indicating that her employment status would be discussed at its meeting on May 14, 2018. Ms. Martindale indicated in her testimony that may was traditionally the time when the Board would discuss the contract status of several employees whose contracts were under consideration for renewal or non-renewal. As it turned out, petitioner was one of several employees whose status was being discussed that night.

As part of his duties as petitioner's supervisor and as a member of the personnel committee, Mr. Boler supported the continued employment of petitioner, and to that end, although some of his reviews were incomplete, he had written favorable comments about her performance. While petitioner contends, she should have been evaluated twice a year, a board's failure to comply with statutory evaluation procedures is not fatal to a decision to terminate or not renew a contract. See El-Hewie v. Bd. of Educ. of the Bergen Cty. Vocational Sch. Dist., No. A-6310-07T3 (App. Div. Dec. 24, 2009). Both Ms. Martindale and Ms. Canady indicated that while Mr. Boler's position was considered, it was but one factor in the Board's ultimate decision not to renew petitioner's contract.

Board members were concerned about petitioner's interactions with parents and co-workers, in addition to the situation that occurred between Ms. Greene and Ms. Fink. Staff members on exit interviews expressed their dissatisfaction with Ms. Greene. It was stated by at least one other staff member that "petitioner did not know how to talk to people and did not support teachers." And the interaction between petitioner and Ms. Fink that led to the grievance which petitioner did not seem to see the offensive nature of her comments was also considered by the Board in deciding not to renew her contract.

Although petitioner acknowledged receipt of the May 8 Rice Notice, she remained silent at the meeting during the public portion, thus waiving her right to challenge the Board's decision not to renew.

Following the meeting, the next day, May 15, 2018, Mr. Boler notified petitioner in writing that the Board did not renew her contract for the next school year. As was her right, petitioner asked for and received a statement of reasons behind the decision not to renew. But for reasons unknown, despite her emphasis in this appeal on procedure, petitioner did not follow up with a request for a Donaldson hearing which would have afforded her the opportunity to have a formal dialogue with the Board and perhaps convince the Board that it should reconsider its decision.

There is simply no evidence that the Board acted in a discriminatory or arbitrary and capricious manner in deciding not to renew petitioner for the next school year. Petitioner is an African American female with an impressive educational background. The Board for the most part, consists of African American members, and both Martindale and Canady are African American. Mr. Boler is African American. And the student body for the most part and their respective families are African American or other minority groups. So it is hard to understand petitioner's argument that she was the victim of discrimination when all of the decision makers were of the same ethnicity as petitioner.

Petitioner also complained that the board failed to give proper consideration to the favorable reviews she received from Mr. Boler. "In determining whether to renew a teacher's contract, a local board has the right to base its decision not to re-employ on matters outside of a teacher's evaluations." Dore v. Bedminster Twp. Bd. of Educ., 185 N.J. Super. 447 (App. Div. 1982). A board of education's decision to non-renew the contract of a non-tenured employee should not be disturbed unless it is arbitrary or capricious. See N.J.S.A. 18A:27-4.1.

In this case, petitioner received a Rice notice in advance of the May discussion concerning her employment status. She remained silent during the public portion of the meeting. And after asking for and receiving a written statement of reasons why her contract was not renewed, she waived her right to request a Donaldson hearing.

While the evidence supports petitioner's contention that the Board did not follow proper protocol in part by adopting a recommendation from the mediator that exceeded the scope of the mediator's authority, there is no evidence that the Board of Education violated any law as to the more critical contract renewal process and I therefore **CONCLUDE** that petitioner has failed to demonstrate that the Board's refusal to renew her contract was arbitrary, capricious or discriminatory.

ORDER

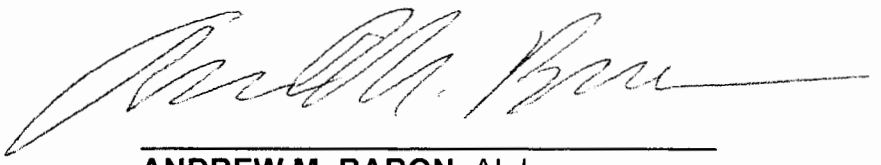
It is **ORDERED** that the Burch Charter School Board's determination as to the grievance filed against petitioner is deemed void, and it is further **ORDERED** that the decision by the Burch Charter School Board of Education, the result of which was to not renew petitioner's contract for the 2018–2019 school year, is **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final

decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

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



November 20, 2019
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: November 20, 2019

Date Mailed to Parties:

mm

APPENDIX

Witnesses

For Petitioner:
Yolanda Greene

For Respondent:
Heather Martindale
Patricia Holness
Theodore Boler
Beverley Canady
Rashida Hassan

Exhibits

For Petitioner:

P-1 Grievance Policy Timeline

P-2 Burch Charter School Employee Handbook, dated September 9, 2014. The revised handbook dated October 5, 2017 was not marked but is included.

P-3 Rice Notice, dated May 8, 2018

P-4 Rice Notice, dated May 15, 2018

P-5 Mediator Report

P-6 Evaluation, dated 2015/2016

P-7 Evaluation, dated 2016/2017

P-8 Evaluation, dated2017/2018

P-9 Meeting Minutes, dated August 14, 2017

P-10 Meeting Minutes, dated May 14, 2018

P-11 Meeting Minutes, dated December 12, 2017

P-12 Email

P-13 Rice Notice/Mediation Report, dated October 3, 2018

P-14 Request for Public Meeting, dated October 13, 2018

P-15 Board Agenda, dated October 10/16/18

As reflected in the transcripts, some items testified to by petitioner were given consideration but nor formally marked into evidence and/or introduced by both sides. Certain exhibits were either marked out of order, nor marked. See email exchange of April 12, 2019.

For Respondent:

R-1 Meeting minutes, dated May 7, 2018
R-2 Rice Notice, dated May 8. 2018
R-3 Omit
R-4 Omit
R-5 Letter, dated October 3, 2017
R-6 Letter, dated October 19, 2017
R-7 Letter, dated December 27, 2017
R-8 Mediator's Report, dated October 4, 2017
R-9 Email, dated September 25, 2017
R-10 Holness/Greene letter, Dated December 19, 2017
R-11 Greene to Cole, dated May 5, 2017
R-12 Rutgers Principal Evaluations
R-13 Meeting Minutes, dated October 16, 2017
R-14 Meeting Minutes, dated November 14, 2017
R-15 Meeting Minutes, dated March 13, 2018
R-16 Grievance

Court: Court 1-Contract

Respondent's exhibits were marked at D-1 to D-16 but should have been marked as R-1 to R-16. Certain exhibits were marked by both sides and some were marked out of order. See email exchange of April 12, 2019.

49-20E

OAL Dkt. No. EDU 18125-19
Agency Dkt. No. 333-12/19

New Jersey Commissioner of Education

Order on Emergent Relief

Board of Education of the Township of Mansfield, Warren County,

Petitioner,

v.

New Jersey Department of Education,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted for the reasons expressed therein. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/20
Date of Mailing: 2/4/20

participation due to the unwanted stress that it would cause the students and staff, as well as the distrust that would develop within the District's learning environment." (Petitioner's Exhibit B). On the same date, the NJDOE responded to Mr. Giordano's request by indicating that the District must participate. (See Exhibit C, letter from Mr. Steele-Dadzie). In further October 1, 2019 correspondence, the Superintendent made a "formal" request to opt-out.

Again, both parties note that the NJDOE responded in another letter from Mr. Steele-Dadzie citing N.J.A.C. 6A:8-4.1(b) in pertinent part "[which] states that "the Commissioner shall implement a system and related schedule of Statewide assessments to evaluate student achievement of the NJSLS." He added that "the ELA Field test is part of the state assessment program which all public school districts must participate in." See Petitioner's Exhibit E. To that end, the NJDOE denied the District's "formal" request to opt-out for those reasons and I so **FIND**.

There was follow-up correspondence regarding this issue from the District's attorney to the NJDOE regarding the District's position on October 7, 2019 and no response received until November 25, 2019 after the District's attorney wrote again to the NJDOE. As the District already received an answer at least twice from the NJDOE directly; I **FIND** this alleged delay is noted but will not give it much weight as the District received an immediate answer from the NJDOE regarding it's inability to opt-out of the field testing.

On November 25, 2019, the attorney for the District, Mr. Zitomer received the same answer with the identical legal authority above noting the NJDOE's responsibility and that the ELA field testing as an "integral component of the Statewide assessment systems, which all public school districts must participate in." (See Petitioner's Exhibits H and J).

It is undisputed as it is published by the NJDOE, that the extra testing time required for the ELA portion of the field test is 90 minutes. (See Petitioner's Exhibit J-NJDOE Statewide Assessment Unit Times)

The District argues, if they cannot opt out; they will suffer irreparable harm regardless of the laws noted above, in pertinent part:

> [b]ecause the field test unit is not identifiable to students, the administering of said unit by the District will cause students to develop a sense of distrust within the District's environment by requiring students to "guess" which units count and which one is merely being proctored by the District for the Respondent's benefit to evaluate their own test questions.

See District's Petition paragraph 25.

Further, the District argues that without opting out, the education of the students will be "unnecessarily interrupted"; "added stress and anxiety will be thrust upon both students and staff, and the District will risk losing the trust of students and parents." The District further adds the assumption that students "may exert less effort on the testing overall by speculating as to which test questions "do not count." (See District's Petition paragraph 26.

However, where petitioner falls short in their argument is whether any of these assumptions or speculations apply specifically to this District. The petitioner has not presented any affidavits or certified exhibits of a certain type of population, a specific student, or anything that distinguishes this District from any other in the state. In short, the District has nothing to point to for irreparable harm other than speculation as to the effect of taking the field test for the ELA for an extra 90 minutes and thus I so **FIND.**

It should be noted that I have reviewed all corresponding certifications and documentation from both sides in this matter and discussed the matter at length in an attempt to resolve same. I **FIND** that the District's Superintendent did try to opt-out and that via email, that request was timely denied several times as outlined above. In addition, once the District's attorney wrote to the NJDOE, the same answer was given with additional citations to the relevant law.

This tribunal and both parties concede that my ruling is controlled by state law with regard to NJDOE's statewide assessments and their requirements therein pursuant to

N.J.A.C. 6A:8-4.1(b), as well as, N.J.A.C. 6A:3-1.6(b) and the Crowe v. DeGioia standard which will be explored in detail below.

In accordance with N.J.A.C. 6A:3-1.6 and 1:1-12.6, emergency relief may be granted "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 . . . ." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 90 NJ 126 (1986), as follows:

> The judge may order emergency relief ... if the judge determines from the proofs that:
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted.
>
> 2. The legal right underlying the petitioner's claim is settled.
>
> 3. The petitioner has a likelihood of success on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.

ANALYSIS AND CONCLUSIONS

The issue before me is whether, based on the disputed, undisputed facts and procedural history before me, the criteria for the granting of emergency relief has been met for the District to opt-out of the ELA field testing for Spring 2020. The applicable regulation incorporates the well-established standard for injunctive relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982):

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

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

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

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

[N.J.A.C. 6A:3-1.6]

With respect to the first prong, I **FIND** that petitioner will not suffer irreparable harm if the requested relief to opt-out of the Spring 2020 ELA field test of the NJSLA is not granted. There is no direct proof or certified allegations of the stress or anxiety that the students will face if they have to take the field test portion of the ELA which as noted above is 90 minutes extra of testing. There is not one certification from a Psychiatrist or Psychologist or any actual alleged evidence other than mere speculation as to what the students will face if they have to take the extra part of the test. I find it especially specious to argue that it will cause "distrust" of the students and the District when that can easily be fixed by citing the regulations that make this mandatory for randomly-selected districts throughout the State. (See Petitioner's Exhibit J)

To that end, this case is not unique. The District's argument about any stress, anxiety, distrust, less time in the classroom is misplaced as there are no facts verified with this petition to distinguish this District from any other in New Jersey as thus I so **FIND.** That alleged lack of trust can be remedied by the District itself in communicating with the parents and teachers about what to expect on a year their district is randomly selected for a field test and why it's required. In addition, these students will already be taking the test; this is merely adding 90 minutes extra time. If anything, an argument can be made that more time taking the test would add valuable test-taking practice and skills that are required throughout elementary, middle school, high school, college and beyond.

I have reviewed the second and third prongs of Crowe together because the merits and rights are intertwined here. Petitioner has a very high burden on this application with respect to proving that this forum is likely to reverse the determination of the NJDOE and their legal obligation under the NJ regulations to implement the NJSLA testing procedures. To that end, Petitioner's rights are not well-settled. In fact, as Respondent

notes, there is no statutory or regulatory authority that permits Petitioner to opt out of routine field testing; nor has any authority been cited by the District. My independent research does not note a case where such emergent relief was granted. Conversely, N.J.A.C. 6A:8-4.1(b) gives the NJDOE the authority and responsibility to create test questions that are appropriate for the evaluation or student achievement. The law does not exclude field testing and I can take Judicial Notice from both submissions and a review of the NJDOE website that field-testing is well-known as part of their building of statewide assessments. In addition, there is no provision in the law that allows a school district to opt-out of this field testing under these circumstances. As there is no case law, but rather regulations that support the State in completing their required task for assessments and no regulation that permits a District to opt out, I **FIND** the District cannot meet the second or third prongs. Without the law being settled, there is no likelihood of prevailing on the merits of its underlying claim and thus I so **FIND.**

On the last prong, I **FIND** that since there is no demonstrated irreparable harm to the District in taking the test field portion of the ELA, the alleged harm certainly does not outweigh the NJDOE's and the public's interest in maintaining, developing and implementing appropriate statewide assessments and to develop test questions that accurately evaluate student achievements. To that end, I agree with Respondent that the administration of field tests will lead to better standardized tests and thus benefit all students regarding an accurate measure of their academic achievement. In fact, as argued in the brief and in oral argument, I am persuaded that there is no better way for the NJDOE to evaluate how students respond to test questions other than in a test-taking environment. Furthermore, to allow this "opt-out" for this District with no noted irreparable harm or special circumstances, it could set a precedent where all schools note that an inconvenience to their students would be enough to shield them from field tests when it's their turn. As a result, it follows logically that there is no authentic way to test the efficacy of the questions other than on students in those grades under test conditions, and thus I so **FIND.**

In balancing these interests, I **CONCLUDE** that petitioner has not satisfied its burden of proof as to any of the Crowe factors with regards to their desire to "opt out" of the field test portion of the ELA Spring 2020 NJSLA and that as a result, the interests

clearly weigh in favor of denying the relief sought herein as all four prongs are needed to meet the District's burden.

ORDER

Accordingly, it is hereby **ORDERED** that the emergent application for relief of the petitioner is hereby **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

January 8, 2020
DATE

DANIELLE PASQUALE, ALJ

sej

New Jersey Commissioner of Education

Final Decision

Deanna DeGraff,

Petitioner,

v.

Board of Education of the Township of Belleville, Essex County,

Respondent.

Synopsis

In this case on remand, the petitioner – formerly employed as a tenured Teacher of Dance by the Belleville Board of Education – claimed that her tenure rights were violated when the Board abolished its dance program and her position as the school district's only certificated Teacher of Dance. Petitioner appealed the Board's action in September 2016, alleging that the elimination of the dance program was a violation of the New Jersey Student Learning Standards (NJSLS). The Commissioner issued a decision in this matter in September 2018, holding that the NJSLS require that dance instruction be made available to all students in grades K-12, and remanding the case to the OAL for further proceedings regarding the whether the Board failed to provide dance instruction in violation of the NJSLS and whether petitioner's tenure rights were violated as a result of the Board's actions.

On remand, the ALJ found, *inter alia*, that: the Department of Education, through the NJSLS, requires that actual instruction in dance technique be offered to high school students, not just exposure to dance through such things as reading about it in a book or watching someone else dance in a video; the Board failed to meet its obligation under the NJSLS to offer dance instruction, and its action in abolishing its dance program is impermissible; and the Board must restore the program; regarding the petitioner's tenure rights, while the Board had the statutory right to abolish petitioner's position, it did not have the authority to abolish the subject she taught; petitioner's evidence that historical student demand for dance in the school district requires a full-time Teacher of Dance went unrebutted by the Board; and the Board's actions in eliminating the dance program and petitioner's position were improper. The ALJ concluded that petitioner is entitled to reinstatement as a full-time teacher, retroactive to the date of her RIF. Accordingly, the ALJ ordered the Board to restore its formal dance program, and to reinstate petitioner as a full-time Teacher of Dance retroactive to the date of her RIF, with full back pay, benefits, and emoluments, less mitigation.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter.

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

February 4, 2020

OAL Dkt. No. EDU 14208-18
On Remand OAL Dkt. No. EDU 16478-16
Agency Dkt. No. 265-9/16

New Jersey Commissioner of Education

Final Decision

Deanna DeGraff,

Petitioner,

v.

Board of Education of the Township of Belleville, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed.[1]

Petitioner in this matter was the school district's only certificated Teacher of Dance. The district abolished its dance program and eliminated petitioner's position. Petitioner appealed, alleging that the elimination of the dance program was, among other things, a violation of the New Jersey Student Learning Standards (NJSLS). The Commissioner issued a decision in this matter on September 20, 2018, holding that the NJSLS require that dance instruction be made available to all students in grades K-12; the Commissioner accordingly remanded the matter to the OAL for further proceedings regarding whether the Board failed to provide dance instruction in violation of the NJSLS and whether such violation implicated petitioner's tenure rights.

On remand, the Administrative Law Judge (ALJ) found that the NJSLS require that students be offered actual instruction in dance technique, not just exposure to dance. The Board failed to meet its obligations under the NJSLS to offer dance instruction, and its action in abolishing

[1] Petitioner did not file a reply to respondent's exceptions.

the dance program was *ultra vires*. Because the Board did not rebut petitioner's evidence that student demand in the district historically required the full-time employment of a Teacher of Dance, the Board was obliged to offer a dance program that would have necessitated the employment of a full-time dance teacher. The ALJ further concluded that the reduction in force (RIF) that abolished petitioner's position was improper in light of the NJSLS requirement and that petitioner was entitled to reinstatement as a full-time teacher, retroactive to the date of the RIF.

In its exceptions, the Board argues that the ALJ erred in holding that the district's provision of exposure to dance does not satisfy the NJSLS. The Board contends that students can be taught about dance through relevant reading materials, videos in other classes such as theatre or music, instruction in physical education classes, or activities and events such as competitive cheer, color guard, musical productions and plays, and talent competitions. The district also offers "Option II," which allows students to receive graduation credit for activities in dance outside of school. According to the Board, these opportunities allow students to meet the benchmark levels set forth in the NJSLS. The Board disagrees with the ALJ's conclusion that the historical student demand in the district necessitated the full-time employment of a certificated Teacher of Dance and contends that three of the five daily classes taught by petitioner were classified as physical education courses. The Board argues that it was not asked to address the issue of student demand and requests that, if the Commissioner finds that issue relevant to the inquiry, the matter be remanded to the OAL for additional factual determinations.

Upon review, the Commissioner concurs with the ALJ's findings and determinations in this matter. As noted in the Commissioner's previous decision, instruction in all four visual and performing arts disciplines – dance, music, theater, and visual arts – must be made available to high school students. The evidence proffered by the Board on remand fails to demonstrate that the Board has met its obligation to offer dance instruction that meets state standards and allows students to fulfill the graduation requirements set forth in *N.J.A.C.* 6A:8-5.1. While the Commissioner

acknowledges that boards of education have a great deal of freedom to implement curricula, none of the activities cited by the Board as providing "exposure to dance" afford students the opportunity to earn graduation credits in the discipline of dance. Moreover, the Board cannot satisfy its obligation to offer dance instruction through the use of Option II, as the purpose of Option II is to allow flexibility for students who are actively engaged in the arts outside of school to earn credit for those outside activities; the choice of whether to utilize Option II belongs to the student, not the district.

The Commissioner further agrees that the Board's failure to provide dance instruction following the RIF implicates petitioner's tenure rights. Petitioner was the only tenured teacher in the district qualified to provide dance instruction at the secondary level, so her retention was necessary for the Board to provide dance instruction. Because the Board's actions leading to petitioner's RIF were improper, they are void. Petitioner must therefore be restored to the position she held at the time of the RIF.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is ordered to reinstate petitioner to her position as a full-time Teacher of Dance retroactive to the date of her RIF, with full back pay, benefits, and emoluments of employment, less mitigation.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 2/4/20
Date of Mailing: 2/4/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14208-18
AGENCY DKT. NO. 265-9/16
On Remand
OAL DKT. NO. EDU 16478-16

DEANNA DEGRAFF,

Petitioner,

v.

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

Respondent.

Sanford Oxfeld, Esq., for petitioner, (Oxfeld Cohen, attorneys)

Marc Mucciolo, Esq., for respondent, (Methfessel and Werbel, attorneys)

Record Closed: November 7, 2019 Decided: November 15, 2019

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Deanna DeGraff, a tenured Teacher of Dance formerly employed by the Belleville Board of Education (the Board), asserts that the Board improperly terminated her pursuant to a Reduction-in-Force (RIF). New Jersey Student Learning Standards (NJSLS) require the Board to offer dance instruction at the high school level and DeGraff

urges that, upon her termination, it failed to do so. She asks that an order be entered directing the Board to reestablish its dance program and to reinstate her to a full-time position as a Teacher of Dance. The Board replies that its actions were at all times consistent with applicable law and regulation.

DeGraff filed her appeal on September 28, 2016; an answer was filed, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, on October 27, 2016. An Initial Decision was issued by the Honorable Diana Sukovich, A.L.J., on August 7, 2018. (C-1.) On September 20, 2018, the Commissioner issued a decision remanding the case to the OAL for additional fact finding. (C-2.) The case was reassigned to me on January 16, 2019.

Counsel agreed that the additional information sought by the remand decision could be submitted via certification. These were filed on March 8, 2019, and May 5, 2019. A legal brief was filed by the Board on August 30, 2019; DeGraff chose not to file a legal argument. At my request, counsel for DeGraff supplemented his client's certification on October 17, 2019. I held the record open until November 7, 2019, to allow the Board an opportunity to reply to that certification. I received no reply, and the record closed.

ISSUES PRESENTED ON REMAND

The remand decision presents the following issues for adjudication:

1. Upon RIFing DeGraff, did the Board violate the New Jersey Student Learning Standards (NJSLS) by failing to offer formal dance instruction to its students; and if so, is it required to restore the formal dance program at its high school?

2. If, subsequent to RIFing DeGraff, the Board failed to meet its obligation to offer formal dance instruction, is DeGraff entitled to reinstatement and back pay?

FINDINGS OF FACT

The factual findings of the Initial Decision (EDU 16478-16) are incorporated herein by reference. The certifications submitted by the parties reveal the following additional uncontroverted facts, and I **FIND**:

DeGraff was employed by the Board as a Teacher of Dance from September 2002 until the end of the 2015-2016 school year. Throughout her employment, she was the only teacher in Belleville who held an Instructional Certificate with a Teacher of Dance endorsement. DeGraff worked full-time; teaching a class load of five dance classes per day. She indicates via certification that "three [of these classes] were labeled 'Dance' and two were labeled 'Dance/P.E.' classes." Even in DeGraff's last year of employment there were enough dance students and dance classes to support her full-time employment, and she held the same instructional load as any other full-time teacher.

DeGraff was RIFed at the end of the 2015-2016 school year, and Belleville has not offered a formal dance program to its students since. Notwithstanding, Superintendent of Schools Richard Tomko agrees that instruction in all four visual and performing arts, to include dance, must be made available to high school students. He urges that the district meets State requirements because the Physical Education department includes curriculum standards that mention or are related to dance, as follows:

a. **HPE.2.5.12.A.3** - Design and lead a rhythmic activity that includes variations in time, space, force, flow, and relationships (creative, cultural, social and fitness dance).

b. **HPE.2.5.12.C.3** – Determine the current impact of globalization and technology on the development of, participation in, and viewing of games, sports, dance, and other movement activities, and predict future impact.

c. **Exit skills** – Explain and perform movement skills that combine mechanically correct movement in smooth flowing sequences in isolated settings (i.e. skill

> practice) and applied settings (i.e. games, sports, dance, and recreational activities).

These curricular requirements provide "exposure to dance," and Tomko points to activities that incorporate such exposure; such as yoga, competitive cheerleading, color guard, musical productions, and homecoming dances and proms. Tomko asserts that "students are exposed to dance through other classes, such as theatre and music, in a variety of ways including but not limited to media, reading materials and activities." And the school district offers an alternative called "Option II," through which students can receive graduation credits in outside activities/programs in dance and theatre, with curriculum/program approval and monitoring by the building principal.

The Commissioner cites the New Jersey Core Curriculum Content Standards for the Visual and Performing Arts in his remand decision and confirms that while "the Board is able to develop its own instructional methods . . . any such instruction must be aligned to the NJSLS and core curriculum." The remand decision at footnote 8 references a FAQ document that offers additional clarification about visual and performing arts instruction. That document confirms that "all K-12 students must have regular sequential arts instruction in the four arts disciplines included in the standards of the following: dance, music, theatre, and the visual arts." Relative to high school students, the FAQ page explains that

> [i]n grades 9-12, all students are expected to communicate at a basic level in the arts and demonstrate proficiency in at least one arts discipline. <u>This specialization allows for student choice which means that all four arts disciplines must be made available to students</u>. All high school students must successfully complete five credits in at least one visual and performing arts course in order to receive a state-endorsed diploma.
>
> [Emphasis supplied]

As for who is qualified to provide instruction in dance, the FAQ document advises that a certification exists for each area of the arts, to include specific certification as Teacher of Dance. While Tomko points to several physical education activities that allegedly infuse

dance, the answer that the FAQ document offers to the question "Can dance be used as a substitute for physical education?" is noteworthy. The document provides:

> No. The dance standards are very specific and require a high level of dance execution. Therefore, they are not easily aligned with the physical education standards. For example, a standards-based physical education program may utilize dance forms as part of instruction, but its focus is on fitness and wellness, while a dance class may address various dance techniques and styles. While there are some common elements, it is unlikely that the curricular objectives will align sufficiently. Courses in dance should be used to achieve arts credits.
>
> [Emphasis supplied]

DeGraff points out that New Jersey has adopted the National Core Arts Standards, and attaches a document to her certification entitled "National Core Arts Standards in Dance General Implementation Guidelines." The document discusses alignment of curriculum with all facets of dance, to include artistic creation (choreography), performance and analysis of artistic work.

Relative to Option II, DeGraff shares that while it is technically offered in Belleville, to her knowledge no one has ever availed themselves of this option for dance instruction. The Board has offered nothing to rebut this assertion. And the Department's FAQ document couches this as an opportunity for a student to opt out of in-school arts education; not as a vehicle for the school district to absolve itself of its obligation to provide required curricular offerings. The Department explains that "Option Two (sometimes called Plan B or program completion) is available to high school students. Option Two permits a local board of education to approve alternative activities e.g., participation in a dance company, community theater to achieve the New Jersey Student Learning Standards."

ANALYSIS AND CONCLUSIONS OF LAW

Does the Board offer dance instruction that aligns with and is compliant with NJSLS?

New Jersey has developed standards for student learning that are intended to ensure that all students exit school equipped to successfully pursue their post-secondary paths. See: N.J.A.C. 6A:8-2.1. Local district boards of education are required to guarantee "that curriculum and instruction are designed and delivered in such a way that all students are able to demonstrate the knowledge and skills specified by the NJSLS..." N.J.A.C. 6A:8-3.1. Visual and performing arts are a required course of study in New Jersey schools, and students must earn at least five credits in the arts to earn a State endorsed diploma. N.J.A.C. 6A:8-5.1(a)(vii). As noted in the remand decision, "instruction in all four VPA disciplines [dance, music, theater, and visual arts] must be made available to high school students."

Ever since abolishing its formal dance program, this Board has failed to offer a visual and performing arts curriculum to its students that aligns with NJSLS. I **CONCLUDE** that the Department of Education, through the NJSLS, requires that actual instruction in dance technique be offered to high school students; not just "exposure to dance;" opportunities to read about it in a book; or opportunities to watch someone else dance in a video. Yoga and physical education are not dance. And Tomko's assertion that students are being provided instruction in dance because they are given opportunities to attend school dances and proms is particularly insulting to anyone serious about dance as a fine art, and is nothing short of preposterous.

Moreover, I agree with DeGraff that the sort of dance instruction contemplated by the NJSLS must be delivered by a properly certificated teacher. She correctly points out that a Teacher of Dance endorsement is required to teach dance in the public schools. N.J.A.C. 6A:9B-9.3(a)(1)(ii). DeGraff was the only staff member in Belleville to hold a Teacher of Dance endorsement on her Instructional Certificate. The "exposure" to dance currently being offered in Belleville by physical education or other instructional staff thus does not and cannot meet NJSLS requirements.

The suggestion that this Board has met its obligations in dance instruction by offering Option II is likewise unavailing. As noted above, it is clear that this option is designed to afford flexibility for students who are actively engaged in the arts outside of school. N.J.A.C. 6A:8-5.1(a)(2). It is inconceivable that the drafters of N.J.A.C. 6A:8-5.1(a) intended that a local board could meet its obligations to "develop, adopt, and implement local graduation requirements that prepare students for success..." by telling its students to go out and find instruction elsewhere. I **CONCLUDE** that individual students in Belleville surely can meet their visual and performing arts graduation requirements via Option II, but at their option, not the Board's.

In summary, I **CONCLUDE** that the Board has failed to meet its obligations to provide dance instruction to its students; that its action in abolishing its dance program was ultra vires; and that the Board must restore the dance program. And having heard nothing to rebut DeGraff's statement that student demand in Belleville historically required the full-time employment of a duly certificated Teacher of Dance, I am compelled to further **CONCLUDE** that from 2016 to the present, the Board was obliged to offer a dance program that would have necessitated the employment of a full-time dance teacher.

DeGraff's Rights to Recall

The prerogative of the Board to reduce force is well-established. N.J.S.A. 18A:28-9 provides that

> [n]othing 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.

RIFs and recalls of tenured staff must be based on seniority according to standards established by the Commissioner. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, aff'd, 1983 S.L.D. 1554.

While here, the Board had the statutory right to abolish DeGraff's position, it lacked the authority to abolish the subject she taught; accordingly, under the unique circumstances of this case, I **CONCLUDE** that DeGraff's RIF was improper. As the Commissioner aptly put it in his remand decision:

> ...petitioner may be able to establish that termination was improper if, following the RIF, the Board did not have qualified teachers to provide dance instruction and/or failed to provide dance instruction (i.e. violated NJSLS), and that petitioner would have been entitled to the position by virtue of her tenure and seniority and/or because she was the only tenured teacher qualified to provide dance instruction at the secondary level (retention of whom would have been necessary for the Board to provide dance instruction).

The Board violated the NJSLS once DeGraff was RIFed by failing to provide dance instruction. DeGraff was the only tenured teacher in Belleville qualified to provide dance instruction at the secondary level; clearly, her retention would have been necessary for the Board to continue to offer such instruction. DeGraff is incontrovertibly entitled to a Teacher of Dance position in Belleville by virtue of her tenure and seniority. And since DeGraff's description of student demand as necessitating a full-time teacher went unrebutted, I **CONCLUDE** that she is thus entitled to reinstatement as a full-time teacher, retroactive to the date of her RIF.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Board restore its formal dance program, and that DeGraff be reinstated as a full-time Teacher of Dance retroactive to the date of her RIF, with full back pay, benefits and emoluments of employment, less 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

November 15, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: November 15, 2019

Date Mailed to Parties: November 15, 2019

sej

APPENDIX

Witnesses:

For Petitioner

None

For Respondent

None

Exhibits:

For Petitioner

P-1 Certification of Deanna DeGraff

P-2 Supplemental Certification of Deanna DeGraff

For Respondent

R-1 Certification of Richard Tomko

Judge's Exhibits

C-1 Initial Decision, EDU

C-2 Commissioner's Decision, EDU

New Jersey Commissioner of Education

Decision

Janan Wehbeh,

Petitioner,

v.

Board of Education of the Township of Verona, Essex County,

Respondent.

Synopsis

Petitioner, a tenured teacher in the respondent Board's school district, appealed the Board's decision to affirm the results of a harassment, intimidation, and bullying (HIB) investigation into petitioner's conduct. The HIB investigation summary determined that the petitioner unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the student. The Board affirmed the findings of the investigation, which stemmed from a meeting petitioner had with a student to discuss the student's desire to enroll in an advanced placement (AP) chemistry course. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: petitioner's conversation with the student regarding entry into the AP chemistry course concluded with a recommendation that the student not enroll in the course, but left the decision up to the student; petitioner discouraged the student because of the degree of difficulty and the student's prior performance in an honors chemistry course that petitioner taught; the student has been diagnosed with anxiety and panic disorders and has a 504 plan that assists her in meeting her educational goals; the HIB complaint alleged that petitioner made verbal remarks that touched upon the student's disability; and the HIB investigation summary concluded that petitioner had unintentionally engaged in bullying behavior and had no awareness of its potential negative effects upon the classified student. The ALJ concluded, *inter alia*, that: in order to establish an occurrence of HIB, the actor's intent to harm must be demonstrated, and an actor cannot "unintentionally" commit an act of HIB; because the Board determined that petitioner had unintentionally engaged in bullying behavior, the intent required by the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.*, was lacking. Accordingly, the ALJ granted petitioner's motion for summary decision.

Upon comprehensive review, the Commissioner disagreed with the ALJ's conclusion that an act of HIB cannot be "unintentionally" committed, finding, *inter alia*, that HIB can occur when the victim reasonably perceives that an action was motivated by a desire to do harm. The Commissioner noted that in the Initial Decision, the ALJ stated that there were several disputed issues of material fact in this case, including whether or not petitioner should have known under the circumstances that her words, actions or gestures would have the effect of physically or emotionally harming the student. The Commissioner concluded that these disputed issues of fact must be resolved before reaching a determination regarding whether the Board's decision was arbitrary, capricious or unreasonable. Accordingly, the matter was remanded to the OAL for further proceedings consistent with the Commissioner's decision.

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

February 4, 2020

OAL Dkt. No. EDU 10981-18
Agency Dkt. No. 154-6/18

New Jersey Commissioner of Education

Decision

Janan Wehbeh,

Petitioner,

v.

Board of Education of the Township of Verona, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto have been reviewed.

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by petitioner, a high school chemistry teacher. Petitioner met with a student to discuss the student's desire to enroll in an advanced placement (AP) chemistry course. The student, who has been diagnosed with anxiety and panic disorders, filed an HIB complaint regarding comments the student alleges petitioner made during the conversation. Following an investigation, district staff issued an HIB investigation summary that indicated that petitioner had "unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the victim." The Board later voted to affirm the findings of the investigation, and petitioner appealed.

Following cross motions for summary decision, the ALJ concluded that, in order to establish an occurrence of HIB, the actor's intent to harm must be demonstrated, and an actor

cannot "unintentionally" commit an act of HIB. The ALJ further concluded that, because the Board had determined that petitioner unintentionally engaged in bullying behavior, the intent required by the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, was lacking and the Board's decision must be reversed. Accordingly, the ALJ granted petitioner's motion for summary decision.

The ALJ then went on to address an aspect of the case not argued by either party. The ALJ asserted that the superintendent's letter to petitioner, wherein she was told that the district found evidence of HIB in their investigation, did not address all of the elements required for a determination of an act of HIB. The superintendent only discussed elements of the definition of HIB contained in the statute's first paragraph. The ALJ concluded that because the letter did not address the definition of HIB in its entirety, the superintendent did not consider the elements of HIB defined in the second paragraph to have been satisfied by the evidence. For this reason, the ALJ determined that the contents of the superintendent's letter were inadequate to support a finding of HIB. The ALJ further concluded that since the Board's decision appears to have been based solely on the findings set forth in the superintendent's letter, it was not based on the full definition of HIB, and thus establishes a second basis for the reversal of the Board's decision.

In its exceptions, the Board argues that the ALJ's holding that the Act requires intent on the part of the actor is in error. The Board cites to the Commissioner's decision in *L.K. and T.K., o/b/o minor child A.K. v. Bd. of Educ. of the Twp. of Mansfield, Burlington Cty.*, Commissioner Decision No. 107-19, decided April 22, 2019, in which the Commissioner affirmed a board's finding of HIB against a seven-year-old child and stated that the child "should have known" that her actions were harming another student. Accordingly, the Board contends that the Act focuses on the reasonable perception of the victim and whether the actor should have

known that the action would cause harm. The Board provides an example of a teacher dressing in a KKK costume for Halloween, with no intent to cause harm, and suggests that such an act would constitute HIB because the students could reasonably perceive the action to be motivated by race and a reasonable teacher should know that the action would cause harm. The Board argues that the ALJ's holding sets up the untenable situation wherein HIB could never be proven because everyone accused of HIB would simply state that they did not mean to cause harm. The Board also takes issue with the ALJ's comments regarding a December 2012 publication, entitled Guidance for Parents on the Anti-Bullying Bill of Rights Act and available on the Department of Education's website, which the ALJ interpreted as requiring intent. The Board argues that the Commissioner's recent decision in *L.K. and T.K., supra,* not a document on the Department's website, should control.

Finally, the Board argues that the ALJ was incorrect in concluding that the Superintendent's letter of March 14, 2018 to petitioner was insufficient to support a finding of HIB. The Board indicates that its decision was based on findings other than those set forth in the letter and that the letter was not intended as the Board's official findings to the exclusion of all other evidence gathered during the HIB investigation process. According to the Board, neither party disputed or briefed this issue, and the ALJ's *sua sponte* consideration of it is contrary to the record and deprived the Board of the opportunity to provide evidence or testimony to address the question.

In reply, petitioner submits that the Commissioner should adopt the ALJ's analysis in whole. Petitioner distinguishes the holding in *L.K. and T.K., supra,* because the alleged bully in that case was repeatedly asked to stop her behavior, while petitioner had only one allegedly problematic interaction with the student and was never told that her choice of words might cause harm to the student. Petitioner claims that she had no way of knowing that a

conversation she has with her students every year could allegedly cause emotional harm to this particular student. According to petitioner, the statutory language requires "at least" knowledge that one's actions could cause harm to the alleged target, and a reasonable person in her shoes would have no way of knowing that her actions would constitute HIB. Petitioner indicates that the arbiter of facts must determine how a reasonable person in similar circumstances would reasonably perceive the alleged bully's actions.

Further, in response to the Board's example, petitioner agrees that a teacher dressing in a KKK robe for Halloween would constitute HIB, because a reasonable person would know that this action was inappropriate and would cause emotional harm, even if the teacher did not subjectively know that. Petitioner argues that if bullying can be committed unintentionally, teachers would live in fear of developing a rapport with students because their objectively reasonable and unintentional conduct could be deemed bullying. Petitioner also cites to guidance issued by the Department of Education that, according to petitioner, supports a finding that intent is required to commit an act of HIB. Finally, petitioner urges the Commissioner to accept the ALJ's findings regarding the sufficiency of the March 14, 2018 letter, which petitioner claims demonstrates that not all of the elements of the statute were satisfied.

Upon review, the Commissioner disagrees with the ALJ's conclusion that an act of HIB cannot be "unintentionally" committed. The Act defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

N.J.S.A. 18A:37-14.

Therefore, a finding of HIB requires three elements. First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school.[1] The third condition is that *one* of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.[2]

In defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable.[3] It does not require an analysis of the actual motivation of the actor.

---

[1] The conduct must also take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. This requirement does not appear to be at issue in this case.

[2] The Initial Decision incorrectly views subsection (a), that a reasonable person should know the act will have a harmful effect, as the third requirement, with an additional fourth requirement being a choice between subsections (b) and (c). As a matter of standard statutory construction, the term "or" between subsections (b) and (c) also applies to subsection (a), such that a demonstration of any of these three criteria can support a finding of HIB.

[3] This conclusion does not make the Act a strict liability statute, as the ALJ opined it would. The statute is clear that the perception must be reasonable. The Commissioner does not interpret the Board's arguments as suggesting a purely subjective standard in which any perception by an alleged victim is automatically reasonable, as the ALJ did. If the Board was in fact suggesting such an interpretation, the Commissioner rejects it in favor of a standard reasonableness determination common in many types of adjudications. Furthermore, the Commissioner does not agree with the ALJ that, in order to be reasonable, the alleged victim must correctly assess the actor's motivation, as such a requirement would convert the analysis from one about reasonably perceived motivation to one about actual motivation and would inappropriately place the burden on the alleged victim to divine the intent of the actor.

Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis. Moreover, an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . .". *N.J.S.A.* 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that her actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know.

While the ALJ found, and petitioner argues, that conduct found to be unintentional cannot reasonably be perceived as being motivated by a distinguishing characteristic, the Commissioner disagrees. Initially, the Commissioner notes that the Board's decision does not state that the conduct was not motivated by a distinguishing characteristic. The language used in the documents in the record suggest that the lack of intentionality was related to the causing of harm, an element distinct from the motivation. However, even if the Board was indicating that petitioner's comments were not motivated by the student's disability, it could have reasonably found that she committed an act of HIB if the student reasonably perceived the comments as being motivated by her disability.

Petitioner also relies, in part, on guidance published by the Department of Education,[4] which states, "Bullying among students is aggressive behavior that is intentional."

[4] The Initial Decision indicates that the ALJ did not review the guidance or make any evaluation or factual finding regarding it. The Commissioner nonetheless deems it appropriate to address the guidance, as it has been part of the arguments made by the parties in both the briefs below and the exceptions.

https://www.nj.gov/education/students/safety/behavior/hib/guidance.pdf (page 44). The Commissioner first notes that guidance, while intended to be instructive for the public, does not replace the Commissioner's decisions as the definitive interpretation of the law. Second, the document containing this statement also explicitly states, "[t]he term 'bullying' is used to refer to general information on this subject and is not limited to the HIB definition in the [Act]." *Ibid.* at page 5. Therefore, this particular statement defining "bullying" is not useful or applicable in interpreting what constitutes HIB under the Act. Another guidance document describes bullying as "intentionally committing a mean or violent act." https://www.nj.gov/education/students/safety/behavior/hib/ParentGuide.pdf (page 11). However, it goes on to indicate that bullying occurs when the "aggressor's behavior would lead a person to reasonably believe that the aggressor is motivated by a desire to physically or emotionally hurt someone." *Ibid.* This language clearly tracks the "reasonably perceived" language of the Act, and concludes, as the Commissioner does herein, that HIB can occur when the victim reasonably perceives that the action was motivated by a desire to do harm.

Petitioner's reply to the Board's exceptions appears to misconstrue the Initial Decision and instead agrees, in large part, with the analysis herein. Petitioner acknowledges that the reasonable person test applies when analyzing the actions in question and argues that the ALJ's conclusion should be affirmed because a reasonable person in her shoes would have no way of knowing that her actions would constitute a HIB violation. But the ALJ did not make that finding and, in fact, listed "whether or not Wehbeh should have known under the prevailing circumstances that her words, actions, or gestures would have the effect of physically or emotionally harming" the student as a disputed issue of material fact. Moreover, even if this issue was resolved in petitioner's favor with a finding that a reasonable person would not have known that her action would emotionally harm the student, a finding of HIB could still

be supported if either of the other two criteria – that the act had the effect of insulting or demeaning the student or that it created a hostile educational environment for the student – was proven. These questions are also identified in the Initial Decision as disputed issues of material fact. For these reasons, the Commissioner is not able to ascertain whether the petitioner committed an act of HIB. The disputed issues of fact must be resolved before reaching a determination regarding whether the Board's decision was arbitrary, capricious, or unreasonable.

Regarding the sufficiency of the March 14, 2018 letter from the superintendent to petitioner, the Commissioner disagrees with the ALJ's conclusion. The decision being appealed in this matter is the Board's decision of March 28, 2018. The only requirement in the Act regarding the Board's decision is that it must be in writing and affirm, reject, or modify the superintendent's decision. *N.J.S.A.* 18A:37-15(b)(6)(e). The Board satisfied that requirement through its letter of March 28, 2018 affirming the superintendent's decision. Furthermore, there is no basis in the record for the ALJ's conclusion that the Board's decision was based solely on the Superintendent's letter.

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 2/4/20
Date of Mailing: 2/4/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10981-18
AGY. REF. NO. ~~156-6~~ 154-6/18

JANAN WEHBEH,

Petitioner,

v.

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

Respondent.

William P. Hannan, Esq., for Petitioner (Oxfeld Cohen, attorneys)

Daniel R. Roberts, Esq., for Respondent (Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: September 27, 2019 Decided: December 24, 2019

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

This is a Harassment, Intimidation, and Bullying (HIB) case arising out of the New Jersey Anti-Bullying Bill of Rights, N.J.S.A. 18A:37-13, et seq. Dr. Janan Wehbeh (Wehbeh) appeals the Verona Board of Education's (respondent's or BOE's) affirmance

of the school district's HIB Investigation. The school district's investigation found that during a meeting with a student named J.G., Wehbeh unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the victim.

The background of the matter is as follows. Wehbeh is a chemistry teacher at Verona High School. On February 15, 2018, Wehbeh met with a student referred to herein as "J.G." to discuss J.G.'s desire to enroll in an Advanced Placement (AP) chemistry course. Wehbeh recommended to J.G. that she not enroll in the Advanced Placement chemistry course because of its degree of difficulty and because, in Wehbeh's opinion, J.G. was having a difficult time in the honors chemistry course in which she was currently enrolled. J.G. is a student who has been diagnosed with anxiety and panic disorders and has a 504 plan that assists her in meeting her educational goals.

PROCEDURAL HISTORY

On or about February 15, 2018, J.G. and her mother filed an HIB complaint against Wehbeh. They claimed that Wehbeh made verbal remarks about J.G.'s ability to handle the requirements of the AP chemistry course. They claimed that Wehbeh's remarks touched upon J.G.'s disability, which was rooted in an anxiety diagnosis, for which J.G. was categorized as a special education student and given a 504 plan.

On or about February 20, 2018, the school district began its investigation into the HIB allegation. The investigator interviewed two people, Wehbeh and J.G. The investigator, utilizing the definition of HIB found in N.J.S.A. 18A:37-13 et seq., specifically at N.J.S.A. 18A:37-14, concluded and wrote in her HIB Investigation Summary, dated March 14, 2018, that Wehbeh unintentionally bullied J.G. when she made demeaning comments to J.G. in the classroom, which minimized J.G.'s mental disability, interfered with J.G.'s right to access education (opportunities), created a hostile educational environment, and caused J.G. emotional harm. (Petr.'s Ex. B and Resp.'s Ex. C.) On March 27, 2018, the Verona Board of Education voted to affirm the

findings of the investigation and informed Wehbeh of its decision in its letter dated March 28, 2019. (Petr.'s Ex. C and Resp.'s Ex. G.)

On June 26, 2018, Wehbeh's counsel filed a Petition of Appeal with the New Jersey Department of Education, Bureau of Controversies and Disputes. The Verona Board of Education filed its Answer to Petition of Appeal on July 18, 2018. The Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law, where it was filed on August 1, 2018, as a contested case.

The matter was assigned to Ernest Bongiovanni, ALJ on August 8, 2018, but he had a conflict of interest. The case was re-assigned to John P. Scollo, ALJ on August 13, 2018. Judge Scollo held an initial telephone conference with counsel for Wehbeh and counsel for the BOE on August 22, 2018, at which time a plan for discovery was put in place and a Pre-Hearing Order was issued on August 23, 2018.

A telephone conference was held on December 13, 2018, to monitor the progress of discovery and to discuss settlement possibilities. Adjournment of hearing dates were granted twice: once for discovery reasons and once to accommodate the judge's vacation plans. On August 20, 2019, counsel for Wehbeh filed a Motion for Summary Decision limited to Count One of Wehbeh's Petition of Appeal ("HIB cannot be unintentional."). On August 23, 2019, counsel for the BOE filed Opposition papers to the motion and filed a Cross-Motion seeking Summary Decision on both Counts of Wehbeh's Petition of Appeal, for which the petitioner filed Opposition papers on September 27, 2019.

ISSUES

(1) Can an act of HIB be committed unintentionally?

(2) Do the undisputed facts show that Wehbeh unintentionally committed one or more acts of HIB against J.G.?

FINDINGS OF FACT

Each of the following statements was taken from the exhibits presented by the parties. There is no apparent dispute between the parties about the following facts.

(1) In April, 2013, before J.G. started high school, J.G. was diagnosed with both anxiety and panic disorder by psychologist Thomas Hollenbach. Due to these diagnoses, J.G. was determined to be disabled and thus eligible for a 504 Accommodation Plan. (This refers to Section 504 of the Federal Rehabilitation Act of 1973.) She was given an Individual Accommodation Plan (IAP), which allowed her, among other things, to be granted extended time for taking quizzes and tests. (Resp.'s Ex. A.)

(2) Dr. Janan Wehbeh (Wehbeh) has been a chemistry teacher in the Verona School District since 2011. (Petr.'s Ex. E and Resp.'s Ex. B.)

(3) In the 2017-2018 school year, J.G. was enrolled in honors chemistry, which was taught by Wehbeh. (Petr.'s Ex. E and Resp.'s Ex. F.)

(4) On February 15, 2018, J.G. met with Wehbeh to discuss enrolling in Advanced Placement (AP) chemistry in the 2018-2019 school year. (Petr.'s Ex. E and Resp.'s Ex. F.)

(5) Wehbeh recommended to J.G. that she should not enroll in AP chemistry because J.G. was having difficulty with honors chemistry, but left the decision to enroll or not to enroll in AP chemistry with J.G. All parties agree that the ultimate decision about whether to enroll in the AP chemistry course was J.G.'s. (Petr.'s Ex. E and Resp.'s Ex. C.)

(6) On February 15, 2018, the mother of J.G., Ms. E.D., contacted the principal of Verona High School Joshua Cogdill (Cogdill), and guidance counsellor Jen Gadaleta (Gadaleta), requesting a meeting to discuss the conversation between her

daughter, J.G., and Wehbeh, which took place earlier that day. E.D. complained that Wehbeh bullied her students, including J.G., by emphasizing how difficult the AP chemistry course was and by telling them that the course "will kill you." E.D. complained that Wehbeh stated to J.G. that everyone who takes chemistry has anxiety and that J.G. would not be allowed extra time to take quizzes and tests every day. E.D. complained that Wehbeh disrespected J.G. by making disparaging remarks, which E.D. saw as mocking J.G.'s anxiety disorder. E.D. complained that Wehbeh's remarks caused emotional upset to J.G. (Resp.'s Ex. E.)

(7) The school's principal opened an HIB investigation on February 20, 2018. Anti-bullying Specialist and District Director of Counselling Kimberly Ferulato (Ferulato) was assigned to conduct the investigation. During Ferulato's investigation, she interviewed only two people: Dr. Wehbeh on February 21, 2018, and J.G. on February 23, 2018. (Resp.'s Ex. B and Ex. D.) According to the Respondent BOE's answers to Interrogatories, Respondent did not know the date when the HIB investigation ended. (Resp.'s Ex. F, Question 9.)

(8) After conducting the interviews of Wehbeh and J.G., Ferulato concluded that there was evidence supporting the proposition that Wehbeh unintentionally committed an act of HIB against J.G. on February 15, 2018, with J.G.'s anxiety and 504 status being motivating factors. (Petr.'s Ex. A, B, C, D and Resp.'s Ex. C and G.)

(9) An HIB Investigation Summary, dated March 14, 2018, was prepared. (Petr.'s Ex. B and Resp.'s Ex. C.) It was not signed and the author did not affix his or her name. Presumably, it was prepared by the HIB investigator, Ferulato. The HIB Summary contains the *opinions*, but no *findings* of the investigator. The HIB Summary reports that it is the opinion of the investigator that: (i) Dr. Wehbeh uttered "demeaning comments" to J.G. in a classroom; (ii) "unintentionally intimidated and bullied" J.G. by "minimizing" J.G.'s mental disability; (iii) interfered with J.G.'s "right to access education"; (iv) caused emotional harm to J.G.; and (v) created a hostile educational environment. The HIB Investigation Summary, containing the investigator's opinions,

was submitted to Cogdill and to Dr. Rui Dionisio (Dionisio), the School District Superintendent.

(10) In a letter dated March 14, 2018, which was signed by Ferulato, Cogdill, and Dionisio (referred to herein as the "Superintendent's letter dated March 14, 2018"), Wehbeh was informed that the investigation results "have been reported to the Board of Education at the March 27, 2018 meeting."[i] (Petr.'s Ex. A and Resp.'s Ex. G.)

(11) In the Superintendent's letter dated March 14, 2018, Wehbeh was told that "the district found evidence of the investigated act of [HIB]." (Petr.'s Ex. A and Resp.'s Ex. G.) Using underlining, the letter stated that Wehbeh's conduct met the following elements of the definition of HIB set forth in N.J.S.A. 18A:37-14:

(i) [the conduct] "is reasonably perceived as being motivated by any actual or perceived characteristic [such as] mental, physical or sensory disability . . . ."
(ii) [that] "takes place on school property . . . ."
(iii) [that] "substantially disrupts or interferes with the orderly operation of . . . the rights of other students."

(12) The matter was presented to the Verona Board of Education (BOE), which voted at its March 27, 2018 meeting. In a March 28, 2018, letter signed by Ferulato, Cogdill, and Dionisio, they told Wehbeh "The Verona Board of Education voted to affirm the *findings* of the HIB investigation."

(13) Dr. Wehbeh filed a two-count Petition of Appeal dated June 25, 2018, requesting a hearing, seeking to overturn the BOE's decision. (Petr.'s Ex. E.)

(14) From the documents submitted with the motion papers, it is clear there are certain statements of material fact which J.G. and Dr. Wehbeh disagree about. Among them are:

[i] Since March 27 was a date still in the future when this letter was written, it is apparent that the words "and will be considered by the Board of Education" should have been added between the word "Education" and the word "at," but these words were somehow omitted.

(a) whether or not Wehbeh actually made any of the following statements to J.G. that, if J.G. took the AP Chemistry course, she "would die"; she "would get five zeros in a row"; she would "fail the class"; that "all students [including J.G.] would get anxiety" during the AP Chemistry course; that J.G. would "just have to handle it" (or even if this statement referred to J.G.'s anxiety issues); that J.G. would not be allowed extra time for completion of quizzes and assignments in AP Chemistry; and that J.G. "was in the SPED program" (a derogatory term for referring to students enrolled in a special education program), which allegedly brought J.G. to cry hysterically;

(b) whether Wehbeh and J.G. discussed anything about J.G. enrolling in AP Chemistry against Wehbeh's advice and whether Wehbeh would in any way retaliate against J.G. for doing so;

(c) whether or not J.G.'s perception of any of Wehbeh's statements to the class or to her could reasonably be interpreted to have been motivated by an actual or perceived characteristic as listed in N.J.S.A. 18A:37-14;

(d) whether or not Wehbeh should have known under the prevailing circumstances that her words, actions, or gestures would have the effect of physically or emotionally harming J.G. or of placing in J.G. a reasonable fear of physical or emotional harm;

(e) whether or not anything Wehbeh said to J.G. during their meeting was insulting or demeaning on an objective basis;

(f) whether anything Wehbeh said to J.G. during their meeting created a hostile educational environment by interfering with J.G.'s education by severely or pervasively causing her physical harm or emotional harm.

FACTUAL DISCUSSION

As noted above, there are quite a few unresolved issues of fact regarding what Wehbeh said to her class regarding the degree of difficulty of the AP chemistry course; regarding what Wehbeh said to J.G. during their conversation about the AP chemistry course on February 15, 2018; regarding whether Wehbeh said anything to J.G. about

her anxiety issues, her 504 plan, whether or how J.G.'s anxiety issues would affect her performance in AP chemistry; and other questions of fact.

APPLICABLE LAW

In 2002 the New Jersey Legislature enacted L. 2002, c. 83, this State's first harassment, intimidation and bullying (HIB) law. In 2007 the Legislature amended the law L. 2007, c. 129, to cover cyber-bullying. In 2010 the Legislature enacted the Anti-Bullying Bill of Rights Act, L. 2010, c. 122, which revised and supplemented the prior laws chiefly to cover incidents that occur off school grounds under special circumstances. The legislature also enacted L. 2012, c. 1, which permits a school district to implement bullying prevention and training programs.

Definition of Harassment, Intimidation and Bullying (HIB)

The 2010 law refined the definition of HIB to include [bracketed numbers added]:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is [1] reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, [2] that takes place on school property, at any school-sponsored function, on a school bus, or takes place off school grounds as provided for in N.J.S.A. 18A:37-15.3, [3] that substantially disrupts or interferes with the orderly operation of the school or the rights of other students **and that**:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or

> c. creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student."
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

Comprehensive regulations promulgated by the Department of Education further assist districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.9.

Local Control of Policy and Required Contents of HIB Policy

The anti-bullying law provides that "[e]ach school district shall adopt a policy prohibiting harassment, intimidation and bullying on school property, at a school-sponsored function or on a school bus." N.J.S.A. 18A:37-15(a). Pursuant to N.J.S.A. 18A:37-15(b) each school district has "local control over the content of the policy" but the policy must include twelve enumerated components including a definition of harassment, intimidation, and bullying at least as inclusive as the one provided (see above) in N.J.S.A. 18A:37-14. The twelve required components of the policy are set forth in N.J.S.A. 18A:37-15 and are summarized below.

(1) a statement prohibiting HIB of a student;
(2) a definition of HIB no less inclusive than that set forth in N.J.S.A. 18A:37-13;
(3) a description of the type of behavior expected from each student;
(4) consequences and appropriate remedial action for a person who commits an act of HIB;
(5) a procedure for reporting an act of HIB, including a provision that permits a person to report an act of HIB anonymously;
(6) a procedure for prompt investigation of violations and complaints, which procedure shall at a minimum provide that

> [(a) the investigation be initiated within one school day of the report and be completed within ten days of receipt of the written report,
> (b) the results of the investigation be reported to the superintendent within two days of completion,
> (c) the investigation and reports be reported to the board of education no later than the date of the next board of education meeting,

(d) the parents or guardians of the students who are parties to the investigation be entitled to receive certain information and request a hearing within five days after the results of the investigation are reported to the board,
(e) the board must issue a written decision affirming, rejecting or modifying the superintendent's decision, which can be appealed to the Commissioner of Education, and
(f) a complaint can be filed with the Division on Civil Rights within 180 days of an incident of HIB based on membership in a protected group.][;]

(7) the range of ways in which a school will respond once an incident of HIB is identified, which shall be defined by the principal in conjunction with the school anti-bullying specialist, but shall include an appropriate combination of services that are available within the district such as counselling, support services, intervention services and other programs, as defined by the commissioner. In the event that the necessary programs and services are not available within the district, the district may apply to the Department of Education for a grant from the "Bullying Prevention Fund" established pursuant to [N.J.S.A. 18A:37-28] to support the provision of out-of-district programs and services;

(8) a statement that prohibits reprisal or retaliation against any person who reports an act of HIB and the consequence and appropriate remedial action for a person who engages in reprisal or retaliation;

(9) consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or as a means of HIB;

(10) a statement of how the policy is to be publicized, including notice that the policy applies to participation in school-sponsored functions;

(11) a requirement that a link to the policy be prominently posted on the home page of the school district's website and distributed annually to parents and guardians who have children enrolled in a school in the school district; and

(12) a requirement that the name, school phone number, school address and school email address of the district anti-bullying coordinator be listed on the home page of the school district's website; and that on the home page of each school's website the name, school phone number, school address and school email address of the school anti-bullying specialist and the district anti-bullying coordinator be listed. The information concerning the district anti-bullying coordinator and the school anti-bullying specialists shall also be maintained on the department's website.

HIB on School Grounds versus off School Grounds

In regard to the location of acts of HIB (on school grounds versus off school grounds), the enactment of the Anti-Bullying Bill of Rights Act now requires that each school district's policy "include provisions for appropriate responses to harassment, intimidation or bullying . . . that occurs off school grounds, in cases where a school employee is made aware of such actions." N.J.S.A. 18A:37-15.3. A school district's responses to harassment, Intimidation or bullying occurring off school grounds must "be consistent with the board of education's code of student conduct or other provisions of the board's policy on harassment, intimidation, or bullying." N.J.S.A. 18A:37-15.3. Pursuant to the rules governing a board of education's code of student conduct, N.J.A.C. 6A:16-7.5(a) states:

> School authorities have the right to impose a consequence on a student for conduct away from school grounds that is consistent with the district board of education's code of student conduct, pursuant to N.J.A.C. 6A:16-7.1.
>
> 1. This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2.
> 2. This authority shall be exercised only when the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.
> 3. The consequence pursuant to (a) above shall be handled in accordance with the district board of education's approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, and as appropriate, in accordance with N.J.A.C. 6A:16-7.2, 7.3, or 7.4. and (b) school authorities shall respond to harassment, intimidation, or bullying that occurs off school grounds, pursuant to N.J.S.A. 18A:37-14 and 15.3 and N.J.A.C. 6A:16-1.3, 7.1, and 7.7.

Reporting of HIB

In regard to the reporting of alleged HIB incidents and the investigation of same, N.J.S.A. 18A:37-16(a) forbids a member of a board of education, a school employee, a student or a volunteer from engaging in acts of reprisal, retaliation, or false accusation against a victim of HIB or a witness who reports acts of HIB.

N.J.S.A. 18A:37-16(b) requires that acts of HIB must be reported and states:

> A member of a board of education, school employee, contracted service provider, student or volunteer who has witnessed, or has reliable information that a student has been subject to, harassment, intimidation, or bullying shall report the incident to the appropriate school official designated by the school district's policy, or to any school administrator or safe schools resource officer, who shall immediately initiate the school district's procedures concerning school bullying.

N.J.S.A. 18A:37-16(c) provides that any school official who promptly complies with the reporting requirement of the law is immune from a cause of action for damages arising from any failure to remedy the reported incident.

N.J.S.A. 18A:37-16(d) provides that a school administrator who fails to investigate the allegation of HIB or fails to take sufficient action to minimize or eliminate the HIB may be subject to disciplinary action.

HIB Prevention

Pursuant to N.J.S.A. 18A:37-17(a) schools and school districts are required to annually assess their HIB prevention programs, or approaches and other initiatives so as to create school-wide conditions to prevent and address HIB Grants are available from the Department of Education if needed.

N.J.S.A. 18A-37(b) obligates school, districts to provide training related to the district's HIB policies to its employees and volunteers emphasizing the importance of the definition of HIB and of the protected categories found in N.J.S.A. 18A:37-14.

N.J.S.A. 18A-37-17(c) obligates individual schools to include the school district's policies against HIB in its employee training, including full and part-time employees, volunteers and anyone who may have significant contact with students.

Comprehensive regulations promulgated by the Department of Education further assist districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.7.

LEGAL ANALYSIS AND CONCLUSIONS

SECTION ONE

The Tribunal's Ruling on Respondent's Cross-Motion

In its Cross-Motion, the respondent assumes that certain facts are undisputed. (See page 5 of the Cross-Motion.) In Opposition to the respondent's Cross-Motion, the petitioner argues that respondent's assertion that the facts are undisputed is incorrect and that actually several issues of material fact are present and their presence precludes granting Summary Decision in favor of the respondent.

A review of the documents and certifications convinces me that there are unresolved questions of material fact in this case. They pertain to Wehbeh's statements about the rigors of the AP chemistry course to her class, Wehbeh's version of her conversation with J.G., and J.G.'s version of her conversation with Wehbeh. I **CONCLUDE** that these unresolved fact questions are germane only to the outcome of the respondent's Cross-Motion and must be resolved by an evidentiary hearing. I **CONCLUDE** that these questions are not germane to the petitioner's Motion on Count One of the Petition of Appeal because the issue therein is a purely legal question:

whether there is or is not an element of intent within the subject statute, N.J.S.A. 18A:37-14.

Therefore, I **CONCLUDE** that the respondent is not entitled to an Order granting Summary Decision on its Cross-Motion based on Counts One and Two of the petitioner's Petition of Appeal; and I **CONCLUDE** that the respondent's Cross-Motion must be and hereby is **DENIED**.

SECTION TWO

Analysis of the Arguments Presented by the Petitioner and by the Respondent

An analysis of the petitioner's arguments in favor of her motion for Summary Decision on Count One of the Petition of Appeal are set forth below.

The Petitioner seeks a grant of Summary Decision on only Count One of her Petition of Appeal. Petitioner's arguments in favor of her motion for Summary Decision are as follows. The essence of the petitioner's argument is that N.J.S.A. 18A:37-14 only applies to intentional conduct. Put another way, petitioner argues that an act of bullying is an inherently intentional action. As such, it would be self-contradictory (i.e., under the laws of logic, namely the classical law of non-contradiction) to assert that two contradictory propositions can be true in the same sense at the same time. Thus, to assert that the intentional act of bullying can be committed "unintentionally" is absurd.

The petitioner also asserts that evidence from the Department of Education's website supports petitioner's assertion that bullying is intentional behavior. (The Tribunal has not reviewed this evidence and makes no evaluation or factual finding regarding it.)

The petitioner notes that the statute focuses on an actor's conduct that is motivated by a receiver's distinguishing characteristics. Petitioner argues that it is impossible to discuss the actor's motive for committing an intentional act, when the

BOE admits that there was no intentional act in the first place. In the absence of intent to do harm or to threaten harm, it is meaningless to discuss the actor's motive.

Finally, the petitioner notes that the Superintendent's letter of March 14, 2018, expressly stated that Wehbeh "unintentionally engaged in bullying behavior" and that Wehbeh "had no awareness of the potential negative impact on the victim." The petitioner points to the Superintendent's admissions that Wehbeh's conduct was unintentional and that Wehbeh had no awareness of any potential harm to the student. Therefore, Wehbeh cannot have committed the intentional act of bullying and cannot be said to have intended to harm the student. It follows that Wehbeh is entitled to be exonerated and the decision of the BOE should be reversed.

A summary of the respondent's arguments seeking Summary Decision on Counts One of the petitioner's Petition of Appeal are as follows.

As to Count One, the respondent argues that the statute, N.J.S.A. 18A:37-14, does not differentiate between intentional or unintentional conduct by the actor. Respondent unequivocally stated its position that "the entire focus is on the 'reasonable perception' of the victim." In support of this argument respondent cites an OAL decision, the case of L.K. and T.K. ex rel. A.K. v. Mansfield Board of Education, EDU 7067-16, Initial Decision (January 22, 2019), Final Decision (April 22, 2019), http://njlaw.rutgers.edu/collections/oal. In that case, A.K., a girl of only seven years of age, was found by the BOE to have committed an act of bullying. The BOE found that A.K. had asked a second-grade boy several times on the school bus why he was wearing girl's clothing, not understanding [i.e., "not aware" or "not knowledgeable," *wording supplied by this Tribunal*] that the boy was "transitioning to female." The ALJ vacated the BOE's decision, finding it to be against the weight of the evidence. However, in interpreting the statute, the ALJ focused solely on how A.K.'s questions were "reasonably perceived" by N3 (the boy in question) and the impact on him. The ALJ further wrote that there was no requirement that the BOE find that A.K.'s conduct was *actually motivated* by the perceived characteristic. (Here, this Tribunal supplied the italics and I must note that the use of the word "motivated" appears to be synonymous

with the word "intended".) Respondent notes that the Commissioner of Education reversed the ALJ's vacation of the BOE's decision and dismissed A.K.'s appeal, affirming that seven-year-old A.K. is a substantiated bully and did so without disturbing the ALJ's interpretation of the statute. The Respondent argues that Mansfield is now the ruling case on the interpretation of the HIB statute and that this Tribunal must follow the interpretation of the statute set forth by the ALJ in Mansfield. That interpretation is that the Tribunal must only focus on how the actor's words have been "reasonably perceived" by the receiver and on the impact to the receiver. I do not agree.

The arguments raised in the appeal of A.K. are different from the arguments raised in the case at bar. Here, the petitioner has pointed to evidence from the Department of Education's own website to the effect that the Department itself, despite the Commissioner's decision in Mansfield, may not have finalized its own position on how it interprets the statute. That aside, the facts of the case at bar are vastly different from those in Mansfield. Moreover, the issues and arguments presented in the case at bar are very different from those presented in Mansfield, e.g., the issue of whether intent is an element of the statute. I **CONCLUDE** the holding in Mansfield is not controlling in the case at bar.

The thrust of the respondent's arguments are, first, the actor's intent is irrelevant, since the words "intent," "intends," or "intentionally" are not expressly stated in the statute and since the element of intent is not referred to in the statute.

The respondent argues, second, (following the Mansfield case) that the Legislature intended that the school investigator's duty was not to pass judgment upon the reasonableness of the receiver's perception of the actor's motivation, but merely to look to whether the receiver felt harmed or threatened (i.e., the impact which the receiver alleges), regardless of the actor's intent.

I perceive several flaws in the respondent's arguments. First, while the statute contains the phrase "reasonably perceived," the respondent simply glosses over the word "reasonably" and merely assumes that J.G.'s perception of Wehbeh's words was

a reasonable perception. Apparently, the reason for this approach is the respondent's belief that the statute cloaks the complainant-victim with the authority to determine whether his perception is reasonable. This is a subjective standard and, as will be demonstrated below, it is not justified by the wording of the statute.

Second, the statute's second paragraph is introduced by the conjunctive phrase "and that." The statute's second paragraph, referencing an actor's conduct (here, Wehbeh's words) contains the phrase "a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student." The Respondent's argument, as well as the Superintendent's March 14, 2018, letter both ignore the statute's second paragraph. (Resp.'s Ex. G.) The respondent also failed to address the inclusion of the word "know" in the statute and the support that word lends to the petitioner's argument. As will be demonstrated below, the concept of knowledge, referred to in the statute, is linked to the concept of intent.

Third, the respondent's position is that the victim's perception subjectively governs the meaning of the actor's conduct. However, the wording of the statute makes it clear that the Legislature expressly adopted the standard of the reasonable person, which is an objective standard, for determining whether the receiver's perception of the actor's conduct was accurate or inaccurate.

Basically, the Respondent's argument is that the actor's intent is irrelevant and that it is only the impact of the actor's words on the receiver that decides the question of whether an act of HIB has occurred. This interpretation of the statute means that once an actor makes a statement to a student (like Dr. Wehbeh recommending to J.G. that she should not enroll in AP chemistry), then the actor will be strictly liable for the content of her statement and will be found to have committed an act of HIB (i.e., of being a bully with its attendant stigma and consequences) if the student subsequently claims to have been offended or harmed by the actor's statement (the advice not to enroll in the course). Under this interpretation it would not matter at all if the actor's (teacher's) motives or intent were completely free of any degree of malice. Under the respondent's interpretation of the statute (referencing the Mansfield case) "the statute

focuses on the impact of [the actor's] A.K.'s conduct on [the receiver] N3 and what N3 reasonably perceived." If This is so, this means that there is no "reasonable person" test to serve as a check on whether a receiver in N3's position reasonably perceived that he or she was harmed or threatened. Relying on Mansfield, the respondent's interpretation of the statute means that if the student *actually feels* threatened or harmed by the actor's words or other conduct, it is, per se, a reasonable perception, HIB is established. Under the respondent's interpretation, the receiver's perception would be a reasonable perception because the impact on him/her was created by the actor's words regardless of the actor's intent. This means that the statute makes HIB a strict liability offense. I **CONCLUDE** that there is no reasonable indication that the Legislature intended to make HIB a strict liability offense.

Analysis of the definition of HIB found in N.J.S.A. 18A:37-14

As noted above, the definition of Harassment, Intimidation and Bullying set forth in N.J.S.A. 18A:37-14 was re-defined in 2010. [In the following recitation (the "Tribunal's recitation") of the definition, I have added bold print, brackets, numbers, and italics for the purpose of making the analysis of the statute's elements easier to comprehend. I have also employed, throughout this writing, the terms "actor" and "receiver" to denote, respectively, the alleged bully and the alleged victim, the one who receives harm from the bullying. The addition of bold print, brackets, numbers, and italics will be referred to in the "One Additional Observation" section of this Initial Decision.] The 2010 law refined the definition of HIB to include:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is **[1A]** *reasonably perceived* as being **[1B]** *motivated* either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other *distinguishing characteristic*, **[2]** that takes place on school property, at any school-sponsored function, on a school bus, or takes place off school grounds as provided for in N.J.S.A. 18A:37-15.3, **[3A]** that substantially disrupts

> or interferes with the orderly operation of the school or **[3B]** the rights of other students **and that**:
>
> **[4]** a. a *reasonable person* should *know*, under the circumstances, will have the *effect* of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> **[5]** b. has the effect of insulting or demeaning any student or group of students; or
> **[6]** c. creates a hostile educational environment for the student by **[6A]** interfering with a student's education or **[6B]** be severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

The above-mentioned definition of HIB is part of a statute that prohibits and seeks to eradicate the despicable conduct commonly referred-to as "bullying," while not infringing or chilling the rights of people whose conduct (physical acts, gestures and speech) is innocent, legitimate and protected.

N.J.S.A. 18A:37-14 seeks to set forth a prohibition against harmful conduct (whether physical acts, gestures or words) in the educational environment. In doing so, the statute employs a variety of words and phrases in its attempt to identify instances of conduct that are harmful. The statute proscribes gestures, physical acts or words which are

> "*reasonably perceived*" as being "*motivated*" either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic . . . and that a "'*reasonable person*' '*should know*' . . . will have the effect of physically or emotionally harming a student . . . or placing a student in reasonable fear of physical or emotional harm . . . ."

These words and phrases will be analyzed below.

The Concept of Harmful Conduct

Harmful conduct occurs: (i) when the actor's gestures, physical acts or words are motivated by one or more of the receiver's distinguishing characteristics and reasonably perceived by the receiver as harmful and threatening; and (ii) when a reasonable person in the same or similar circumstances in the actor's position should know that his or her gestures, physical acts or words will have the effect of harming a student or placing the student in reasonable fear or physical or emotional harm; and (iii) when the actor's gestures, physical acts or words have the effect of insulting or demeaning a student or group of students; or (iv) when the actor creates a hostile educational environment for a student by interfering with the student's education or by severely or pervasively causing physical or emotional harm to the student.

The mechanism set forth in the statute to differentiate harmful conduct (that which harasses, intimidates or bullies) from innocent conduct is one of cause and effect. If the actor's conduct is demonstrably harmful or threatening, it is the cause; and if the receiver reasonably perceives the harmful conduct as harmful or threatening, it is the effect. When both cause and effect are present, then the statute has been violated. In the absence of one or the other, then the statute has not been violated. The issue of the reasonableness of the perception will be addressed below.

The Concept of Reasonable Perception

We turn now to an examination of the phrase "reasonably perceived" as it appears in the first paragraph of N.J.S.A. 18A:37-14.

If, in the first paragraph of the statute, the word "perceived" stood alone in the text (i.e., without the adjective "reasonably" present to modify it) the statute would establish a purely subjective standard by which to judge whether the actor's gesture, physical act or words constituted an occurrence of HIB. Under such a subjective standard, any gesture, physical act or words which the receiver perceives to be disparaging or threatening and which has been motivated by his or her distinguishing

characteristics would be all that is needed to establish an occurrence of HIB. Under such a subjective standard, the school authorities, the Board of Education, or the Commissioner would be compelled to conclude that the statute was violated. The argument offered by the respondent would make sense only if the word "perception" stood alone. However, this is not what the Legislature intended because the Legislature used the word "reasonable' to modify the word "perceived."

The word "perceived" does not stand alone in the text. It is modified by the word "reasonably." As used here, the word "reasonably" denotes a limitation. The use of the word "reasonably" limits the ability of the receiver to assess the actor's action (gestures, physical acts or words) on a purely subjective basis. Before an occurrence of HIB can be established, it must be demonstrated that the receiver's perception of harm or a threat was reasonable.

The use of the word "reasonably" as the modifier of the word "perceived" and the statute's employment of the term "reasonable person" in its second paragraph (N.J.S.A. 18A:37-14a) make it clear that the standard for assessing the actor's conduct is an objective standard, not a subjective standard. In other words, the applicable standard is that of the "reasonable person."

The word "motivated" and the phrase "reasonably perceived" are closely connected in the statute. The receiver's "reasonable perception" refers to his or her assessment of the actor's apparent motivation in making the gesture, performing the physical act or saying the words. As already discussed, a plain reading of the statute requires that the receiver's perception must be a reasonable one. The word "motive" or "motivation," by definition, refers to what tempts or impels the actor to act. The statute looks to the actor's motive and sets it against the background of the receiver's set of distinguishing characteristics.

In order to be sure that a receiver's perception qualifies as a reasonable perception, a reviewing court must be reasonably certain that the receiver accurately assessed the actor's motivation. In other words, the Tribunal in an HIB case must be

equipped with some way to verify the receiver's accusation against the actor. The way to test the veracity of the receiver is to resort to the standard of the reasonable person.

The Statute's Employment of the Reasonable Person Standard

The statute's use of the term "reasonable" in its first paragraph signals that the standard that a court must use to determine the accuracy of the receiver's perceptions is that of the reasonable person. It follows that when receiver's perception comports with how a *reasonable person* would assess the actor's conduct, then his assessment is accurate. If the receiver accurately assesses both the actor's motive and the presence of a real threat or insult to his or her physical or emotional safety, then and only then, is his or her perception a *reasonable* perception of an improper motivation, and a threat of harm, etc.

The concept of the reasonable person has its origins in the law of torts. Cf. William L. Prosser, The Law of Torts, West Publishing Co., 4th Ed. (1971) pp. 149-52. In tort law it is useful in determining whether a defendant has acted reasonably. In criminal law it is useful in determining whether self defense is a viable defense. In contract law it is useful in determining contractual intent. In the statute under discussion in this case, the Legislature has expressly incorporated the standard of the reasonable person to determine the reasonableness of the receiver's perception and as a measure of the actor's awareness of the probable consequences of his acts, gestures, or words.

After introducing the standard of the reasonable person in its first paragraph, the statute reiterates its use of the reasonable person standard in its second paragraph. This underscores the Legislature's intention to utilize the reasonable person standard in the interpretation and in the application of this statute. The statute states in its second paragraph that a reasonable person (the actor) should be able to *know* what gestures, physical acts, or words will have the effect of harming a student. The statute's use of the word "know" raises another issue—the meaning of the word. As will be seen below,

the discussion of the word "know" and the phrase "should know," inevitably leads to a discussion of the concept of "intent."

The concept of intent is the core of petitioner's Petition of Appeal, Count One. The petitioner's argument is that intent is a necessary element of HIB. The respondent BOE's argument is that intent is not an element of HIB and that HIB can be committed unintentionally.

The Concepts of Knowledge and Intent

Now that it has been established that the statute employs the standard of the reasonable person, we will move on to an analysis of what the phrase "should know" means, as set forth in the second paragraph of N.J.S.A. 18A:37-14. The second paragraph refers to what a reasonable person "should know" about the likely consequences of his conduct. The text of the statute says that a reasonable person:

> should know [that his conduct], under the circumstances, will have the effect of physically or emotionally harming a student . . . or placing a student in reasonable fear of physical or emotional harm to his person . . . .

The first paragraph of the definition of HIB refers to gestures, physical acts, and words that are reasonably perceived as being motivated by the receiver's distinguishing characteristics. In the second paragraph of the definition of HIB it refers to what "a reasonable person [in the position of the actor] should *know*, under the circumstances, *will have the effect* of physically harming a student . . . or placing a student in reasonable fear of physical or emotional harm." The word "know" means "to have knowledge" or "to be aware." See Merriam-Webster Dictionary. As used in the statute, the term "should know" denotes conscious awareness of one's actions because it is linked to the phrase "will have the effect of physically or emotionally harming a student." This means that the actor has the capacity to know what will result from his or her actions and therefore it excludes accidental or unconscious insults or other *unintended* consequences.

This brings us to the issue of whether "intent" is included in the statute. Intent is the state of a person's mind that directs his actions toward a specific object. See The Random House College Dictionary, Revised Edition. The word "intent" expresses mental action and shows the presence of a person's will in the act. See Black's Law Dictionary, West Publishing Company, Revised Fourth Edition. The statute must be read in its entirety. The first two paragraphs of the statute must be read together. A plain reading of the statute shows that the Legislature incorporated the element of intent by using the phrase "should know" and by connecting the phrase "should know" to the phrase "will have the effect." When the statute requires that the actor must or should "know" that his gestures, physical acts, or words "will have the effect of . . . harming a student," then the statute is referring to and focusing on the actor's *intent*. In other words, a plain reading of the statute shows that it contains the requirement that the actor's intent must be demonstrated in order to establish an occurrence of HIB.

From the foregoing analysis, I **CONCLUDE** that the Legislature, by using the words "reasonable person" in the statute, incorporated the objective, reasonable person standard for distinguishing harmful conduct from innocent conduct.

I **CONCLUDE** that the actor's intent is an element in the statute.

I **CONCLUDE** that in order to establish an occurrence of HIB, it is necessary that the actor's intent to harm or to threaten or to disrupt must be demonstrated.

I **CONCLUDE** that an occurrence of HIB cannot occur in the absence of intent.

I **CONCLUDE** that an actor cannot "unintentionally" commit an act of HIB.

I **CONCLUDE** that by linking the phrase "should know" to the phrase "will have the effect" the Legislature meant that before an act of HIB can be established it must be demonstrated that the actor had a reasonable degree of awareness that his or her gestures, physical acts, or words were likely to cause harm to a student or instill a reasonable fear of harm in a student.

I **CONCLUDE** that because the Superintendent's letter dated March 14, 2018, states that Wehbeh "*unintentionally* engaged in bullying behavior" and because Wehbeh "had no awareness of the potential negative impact on the victim," it means that the intent required for a violation of N.J.S.A. 18A-37-14 was lacking. (Petr.'s Ex. A and Resp.'s Ex. G.)

Accordingly, for the aforesaid reasons, the respondent's motion for summary decision is denied and the BOE's determination that Wehbeh violated the HIB statute must be, and hereby is, **REVERSED**.

Accordingly, for the aforesaid reasons, the petitioner's motion for summary decision on Count One of her Petition of Appeal must be, hereby is, **GRANTED**.

One Additional Observation

Although it was not directly argued in either side's papers, the Tribunal finds it necessary to address another aspect of this case.

In the Superintendent's letter dated March 14, 2018, Wehbeh was told that "the district found evidence of the investigated act of harassment, intimidation and bullying." (Petr.'s Ex. A and Resp.'s Ex. G.) Using underlining, Superintendent stated that "Wehbeh's conduct met the following *elements* of the definition of HIB set forth in N.J.S.A. 18A:37-14. Specifically, the Superintendent stated:

> According to the definition of HIB, the incident met the following: Harassment, Intimidation or bullying means any gesture, any written, verbal or physical act, or any electronic communications, whether it be single or a series of incidents that:
>
> (i) is reasonably perceived as being motivated by any actual or perceived characteristic [such as] mental, physical or sensory disability . . .
> (ii) [that] "takes place on school property . . .

(iii) [that] "substantially disrupts or interferes with the orderly operation of the school or the rights of other student(s).

It is noteworthy that the evidence referred to by the Superintendent supported elements contained in the statute's first paragraph but does not mention whether the evidence supports any of the elements contained in the statute's second paragraph. Utilizing this writer's recitation of the statute employing bold print, brackets, and italics, in the section of this Initial Decision titled "Analysis of the statutory definition of HIB found in N.J.S.A. 18A:37-14," found on pages 18 to 19, we see that that first paragraph of the statute contains elements [1A], [1B], [2], [3A], and [3B]. The second paragraph of the statute contains elements [4], [5], [6], [6A], and [6B]. The underlined portions of the Superintendent's March 14, 2018, letter, cited above, cover only elements [1A], [1B], [2], [3A], and [3B]. They do not cover elements [4], [5], [6], [6A], and [6B].

Referring again to the Superintendent's March 14, 2018, letter, it subsequently informs Wehbeh that she "unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the victim."

The letter made no other findings. In the same paragraph, immediately following these words, the Superintendent wrote *dicta* (i.e., "[t]hat the effects of HIB can substantially disrupt or interfere with the rights of a student"), which is clearly not a set of findings.

It is noteworthy that the Superintendent's March 14, 2018, letter does not state that Wehbeh had substantially interrupted or interfered with J.G.'s rights. It did not state that Wehbeh interfered with J.G.'s education. It did not state that Wehbeh had created a hostile educational environment. It did not state that Wehbeh had caused physical or emotional harm to J.G. Indeed, the letter's *findings* were not as broad as the *opinions* expressed by the investigator in the HIB Summary. (Petr.'s Ex. B and Resp.'s Ex. C). Had the Superintendent intended to adopt all the investigator's opinions, he would have said so.

The Superintendent did not cite the text of the second paragraph of the statute (elements [4], [5], [6], [6A], and [6B]) and did not underline them as he did with elements [1A], [1B], [2], [3A], and [3B]. If he had done so, then he would have been stating his conclusion that the evidence demonstrated that Wehbeh was aware of (i.e., had knowledge of) the effect of her words. If Wehbeh had been aware of the potential effects of her words, then the Superintendent would not and could not have characterized Wehbeh's conduct as "unintentional." The fact that the Superintendent did not cite and underline elements from the second paragraph of the statute indicates that he did not consider the elements of the second paragraph to have been satisfied by the evidence.

From the foregoing, I **CONCLUDE** that the contents of the March 14, 2018, Superintendent letter are inadequate to support a finding of HIB. Since it appears that the BOE's decision was based only upon the findings set forth in the letter, then the BOE's decision was not based on the entire definition of HIB set forth in the statute and therefore it must be, and hereby is, **REVERSED**.

ORDER

Based upon the foregoing, I hereby **ORDER** that respondent's Cross-Motion for Summary Decision is **DENIED**; and I further **ORDER** that petitioner's Motion for Summary Decision is **GRANTED** and that the BOE's determination that Wehbeh violated the HIB statute is hereby **REVERSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

December 24, 2019
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency: December 24, 2019

Date Mailed to Parties: December 24, 2019

db

APPENDIX

List of Moving Papers

For Petitioner:

Motion for Summary Decision

Opposition Papers to Cross-Motion

For Respondent:

Opposition to petitioner's Motion for Summary Decision

Cross-Motion seeking Summary Decision

New Jersey Commissioner of Education

Decision

Luiz Vazquez,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Audley Bridges,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Rebecca Richardson,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Danaayaal Salaam,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Mary Repousis,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Synopsis

Petitioners – tenured teachers in the respondent Board's employ – challenged the Board's decision to reduce their salaries based on Policy 3151 "Assessment of Pay," which among other things, requires the punctual commencement of assigned teaching duties, and imposes a list of penalties to be imposed upon staff who routinely fail to timely report for work each day. Petitioners contended that the collective bargaining agreement (CBA) between the Board and the Roselle Education Association (REA) does not authorize the Board to impose minor disciplinary action in the form of fines or reduction of compensation, and further argued that they and the REA never accepted, negotiated, or agree to adhere to Policy 3151, and the Board's actions were in violation of petitioners' tenure rights. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue here, and the matter is ripe for summary decision; *N.J.S.A.* 18A:6-10 provides that no person shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after the filing of tenure charges and subsequent hearing; all petitioners herein are tenured teachers and had a reduction in salary based on Policy 3151 without charges or a hearing as provided in *N.J.S.A.* 18A:6-10; Policy 3151 was not negotiated between the REA and the Board, the previous CBA did not address excessive tardiness, and there was no CBA in effect when the reductions in petitioners' salaries were enforced; there is no evidence that Policy 3151 was applied prior to the petitioners' salaries being reduced; and petitioners did not waive their rights to challenge Policy 3151. Accordingly, the ALJ concluded that the Board's action in reducing petitioners' salaries based on Policy 3151 must be reversed.

Upon comprehensive review of the record, the Initial Decision of the OAL, and the exceptions thereto, the Commissioner determined that this matter must be remanded to the OAL to allow the parties to submit reply briefs regarding the cross motions for summary decision. In so deciding, the Commissioner noted that the parties and the ALJ had agreed to a briefing schedule that included due dates for reply briefs; however, the ALJ issued the Initial Decision based solely on the motion papers, prior to the due date for the filing of reply briefs. While the Commissioner acknowledged that the ALJ has discretion to permit the filing of reply briefs, in the instant matter, the parties had agreed to a briefing schedule that included the filing of reply briefs during a telephone conference with the ALJ – which was subsequently memorialized in writing by the ALJ's staff. The parties consequently expected to have the opportunity to respond to each other's arguments. Accordingly, the matter was remanded for further proceedings consistent with the within 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.

February 4, 2020

OAL Dkt. Nos. EDU 09004-19, 09007-19, 09009-19, 09096-19, and 09103-19 (consolidated)
Agency Dkt. Nos. 127-6/19, 126-6/19, 125-6/19, 129-6/19, and 130-6/19

New Jersey Commissioner of Education

Decision

Luiz Vazquez,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Audley Bridges,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Rebecca Richardson,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Danaayaal Salaam,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Mary Repousis,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by petitioners have been reviewed.

This matter concerns a challenge by petitioners, who are tenured teachers, to the Board's decision to reduce their salaries pursuant to the Board's policy regarding tardiness. The Administrative Law Judge (ALJ) found that the Board's action in reducing petitioners' salaries must be reversed, and accordingly granted petitioners' motion for summary decision and denied the Board's motion for summary decision.

In its exceptions, the Board argues, among other things, that the parties and the ALJ agreed to a briefing schedule that included due dates for cross motions for summary decision and reply briefs. However, the ALJ issued the Initial Decision based solely on the motion papers, prior to the due date for the filing of reply briefs. In reply, the petitioners argue that reply briefs are within the discretion of the ALJ and that it was appropriate to issue the Initial Decision based on the motion submissions.

Upon review, the Commissioner determines that the matter should be remanded to the OAL to allow the parties to submit reply briefs regarding the cross motions for summary decision. While the Commissioner acknowledges that the ALJ has discretion to permit the filing of reply briefs, here the parties agreed to a briefing schedule that including the filing of reply briefs during a telephone conference with the ALJ, which was subsequently memorialized in writing by the ALJ's staff. The parties consequently expected to have the opportunity to respond to each other's arguments.

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 2/4/20
Date of Mailing: 2/4/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 09004-19

AGENCY DKT. NO. 127-06/19

LUIZ VAZQUEZ.,

Petitioner,

v.

BOROUGH OF ROSELLE BOARD OF EDUCATION, UNION COUNTY.,

Respondent.

AUDLEY BRIDGES

Petitioner,

v.

BOROUGH OF ROSELLE BOARD OF EDUCATION, UNION COUNTY.,

Respondent.

OAL DKT. NO. EDU 09007-19

AGENCY DKT. NO. 126-06/19

REBECCA RICHARDSON,

Petitioner,

v.

BOROUGH OF ROSELLE BOARD OF EDUCATION, UNION COUNTY.,

Respondent.

OAL DKT. NO. EDU 09009-19

AGENCY DKT. NO. 125-06/19

DANAAYAAL SALAAM,
Petitioner,
v.
BOROUGH OF ROSELLE BOARD OF EDUCATION, UNION COUNTY.,
Respondent.

OAL DKT. NO. EDU 09096-19
AGENCY DKT. NO. 129-06/19

MARY REPOUSIS,
Petitioner,
v.
BOROUGH OF ROSELLE BOARD OF EDUCATION, UNION COUNTY.,
Respondent.

OAL DKT. NO. EDU 09103-19
AGENCY DKT. NO. 130-06/19

(CONSOLIDATED)

Nicholas Poberezhsky., Esq. on behalf of petitioners (Caruso Smith Picini, attorneys)

Margaret A. Miller, Esq. on behalf of respondent Board of Education of the Borough of Roselle

Record Closed: October 31, 2019 Decided: November 25, 2019

BEFORE: **KIMBERLY A. MOSS,** ALJ:

Petitioners challenge the Board's decision to reduce their salary due to respondent's policy regarding tardiness. Petitioners assert that the reduction in pay is a violation of their tenure rights. These matters were filed at the Office of Administrative Law (OAL) on July 8, 2019. A telephone prehearing was conducted on July 22, 2019, before the undersigned, regarding OAL Docket number EDU 09004-19. During the pendency of the prehearing the parties advised that there were similar cases that were transmitted that should be consolidated with EDU 09004-19. A telephone status conference was conducted August 27, 2019. An order consolidating the matters was

issued on August 28, 2019. Telephone status conferences were conducted September 11 and 17, 2019. On October 31, 2019 both parties filed a motion for summary decision. Both parties state that there were no material questions of fact.

FACTUAL DISCUSSION

The following are uncontested facts:

Luis Vasquez (Vasquez) is a tenured member of the teaching staff that has been employed by the Borough of Roselle Board of Education (Board) for twelve years. Audley Bridges (Bridges) is a tenured member of the teaching staff that has been employed by the Board for twenty years. Rebecca Richardson (Richardson) is a tenured member of the teaching staff that has been employed by Board for sixteen years. Danaayaal Salaam (Salaam) is a tenured member of the teaching staff that has been employed by the Board for five years. Mary Repousis (Repousis) is a tenured member of the teaching staff that has been employed by the Board for sixteen years.

On or About January 6, 2014, the Board adopted District Policy 3151 "Assessment of Pay" (Policy 3151) which acknowledges the proper performance of a teaching staff member's professional duties, requires the punctual commencement of his/her assigned duties to properly discharge his/her professional duties, imposes a list of penalties to be imposed against a staff member who routinely fail to timely report for work each day.

The Roselle Education Association (REA) is a duly organized employee representative and the negotiation representative for all teachers. The Board and REA were parties to collective negotiation agreement from July 1, 2014 through June 30, 2017. The successor agreement which would extend from July 1, 2017 to June 30, 2021 has not been finalized.

In accordance with Policy 3151 on March 15, 2019 and March 30, 2019, Vasquez salary was reduced by $266.30 and $56.06 respectively because he was tardy fourteen times during the 2018-2019 school year. In accordance with Policy 3151, On

March 29, 2019 and April 15, 2019, Bridges salary was reduced $1,243.09 for each pay period because she was tardy eighty-five times during the 2018-2019 school year. In accordance with Policy 3151, on March 29, 2019, Richardson's salary was reduced by $521.65 because she was tardy nineteen times during the 2018-2019 school year. In accordance with Policy 3151, on March 29, 2019 and April 15, 2019 Salaam's salary was reduced by $329.34 and $232.50 respectively, because he was tardy twenty-four times during the 2018-2019 school year. In accordance with Policy 3151 on March 15, 2019, Repousis' salary was reduced by $151.18 because she was tardy twenty-four times.

Petitioners contend that the Collective Bargaining Agreement (CBA) between the Board and REA does not authorize the Board to impose minor disciplinary action in the form of fines or reduction of compensation. Petitioners contend that they and REA did not accept, negotiate for or agree to adhere to Policy 3151. Petitioners also content that they were not afforded a hearing or an opportunity to challenge or dispute the fines imposed upon them. They were not brought up on tenure charges or subject to criminal indictment.

LEGAL ANALYSIS AND CONCLUSION

The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. When there is no genuine dispute as to any material fact and the moving party demonstrates that it is entitled to judgement as a matter of law, its motion for summary judgment should be granted. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954) Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Co. of American, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

To avoid entry of summary judgment, the non-moving party must come forward with legally competent facts essential to proving an element of its cause of action. Brill v. Guardian Life Ins. Co., 142 N.J. at 536-537. If non-movant fails to do so, the moving party is entitled to summary judgment. Moreover, even if the non-movant comes forward with some evidence, the Courts must grant summary judgment if the evidence is "so one-sided that [movant] must prevail as a matter of law." Brill If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed. Brill v. Guardian Life Ins. Co., 142 N.J. 536, 539 (1995). Even where a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996); see also South Brunswick Asphalt v. Dep't of Envtl. Prot., No. A-693-98T5 (App. Div. April 10, 2000), certif. denied, 165 N.J. 487 (2000).

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 issues to the trier of fact.

Based upon documentation presented by petitioners, as well as the respondent's, I **CONCLUDE** that there are no genuine issues of material fact in this matter.

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

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public-school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner; except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

I **CONCLUDE** that all petitioners are tenured teachers and had a reduction in salary based on Policy 3151 without a hearing being held.

N.J.S.A. 34:13A-24 provides:

a. Notwithstanding any other law to the contrary, and if negotiated with the majority representative of the employees in the appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the authority of the employer to impose, in the absence of a negotiated agreement

> regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.
>
> b. The scope of such negotiations shall include a schedule setting forth the acts and omissions for which minor discipline may be imposed, and also the penalty to be imposed for any act or omission warranting imposition of minor discipline.
>
> c. Fines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of N.J.S. 18A:6-10.

Policy 3151 was not negotiated between the majority representative of the employees, REA in the appropriate collective bargaining unit with the Board. The facts in this matter can be distinguished from Guadalupe Ferreiro v. Board of Education of the City of Elizabeth, EDU3865-19 Initial Decision (June 11, 2019) adopted Comm'r (July 22, 2019) < http://lawlibrary.rutgers.edu/oal/search.html>. In Ferreiro, the petitioner alleged that the respondent Board violated her rights by docking her salary for excessive tardiness. Further, in Ferreiro there was a collective bargaining agreement (CBA) that addressed excessive tardiness. There was no such provision in the agreement between the Board and the REA.

I **CONCLUDE** that the previous CBA did not address excessive tardiness and there was no collective bargaining agreement in effect when the reductions in the petitioners' salaries were enforced.

Respondent argues that petitioners' rights to object to Policy 3151 were waived. The CBA between REA and the Board did not address excessive tardiness. Policy 3151 became effective on or about January 6, 2014. This was prior to the CBA between REA and the Board which ran from July 1, 2014 thru June 30, 2017. There is presently no successor CBA agreement. Respondents rely on the cases of In the Matter of Upper Saddle River Board of Education 2004 NJ PERC LEXIS 252 and In the Matter of the Township of Middletown PERC NO 98-77. In Upper Saddle River, the association wanted mid-contract negotiations over the Board unilaterally implementing a sick leave policy. The unilateral sick leave policy had been applied seven times before the association demanded the renegotiation of the CBA.

In Middletown, the township unilaterally changed the practice of placing new police officers with academy training and one-year police experience at step three of the salary guide. In that case, it was alleged that the township violated the duty to negotiate in good faith. It lists three types of cases involving allegations of employment conditions being changed, which are as follows:

> 1. Cases where the majority representative claims an express or implied contractual right to prevent a change
>
> 2. Cases where an existing working condition is changed and neither party claims an express or implied right to prevent to impose the change
>
> 3. cases where the employer alleges that the representative has waived any rights to negotiate, usually expressly or impliedly giving the employer the right to impose change.

In Middletown the township alleged that the Middletown PBA waived its right to negotiate by its acquiescence. However, when the township previously deviated from the practice of placing new officers with academy training and one year of experience at step three, the PBA filed an unfair practice charge which was settled.

In this matter, there is no evidence that Policy 3151 was applied prior to the petitioners' salaries being reduced. There presently is no CBA between the REA and the Board. This matter analogous to the Middletown case since once Policy 3151 was enforced against petitioners, they contested its application.

In both Middletown and Upper Saddle River, the organized employee representative brought the charges. In this matter, the petitioners are teaching staff members in Roselle.

I **CONCLUDE** that petitioners did not waive their rights to challenge Policy 3151. Accordingly, respondent's action in reducing petitioners' salaries due to respondent's policy regarding tardiness must be **REVERSED**.

Based on the foregoing, it is **ODERED** that petitioners' motion for Summary Decision is **GRANTED** and respondents' Motion for Summary Decision is **DENIED**.

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

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

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

11-25-19
DATE

KIMBERLY A. MOSS, ALJ

Date Mailed to Parties:
Nov. 26, 2019
ljb

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF TENURE CHARGES BY:

SCHOOL DISTRICT OF THE CITY OF EAST ORANGE
Petitioner

- against -

AL JEFFERSON
Respondent

Agency Docket
No. 296-11/19

Pursuant to N.J.S.A. 18A:28-5 and 18A:6-10

APPEARANCES:

FOR THE PETITIONER
DECOTIIS, FITZPATRICK, COLE & GIBLIN
By: Katie Mocco, Esq.

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

BEFORE:

Perry A. Zirkel, Arbitrator

ARBITRATOR APPROVAL

The School District of the City of East Orange (Petitioner) filed Sworn Tenure Charges against tenured teacher Al Jefferson (Respondent) in accordance with N.J.S.A. 18A:28-5 and 18A:6-10, and served them on Respondent with notice of opportunity to submit evidence and argument in opposition. Thereafter, the Commissioner of Education, following review of the Charges and Respondent's answer, found the Charges were sufficient for referral to an arbitrator. On December 4, 2019 the Office of Controversies and Disputes appointed me as the arbitrator to hear and decide this tenure dispute. At a status conference with the parties, we agreed on hearing dates of January 8–9, with deadlines of December 6 for the Respondent's motion for partial dismissal and December 31 for the Petitioner's reply brief. On January 2, I issued an interim decision denying the Respondent's motion for partial dismissal. Upon the parties' joint motion for postponement based on settlement discussions, I agreed to new hearing dates of January 16–17. On January 15, the parties notified me of their settlement of the case. On January 23, the Commissioner's office approved my request for an extension until February 15, 2020. On February 3, the parties submitted to me the fully executed settlement agreement along with a joint statement explaining its compliance with the Cardonick standards.

After a careful review of the Agreement, I hereby conclude that it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6 based on the following findings:

1. The Petitioner specified the charges and provided them to the Respondent with the requisite accompanying documentation. The recitals section of the Agreement confirmed his receipt of the charges.

2. The Agreement and the accompanying joint statement sufficiently explain the circumstances justifying the settlement.

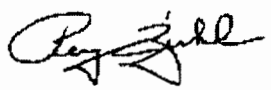
3. ¶¶ 23 and 30 and the signature page of the Agreement attest to the consent of both parties.

4. ¶¶ 23, 26, and 30 of the Agreement along with the Respondent's signature at the end assure and confirm that he fully understood his rights upon entering into the Agreement.

5. The Agreement is in the public interest by saving the notable transaction costs of the detailed statutory proceedings, while removing the Petitioner from any further conduct that is contrary to the District's effective working and educational environment. Moreover, the ¶ 12 of the Agreement show adherence to N.J.S.A. 18A:6-7.6 *et seq.* (Pass the Trash law).

In light of the Respondent's voluntary resignation, the absence of a tenure determination resulting in loss of position renders the Cardonick standard #6 inapplicable. In compliance with the remaining requirements of N.J.A.C. 6A:3-5.6, ¶ 17 confirms adherence to N.J.S.A 47:1A-1 (Open Records law), the signature page shows the Petitioner's consent, and the Commissioner retains discretion for referral to the State Board of Examiners.

Thus, I approve the attached Agreement in full resolution of Agency Docket No. 296-11/19.



Perry A. Zirkel, Arbitrator
February 6, 2020

SEPARATION, SETTLEMENT, AND GENERAL RELEASE AGREEMENT

This Separation, Settlement, and General Release Agreement ("Agreement") is made and entered into by and between Al Jefferson ("Jefferson"), the East Orange Board of Education (the "Board") (collectively, the "Parties").

RECITALS

WHEREAS, on or about _____, an incident involving Jefferson resulted in the Board investigating his conduct; and

WHEREAS, as a result of the investigation in combination with other incidences amounting to a pattern of conduct, on _____, the Board filed tenure charges against Jefferson, pursuant to N.J.S.A. 18A:6-11 (the "Charges") and Jefferson was suspended pursuant to N.J.S.A. 18A:14; and

WHEREAS, at prior to the arbitration the parties agreed it was mutually beneficial to amicably resolve the Charges in dispute in order to avoid further protracted adjudication and expense.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The Board shall accept Jefferson's irrevocable general resignation of employment effective immediately and attached hereto.

2. The Board shall withdraw the Charges.

3. The Board agrees to provide only what Jefferson is entitled to according to the Collective Bargaining Agreement (CBA) with regard to sick days and any retro-active increases based upon raises resulting from the ratification of a labor agreement that he may be entitled to upon receipt of his resignation. The CBA and entitlements set forth therein will govern these entitlements.

4. Jefferson shall waive all any and all additional claims to back-pay, front-pay, health benefit coverage, sick leave, and accrued time off terminal payouts.

5. Jefferson waives all other claims against the Board regarding or arising from this matter, including counsel fees or other monetary relief, except as provided herein.

6. The Parties expressly agree that this Agreement shall have no mitigating precedential effect on any other pending or future disciplinary actions. Jefferson, with full understanding of his legal rights, voluntarily and unconditionally releases and forever discharges the Board, as well as the Board's past and present employees, officers, insurers, reinsurers, directors, agents, attorneys, representatives, predecessors, successors and assigns (collectively,

the "Releasees") from all contracts, agreements, promises, liabilities, claims, causes of action, charges, complaints, grievances, obligations, costs, losses, damages, injuries, attorneys' fees and other legal responsibilities (collectively, the "Claims") of any form whatsoever arising from the beginning of time through the date Jefferson signs this Agreement, whether known, unknown, unforeseen, unanticipated, unsuspected or latent, which Jefferson ever had or now has against any of the Releasees.

7. Jefferson's release of Claims against the Releasees includes but is not limited to: any and all Claims arising out of and/or related to Jefferson's employment with the Board; any and all Claims under any federal, state and/or local statutory, constitutional, common law or tort cause of action for battery, assault, pain and suffering, lost wages, bonus, sick leave, vacation leave and other paid-time-off, intentional or negligent infliction of emotional distress, defamation, breach of collective bargaining agreement, breach of contract or implied contract, breach of public policy, wrongful discharge and/or for benefits owed (except for vested benefits); any and all Claims under the National Labor Relations Act, the Labor Management Relations Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 and/or 1991, the federal False Claims Act, the Reconstruction Era Civil Rights Acts, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act of 1974, the Internal Revenue Code, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Fair Credit Reporting Act, the Occupational Safety and Health Act, the Immigration Reform and Control Act, the federal Whistleblower Protection Statutes, the Worker Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Constitution, the Millville Dallas Airmotive Plant Job Loss Notification Act, and the New Jersey Wage and Hour Laws and any and all amendments to each of the foregoing laws; and any and all Claims under any other federal, state and/or city laws, codes, rules or regulations. This Agreement applies to all Claims through the date of Jefferson's execution of this Agreement and not to Claims arising thereafter. The release of Claims in this Paragraph does not apply to Claims that cannot, as a matter of law, be waived by private agreement.

8. Jefferson represents he has not filed any Claims against the Board. To the extent any such Claims have been filed, Jefferson agrees to promptly withdraw and/or direct the pertinent court or agency to dismiss their respective matters with prejudice. Nothing in this Agreement is intended to interfere with (a) the Equal Employment Opportunity Commission's ("EEOC") or any comparable state or local agency's ability to enforce any anti-discrimination law within their jurisdiction, or (b) Jefferson's ability to participate in an investigation, file a charge, or otherwise communicate with the EEOC or comparable state or local agency responsible for enforcing anti-discrimination laws. Jefferson has not filed and shall not hereafter file any claim, charge or complaint of any nature with the New Jersey Public Employment Commission (PERC) or with any Federal, State or local court or agency against the Board or the Releasees.

9. If Jefferson violates the General Release detailed herein by filing any claim, charge or complaints as prohibited above, Jefferson agrees to pay all costs and expenses of

defending against the suit incurred by the Board and/or the Releasees, including reasonable attorney's fees and costs.

10. **NON-PRECEDENTIAL.** The Parties agree that this Agreement shall be non-precedential, is limited to specific and unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other Board employee.

11. **MUTUAL NON-DISPARAGEMENT.** Jefferson agrees that, in any communications with the press, other media or any other individual, he shall not criticize, ridicule or make any statement which disparages or is derogatory of the Board or its employees, elected officials, directors or senior officials. Likewise, the Board and its senior officials shall not criticize, ridicule or make any statement which disparages or is derogatory of Jefferson. Nothing herein shall infringe upon the Parties' respective rights to express constitutionally protected-speech.

12. **INQUIRES FROM PROSPECTIVE EMPLOYERS.** In the event of any inquiries into this matter, the Parties shall respond that Jefferson resigned from his employment, except as otherwise required by law, including but not limited to the New Jersey Pass the Trash Law, N.J.S.A. 18A:6-7.7. Should a prospective employer that is subject to the requirements of N.J.S.A. 18A:6-7.7 contact the Board, the Board shall accurately and truthfully fill out any required forms and provide any requested information in lieu of further explanation. As such, the Board agrees not to make any representation that the circumstances involving the allegations against Al Jefferson rise to the level of "sexual misconduct" as defined in N.J.S.A. 18A:6-7.6.

13. **ASSIGNMENT.** The Parties shall not assign or transfer any of its rights under this Agreement.

14. **SUCCESSORS AND ASSIGNS.** This Agreement shall be binding upon and inure to the benefit of the heirs, assigns, and successors in interests of the Parties hereto.

15. **NO ADMISSIONS.** The Parties expressly agree that by settling the matter referenced herein neither party admits or accepts any guilt or liability for any claims made or that could have been made by Jefferson or the Board arising from their employment relationship. No statement made or agreed to by either Party in this Agreement shall be deemed an admission by said Party.

16. **NO WAIVER**. No failure or delay on the part of any Party in exercising any right, power, or remedy under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any such right, power, or remedy preclude any other or further exercise thereof of the exercise of any other right, power or remedy hereunder. The rights and remedies provided in this Agreement are cumulative and are not exclusive of any other rights, powers, or remedies existing in law, in equity or otherwise.

17. **CONFIDENTIALITY.** The Parties acknowledge that this Agreement is considered a government record subject to the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., and that nothing herein shall exempt this Agreement from being made

publicly accessible pursuant to an appropriately filed OPRA request subject to any lawfully permitted redactions.

18. **SEVERABILITY.** Should any provisions of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

19. **GOVERNING LAW**. This Agreement has been negotiated and entered into in the State of New Jersey, and shall be governed by the laws of the State of New Jersey, without regard to any principles of choice of law that may otherwise be applicable.

20. **VENUE.** Any controversies or disagreements arising out of, or relating to this Agreement or breach thereof, shall be resolved in the Essex County Vicinage of the Superior Court of New Jersey.

21. **COMPLETE AGREEMENT.** This Agreement contains the entire agreement between the Parties with respect to the subject matter referenced herein and supersedes all other prior agreements, understandings, and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the Board to anything other than what is expressly stated in this Agreement. Jefferson represents and acknowledges that in executing this Agreement, he has not relied upon any representation or statement made by the Board regarding the subject matter, basis, or effect of this Agreement other than as specifically stated in this Agreement. The terms in this Agreement can only be modified in a written document signed by Jefferson and the Board's authorized representative.

22. **NEUTRAL CONSTRUCTION**. In the event of any dispute concerning the construction or interpretation of this Agreement, this Agreement shall be construed neutrally and without regard to events of authorship or negotiations, each Party having been represented by independent legal counsel.

23. **ATTESTATION.** The Parties represent and warrant that they have carefully read each and every provision of this Agreement and that they fully understand all of the terms and conditions contained in each provisions of this Agreement. The Parties further represent and warrant that they have entered into this Agreement voluntarily, of their own free will, without any pressure or coercion from any person or entity including, but not limited to, a Party to this Agreement.

24. **PRECATORY PHRASES.** The precatory phrases ("whereas clauses") are not mere recitals, but are specifically agreed to by the parties and are incorporated herein by reference.

25. **HEADINGS.** The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

26. **CONSULTATION WITH ATTORNEY AND/OR UNION REPRESENTATION.** Jefferson has consulted with his attorney and/or Union representatives with respect to this Agreement and has reviewed with his attorney and/or Union representatives all of the terms and conditions of this Agreement prior to executing this Agreement.

27. **AUTHORIZATION.** By executing this Agreement, each signatory represents that she or he is a party or has been duly authorized by a party to sign on that party's behalf.

28. **REVOCATION PERIOD.** Jefferson may revoke this Agreement within seven (7) days after the date this Agreement is signed by Jefferson. This revocation must take the form of written notice by Jefferson that he intends to revoke this Agreement. This revocation must be provided directly to the Board. This seven (7) day revocation period may not be waived by Jefferson.

29. **REASONABLE CONSIDERATION PERIOD.** Jefferson agrees that he has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but that he may knowingly and voluntarily waive this twenty-one (21) day period by signing and dating in the space provided at the end of this Agreement.

30. **ACKNOWLEDGEMENT.** Al Jefferson affirmatively agrees to and acknowledges the following:

a. I have read this Agreement completely.

b. I have had the opportunity to consider the terms of this Agreement.

c. I agree and acknowledge that I was represented by and consulted with counsel throughout both the negotiation and execution of this Agreement. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement before signing it. Jefferson further acknowledges and agrees that he has been fully and fairly represented by counsel in the negotiation of this Agreement.

d. I understand and agree to all of the terms of this Agreement.

e. I have not relied upon any representation, written or oral, not set forth in this Agreement.

f. I have signed this Agreement voluntarily and entirely of my own free will.

g. I represent and agree that I am not under the influence of any illness, including mental or emotional illness, medical condition, disability or impairment, or of prescription or other medication that would affect my ability to review this Agreement in its entirety, understand it and

knowingly and voluntarily agree to it.

31. **COUNTERPARTS.** This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which will constitute one and the same agreement. A signature affixed by a party to a counterpart of this Agreement and delivered by electronic transmission is valid, binding and enforceable against such party.

Date:_____ By:_____
Al Jefferson

Date: 1/22/2020 By:_____
Terry Tucker, Board President

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the twenty-one (21) day period referred to in Paragraph 28 of this Agreement.

Date:_____ By:_____
Al Jefferson

Al Jefferson

500 Park Avenue, #17

East Orange, New Jersey 07017

January 14, 2020

Dr. Kevin R. West
Superintendent of Schools
East Orange Public Schools
199 4th Avenue
East Orange, New Jersey 07017

Re: Letter of Resignation

Dear Dr. Kevin R. West.:

Please accept this letter as notice of my resignation as a teacher from the East Orange Public School District effective close of business, January 14, 2020.

Sincerely,

Al Jefferson

cc: Nicholas Poberezhsky, Esq.
Katie Mocco, Esq.

CARUSO SMITH PICINI
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
60 Route 46 East, Fairfield, New Jersey 07004
973-667-6000 973-667-1200 facsimile

Nicholas Poberezhsky, Esq.
npoberezhsky@carusosmith.com

February 3, 2020

Via Email to: paz0@lehigh.edu
& Regular Mail
Perry A. Zirkel, Arbitrator
3906 Walbert Ave.
Allentown, PA 18104

Re: In the Matter of the Tenure Hearing of Al Jefferson, School District of the City of East Orange, Essex County
Agency Dkt. No.: 296-11/19

Dear Arb. Zirkel:

As you had requested via e-mail dated January 22, 2020, please accept this letter as a joint statement of consent and explanation as to the legal validity of the settlement agreement[1] entered into by the parties in the above-captioned matter. More specifically, for the reasons that follow, the agreement satisfies the requirements of N.J.A.C. 6A:3-5.6 (a)(1)-(a)(5) and (b):

(a)(1) – the nature of the charges is described in the "RECITALS" section of the agreement, specifically, "incidences" that formed a "pattern of conduct," which resulted in an investigation and Respondent's suspension;

(a)(2) – the circumstances justifying settlement are also stated in the "RECITALS" section of the agreement: "prior to the arbitration, the parties agreed it was mutually beneficial to amicably resolve the Charges in dispute in order to avoid further protracted adjudication and expense;"

(a)(3) – consent of the parties is expressly provided in ¶ 23 of the agreement;

(a)(4) – ¶ 23 of the agreement also provides that Respondent entered into the agreement with a full understanding of his rights;

(a)(5) – public interest is accounted for in the "RECITALS" section of the agreement, which provides that the settlement will help avoid "protracted adjudication and expense," a significant portion of which would be borne by the public; also ¶ 12 ensures strict adherence to N.J.S.A. 18A:6-7.6. As set forth in the agreement, with regard to disclosures, the District only agrees not to make an affirmative representation that the circumstances involving the allegations

[1] A true and accurate copy of the fully-executed settlement agreement is enclosed herewith.

against Al Jefferson rise to the level of "sexual misconduct" as defined in N.J.S.A. 18A:6-7.6; and

(b) - ¶ 17 of the agreement expressly states that it is a government record subject to the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., and it was personally signed and dated by the Board president.

For the foregoing reasons, the parties jointly stipulate that the settlement agreement is legally-valid and complies with N.J.A.C. 6A:3-5.6. It further satisfies the requirements of the "Pass the Trash" law, as provided in ¶ 12 of the agreement.

Date: 2/3/20 By: _____
Nicholas Poberezhsky, Esq.
Counsel for Respondent

Date: 2/3/20 By: _____
Katie Mocco, Esq.
Counsel for Petitioner

Enclosure
c: Al Jefferson (via regular mail)
Katie Mocco, Esq. (via regular mail)
James W. McGuire, UniServ Field Representative (via regular mail)
NJEA Legal Department (via e-mail only)
Marissa McKenzie (via e-mail only)

57-20LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

February 11, 2020

Tatiana Charapova, *pro se*
206 Onizuka Court
Somerset, New Jersey 08873

Ramon E. Rivera, Esq.
Scarinci & Hollenbeck LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071

Re: *Tatiana Charapova v. Board of Education of the Township of Edison, Middlesex County, Agency Dkt. No. 251-9/19*

Dear Parties:

I have reviewed the petition of appeal, as well as the materials filed in connection with the respondent's motion to dismiss the petition in the above-referenced matter. Upon review of the submissions, I have determined to dismiss this matter as it was filed outside of the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

Petitioner contends that respondent Edison Board of Education discriminated against students she taught in the school district's English as a Second Language (ESL) program, and failed to provide them with an equal educational opportunity. Petitioner's allegations appear to stem from actions that occurred in 2005, around the time that her teaching contract had not been renewed due to a reduction in force. *N.J.A.C.* 6A:3-1.3(i) sets forth a 90-day filing deadline for matters filed before the Commissioner. As the petitioner's allegations relate to conduct that occurred approximately 14 years prior to the filing of this matter, they are significantly out of time. As such, the petition should be dismissed.

Additionally, the Commissioner notes that in a prior matter involving the parties, the petitioner challenged her non-renewal, claiming that the Board discriminated against her. The New Jersey Superior Court – Appellate Division affirmed the dismissal of the petition as out of time, and the New Jersey Supreme Court denied petitioner's petition for certification. *Tatiana Charapova v. Board of Education of the Township of Edison, Middlesex County,* 2008 *N.J. Super. Unpub. LEXIS* 1685 (App. Div. July 21, 2008), certif. denied, 196 *N.J.* 598 (2008). The Commissioner finds that, to the extent the instant petition challenges petitioner's non-renewal, this matter is also barred by the doctrine of res judicata.

Accordingly, the Board's motion to dismiss the petition is GRANTED, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/JKH/BCM

VIA E-MAIL ONLY

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

58-20LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

February 11, 2020

Shawanna Brave, *pro se*
81 Dixon Avenue
Boonton, New Jersey 07005

Frances L. Febres, Esq.
Cleary Giacobbe Alfieri Jacobs LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436

Re: *S.B., on behalf of minor child, S.F. v. Board of Education of the Morris School District, Morris County, Agency Dkt. No. 60-3/19, OAL Dkt. No. EDU 05507-19, Commissioner's Decision No. 321-19*

Dear Parties:

I have reviewed the materials filed in connection with the Morris School District Board of Education's (Board) Motion for Reconsideration of my decision, dated December 3, 2019, remanding the within matter to the Office of Administrative Law (OAL) for calculation of tuition owed to the Board and supplementation of the record as warranted.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)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 could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

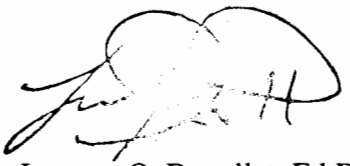
Upon review and consideration of the submissions, I find that the Board has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. In its papers, the Board argues that the decision mistakenly rejected the Administrative Law Judge's (ALJ) findings by relying on a typographical error in the conclusions of law rather than relying

on the findings of fact regarding the dates of ineligible attendance in the 2018-19 school year. In addition to rejecting the ALJ's finding of the per diem tuition rate for the 2019-20 school year, the Board also argues that the decision wrongfully required a particular end date for the calculation of tuition for the 2019-20 school year, as the minor child continues to attend school in the District.

The December 3, 2019 decision did not reject the ALJ's findings of fact, but rather it noted inconsistencies in the Initial Decision that need to be clarified by the ALJ in order to calculate the exact tuition amount due. Additionally, the decision did not require a particular "end date" for the 2019-20 school year. The decision requested a calculation for some "defined portion" of the 2019-20 school year as the Initial Decision included no calculation; nothing prevents the ALJ from finding that tuition can be assessed beyond that date based on a per diem tuition rate, should the record include an academic calendar or some way to determine the number of days of ineligible attendance. Although couched as a mistake, the Board is instead expressing its disagreement with the December 3, 2019 decision, which does not equate to a mistake warranting reconsideration of the matter.

Accordingly, the Motion for Reconsideration is hereby DENIED.

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: Clerk, Office of Administrative Law
Hon. Barry E. Moscowitz, ALJ
County Superintendent
State Law Library

LOR/JKH/BCM

VIA E-MAIL ONLY

59-20LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

February 11, 2020

Opal R. Wright
P.O. Box 7344
Newark, New Jersey 07107

Arsen Zartarian, Esq.
The Newark Public Schools
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102

Frances L. Febres, Esq.
Cleary Giacobbe Alfieri Jacobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, New Jersey 07436

Re: *O.W., on behalf of minor child, I.W. v. Board of Education of the City of Newark, Essex County and Board of Education of the Township of West Orange, Essex County, Agency Dkt. No. 144-6/19*

Dear Parties:

I have reviewed the petition of appeal, as well as the materials filed in connection with the motions to dismiss the petition filed by the Newark Board of Education and the West Orange Board of Education in the above-referenced matter. Upon review of the submissions, I have determined to dismiss this matter as it was filed outside of the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Additionally, this matter is barred by the doctrine of res judicata.

Petitioner contends that both Boards of Education took inappropriate actions with respect to her daughter, I.W., while she was a student in the respondents' school districts, and alleges violation of ten New Jersey statutes. While it is impossible to determine the precise nature of the actions alleged due to the incomprehensible nature of the petition, it appears that all of the allegations stem from actions said to have occurred between 2008 and 2012. *N.J.A.C.* 6A:3-1.3(i) sets forth a 90-day filing deadline for matters filed before the Commissioner. As the events referenced occurred years prior to the filing of this matter, they are significantly out of time. As such, the petition should be dismissed.

Additionally, the Commissioner notes that a final agency decision in a prior case involving the parties and addressing the same incidents was issued in June 2017. *O.W., on behalf of I.W. v. State-Operated School District of the City of Newark, Essex County and Board of Education of the Township of West Orange, Essex County,* Commissioner's Decision No. 170-17, decided June 20, 2017. Thereafter, petitioner filed a motion for reconsideration, which was denied on October 23, 2017. The Commissioner finds that, as the issues in this matter were previously raised and decided in a prior Commissioner decision, this matter is barred by the doctrine of res judicata.

Accordingly, the motions to dismiss the petition are GRANTED, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/JKH/BCM

VIA E-MAIL ONLY

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

60-20

New Jersey Commissioner of Education

Final Decision

Greta-Marie Scott,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that she had not met the requirements for issuance of a P-3 Standard Certificate, the standard certificate for Teacher of Preschool through Grade Three. The Board denied petitioner's application for certification due to her failure to satisfy the P-3 endorsement requirement under N.J.A.C. 6A:9B-11.2(a)(2), which provides that "provisional teachers holding a CE [certificate of eligibility] with a P-3 endorsement shall choose to complete either 350 hours of formal instruction pursuant to N.J.A.C. 6A:9A-5.4(a)1 or 24 semester-hour credits of P-3 pedagogy at a Department-approved New Jersey college or university program." The SBE filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner conceded that she has not completed the educator preparation program required for P-3 certification pursuant to *N.J.A.C.* 6A:9B-11.2(a)(2), but argued that she had availed herself of the SBE's internal appeals process under *N.J.A.C.* 6A:9B-4.12, which allows a candidate for certification to "provide the Board of Examiners with evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency"; petitioner provided the SBE with information about her undergraduate and graduate coursework, other teaching certificates that she holds, and her teaching experience; after review of these credentials, the SBE denied petitioner's appeal, stating that pursuant to *N.J.A.C.* 6A:9B-4.12(c)(2), it is precluded from permitting a candidate to substitute education and/or experience for an approved educator preparation program, nor may it simply waive the requirement. The ALJ concluded that petitioner had failed to advance a claim upon which her request for a P-3 endorsement may be granted. Accordingly, the SBE's motion for summary decision was granted, and the petition was dismissed.

The Commissioner concurred with the findings and determination of the ALJ herein; accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. 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.

February 11, 2020

60-20

OAL Dkt. No. EDU 17464-18
Agency Dkt. No. 178-7/18

New Jersey Commissioner of Education

Final Decision

Greta-Marie Scott,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Board of Examiners is entitled to summary decision. Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 2/11/20
Date of Mailing: 2/12/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 17464-18
AGENCY DKT. NO. 178-7/18

GRETA-MARIE SCOTT,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Greta-Marie Scott, petitioner, pro se

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

Record Closed: November 18, 2019 Decided: January 8, 2020

BEFORE: **MARY ANN BOGAN**, ALJ

STATEMENT OF THE CASE

Petitioner Greta-Marie Scott (Scott) appeals the denial of her application for a preschool through grade three (P-3) endorsement by respondent New Jersey State Board

of Examiners (Board). The Board denied Scott's application due to her failure to satisfy the P-3 endorsement requirement under N.J.A.C. 6A:9B-11.2(a)(2), which provides that "provisional teachers holding a CE [certificate of eligibility] with a [P-3] endorsement shall choose to complete either 350 hours of formal instruction pursuant to N.J.A.C. 6A:9A-5.4(a)1 or 24 semester-hour credits of [P-3] pedagogy at a Department-approved New Jersey college or university program." The three required areas of instruction are "child development and learning," "understanding family and community," and "curriculum and assessment." N.J.A.C. 6A:9B-11.2(a)(2)(i)(ii)(iii).

Scott appealed the Board's decision to the Commissioner of Education, as permitted under N.J.A.C. 6A:9B-4.18. In response, the Board filed a motion to dismiss in lieu of answer to Scott's petition, in accordance with N.J.A.C. 6A:3-1.5(g). The matter was transmitted to the Office of Administrative Law (OAL) and received on December 6, 2018, where it was filed for determination as a contested case pursuant to N.J.S.A. 52:14 B-1 to 15 and N.J.S.A. 52:14F-1 to -13. Oral argument was heard on September 17, 2019. The record remained open for the submission of post-hearing briefs and closed on November 18, 2019.

Based upon the credible documentation submitted by the parties, and oral argument, I **FIND** the following **FACTS**:

Scott earned an undergraduate degree in special education/elementary education in 2004, Magna Cum Laude, and a master's degree in Special Education and Applied Behavior Analysis (ABA), with 1500 hours of ABA training for early childhood through adulthood, in 2008 both from East Stroudsburg University of Pennsylvania. Scott holds a Standard NJ Teacher Certificate in Elementary (K-6) regular education, Teacher of Students with Disabilities (Special Education), and Middle School Arts/Literacy (grades 5-8). Scott has been a special education teacher for fifteen years in the Belvidere School District and in 2016-2017, Scott was selected "Teacher of the Year". Scott passed the P-3 Praxis and obtained a Teacher of Preschool through Grade Three Certificate of Eligibility (CE). In February 2014, Scott established and started the Belvidere School

District's preschool ABA program. Scott applied for a P-3 Standard Certificate, and on June 29, 2018, the Board denied petitioner's application for a Teacher of Preschool through Grade Three standard certificate. (Exhibit A.)

Scott concedes that she has not completed an educator preparation program pursuant to N.J.A.C. 6A:9B-11.2(a)(2). However, Scott availed herself of the Board's internal appeals process under N.J.A.C. 6A:9B-4.12, which allows a certification candidate to "provide the Board of Examiners with evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency." N.J.A.C. 6A:9B-4.12(b). As part of that appeal, Scott provided the Board with information about her undergraduate and graduate coursework, other teaching certificates she holds, and her teaching experience. Board's Brief, Ex. C.

In accordance with N.J.A.C. 6A:9B-4.12(d), the Board reviewed the information provided by Scott, and thereafter issued a written decision denying her appeal. In its decision, the Board stated that Scott "has been denied certification because she has not shown evidence of completion of an approved [P-3] program of study culminating in student teaching or through an approved New Jersey Department of Education alternate route program of [P-3] pedagogy," as required by N.J.A.C. 6A:9B-11.2(a)(2). Board's Brief, Ex. A. The Board stressed that "[t]he three distinct areas of study required by [N.J.A.C. 6A:9B-11.2(a)(2)] are considered unique and critical elements of the knowledge and skills necessary for [P-3] instruction." Ibid. The Board carefully considered and recognized both Scott's undergraduate and graduate coursework and the fact that Scott "has extensive experience as an educator and, more recently since February 2014, as a teacher of an autistic support program and preschool disability program both for ages three through seven," but concluded that Scott did not provide a one-to-one correspondence between her deficiency, i.e. evidence of successful completion of a P-3 program of study and her education and experience for issuance of a standard P-3 certificate" and concluded that "[t]he Board . . . is precluded from permitting a candidate to substitute education and/or experience for an approved educator preparation program nor may it simply waive the requirement," pursuant to N.J.A.C. 6A:9B-4.12(c)(2). Ibid.

LEGAL ANALYSIS AND CONCLUSION

While the Uniform Administrative Procedure Rules (UAPR) governing motions, N.J.A.C. 1:1-12.1 to -12.7, do not specifically limit the types of motions that may be made in administrative hearings or otherwise preclude a "motion to dismiss," the more common method for resolving a case on the papers without a plenary hearing is by a motion for summary decision pursuant to N.J.A.C. 1:1-12.5.

Under N.J.A.C. 1:1-12.5, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). However, a motion for summary decision shall be denied if, by responding affidavit, an adverse party "set[s] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

Summary judgment is analyzed in accordance with the principles established by the Supreme Court in Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995):

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Citation omitted.]

See also Nat'l Transfer, Inc. v. N.J. Dep't of Envtl. Prot., 347 N.J. Super. 401, 408–09 (App. Div. 2002).

The Board argues that dismissal is appropriate because Scott has failed to state a claim upon which relief may be granted. In particular, the Board asserts that Scott has no cause of action because she concedes that she has not completed an educator preparation program pursuant to N.J.A.C. 6A:9B-11.2(a)(2), and despite her other education and experience, N.J.A.C. 6A:9B-4.12(b)(2) prohibits the Board from "[p]ermit[ting] a candidate to substitute education and/or experience for any test, GPA, degree, or approved educator preparation program completion requirements." (Emphasis added).

Although the Board (and I) recognized both Scott's undergraduate and graduate coursework and her extensive experience as an educator, Scott has not completed an educator preparation program required by N.J.A.C. 6A:9B-11.2(a), and for that reason, this omission – her failure to complete such a program – is a deficiency that cannot be remedied by evidence of alternative education or experience pursuant to N.J.A.C. 6A:9B-4.12(c)(2). On that basis, unless and until Scott completes an educator preparation program under N.J.A.C. 6A:9B-11.2(a)(2), the Board cannot issue her a P-3 endorsement. Accordingly, I am constrained to **CONCLUDE** that Scott has failed to advance a claim upon which her request for a P-3 endorsement may be granted.

Therefore, having considered the parties' submissions, I **CONCLUDE** that the Board's motion for summary decision should be **GRANTED**.

ORDER

I hereby **ORDER** 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

January 8, 2020
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: January 8, 2020

Date Mailed to Parties: January 8, 2020

MAB/cb

61-20
OAL Dkt. No. EDU 07602-19
Agency Dkt. No. 102-5/19

New Jersey Commissioner of Education

Final Decision

Marie Aleardi,

Petitioner,

v.

Board of Education of the Kingsway Regional School District, Gloucester County,

Respondent.

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

Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 1 of the Agreement makes reference to an action that was to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

Additionally, with respect to Paragraph 14 of the Agreement, the Commissioner notes that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms

or have agreed upon a mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 2/11/20
Date of Mailing: 2/12/20

62-20R

OAL DKT. No. EDU 14347-19
(EDU 00243-19 On Remand)
Agency DKT. No. 296-12/18

New Jersey Commissioner of Education

Final Decision

C.I. and C.G., on behalf of minor child, Y.I.,

Petitioners,

v.

Board of Education of the Township of Maple Shade, Burlington County,

Respondent.

The record of this matter, the proposed Settlement Agreement (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 – mindful of the Commissioner's October 8, 2019 determination to remand the previous Agreement as it did not comply with the requirements of *N.J.A.C.* 6A:3-1.13. As the deficiencies noted in the Commissioner's prior decision have been addressed, the Commissioner can now approve the within Agreement.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 2/11/20
Date of Mailing: 2/12/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14347-19
AGENCY DKT. NO. 296-12/18
REMAND OF EDU 00243-19
AGENCY DKT. NO. 296-12/18

C.I. AND C.G., ON BEHALF OF MINOR CHILD, Y.I.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,
Respondent.

C.I. and C.G., petitioners, pro se

Victoria S. Beck, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: January 3, 2020 Decided: January 7, 2020

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 11, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the settlement agreement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement (J-1.) Board Resolution is also attached. (J-2.)

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

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

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

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

January 7, 2020
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 1/10/20

Mailed to Parties: 1/8/20

/vj

J-1

SETTLEMENT AGREEMENT

This Settlement Agreement and General Release (the "Agreement") is entered into by and between C.I. & C.G. o/b/o Y.I., and the Maple Shade Township Board of Education (hereinafter "Board"), with its mailing office located at 170 Frederick Avenue, Maple Shade, NJ 08052 (C.I. & C.G. o/b/o Y.I. and Board hereinafter collectively, "the Parties").

WHEREAS, Y.I. is a student currently enrolled in the Maple Shade Township School District;

WHEREAS, C.I. and C.G. are currently domiciled in Maple Shade, New Jersey,

WHEREAS, a dispute previously arose as to Y.I.'s domicile and his enrollment as a student in the Maple Shade Township School District; and

WHEREAS, the Parties in good faith have negotiated concerning the above, and have a desire to settle this matter in an amicable way, and hereby agree as follows:

1. While C.I. and C.G. continue to be domiciled in Maple Shade, NJ, Y.I. shall remain enrolled as a student in the Maple Shade Township School District.

2. The Board will waive any entitlement to payment of tuition by C.I. and C.G. o/b/o Y.I. for Y.I.'s previous and current attendance in the Maple Shade School District.

3. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties.

4. C.I. and C.G. o/b/o Y.I. acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, that they are satisfied with the advice of their respective counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

IN WITNESS HEREOF, the Parties have set their hands this 16 day of October, 2019.

BY: _____ DATED: 10/16/19
Michael McClure, President
Maple Shade Township School District
Board of Education

BY: _____ DATED: 10-28-19
C.I. and C.G. o/b/o Y.I.

Telephone: (856) 779-1750
Fax: (856) 779-7488



MAPLE SHADE BOARD OF EDUCATION

J-2

Administration Building
170 Frederick Avenue, Maple Shade, N.J. 08052-3299

Beth Norcia
Superintendent of Schools

Diana Cawood
Business Administrator/Board Secretary

Resolution

I certify that at the meeting of October 16, 2019 the Maple Shade Board of Education took the following action:

9.2o Approve - Settlement of Residency Appeal in the matter of student #202000670 and Maple Shade Board of Education.

A motion was made by Ms. Wiest and seconded by Mrs. Gatton that the Board of Education approves Settlement of Residency Appeal in the matter of student #202000670 and Maple Shade Board of Education.

Roll Call	
Mrs. Gatton	Yes
Mr. Hartshaw	Yes
Ms. Long	Yes
Mrs. Lotierzo	Yes
Mrs. Maerten	Absent
Mr. McClure	Yes
Mr. Natale	Absent
Mr. Schaal	Absent
Ms. Wiest	Yes

RECEIVED
2019 OCT 25 P 1:
STATE OF NEW
OFFICE OF A

Diana Cawood

Diana Cawood
School Business Administrator/Board Secretary

10/17/19

Date

RESOLUTION OF THE TOWNSHIP OF MAPLE SHADE BOARD OF EDUCATION APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE MAPLE SHADE BOARD OF EDUCATION AND C.I. & C.G. o/b/o Y.I.

WHEREAS, an Appeal of the Residency Determination of the Board of Education (Herein after "Board") was filed by C.I. & C.G. o/b/o Y.I. (Herein after "Petitioners") to the Office of Controversies and Disputes.

WHEREAS, the Township of Maple Shade Board of Education (hereinafter "Board of Education") filed an Answer responding to Petitioner's claims; and

WHEREAS, the matter was transmitted to the Office of Administrative Law ("OAL") and assigned the docket number EDU 00243-18 S.

WHEREAS, the Petitioners and Board of Education, through their respective Counsel engaged in settlement discussions since the Appeal was filed; and

WHEREAS, both the Petitioners and Board of Education acknowledge that the merits of the controversy are in dispute and have not been adjudicated, and that neither admits any liability to any other, but all have reasons to desire amicable resolution of the matter, including to avoid further cost of litigation; and

WHEREAS, a Settlement Agreement was tentatively entered into and is attached as Exhibit "A"

NOW, THEREFORE, be it RESOLVED by the Township of Maple Shade Board of Education on this 16th day of October, 2019, as follows:

1. The Settlement of Agreement between the Township of Maple Shade Board of Education and Petitioners is hereby approved.
2. Board President, Michael McClure, is hereby designated to sign the Settlement Agreement on Behalf of the Township of Maple Shade Board of Education.

RECEIVED
2019 OCT 25 P 12:50
STATE OF NEW JERSEY
OFF. OF ADMIN. LAW

65-20SEC

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
School Ethics Commission
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

By: Michal Czarnecki
Deputy Attorney General
(609) 376-3100

RECEIVED BY
CONTROVERSIES & DISPUTES
2020 JAN 30 P 2:01

	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
	:	
IN THE MATTER	:	OAL DOCKET NO. ECE 03988-2019S
MICHAEL C. GORSKI	:	AGENCY DOCKET NO. C44-18
	:	
	:	**CONSENT ORDER**
	:	

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC") and Respondent, Michael C. Gorski ("Respondent"), have mutually agreed to settle the above-captioned matter, with GURBIR S. GREWAL, Attorney General of New Jersey, by Aimee Blenner, Deputy Attorney General, appearing on behalf of the SEC, and Beth L. Finkelstein, Esq., appearing on behalf of Respondent; and

WHEREAS, this matter arose from the SEC's decision of February 26, 2019 (C44-18), finding probable cause to credit the allegations that Respondents violated N.J.S.A. 18A:12-24(b), N.J.S.A. 18:12-24(d), and N.J.S.A. 18A:12-24.1(f); and

WHEREAS, the SEC strongly admonishes the conduct as outlined the attached affidavits. Respondent's failure, though

inadvertent, to meet ethical standards in this instance led to a undesired outcome, and the SEC maintains concerns regarding the nature of this ethical conduct by school board employees;

WHEREAS the settlement of this matter shall not constitute precedent in other pending or future litigation or be considered an admission of any conduct beyond that specifically described in the attached affidavit of Respondent.

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

1. Respondent acknowledges that the conduct described in the attached affidavits, incorporated herein by reference, constitute a violation of N.J.S.A. 18A:12-24(b), N.J.S.A. 18:12-24(d), and N.J.S.A. 18A:12-24.1(f) as alleged in C44-18.

2. The parties agree that the SEC will recommend that the Commissioner impose the penalty of a reprimand.

3. The Commissioner agrees that he will adopt the SEC's recommendation and impose the penalty of a reprimand for the conduct described in the attached affidavit.

4. By accepting the penalty of a reprimand, Respondent agrees to waive any and all hearings to which they are entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the reprimand.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's February

26, 2019, decision finding probable cause.

Date: 12/9/19

Beth Finkelstein, Esq.
Attorney for Respondents

Date: 1/7/20

Michal Czarnecki, D.A.G.
Attorney for Petitioner

Michael C. Gorski is hereby reprimanded for the conduct as described in the attached affidavits.

Date: 2/11/20

Dr. Lamont Repollett
Commissioner of Education
As to penalty only

New Jersey Commissioner of Education

Final Decision

Catherine Parsells,

Petitioner,

v.

Board of Education of the Borough of Somerville, Somerset County,

Respondent.

Synopsis

Petitioner filed an appeal alleging that the respondent Board violated her tenure and seniority rights by depriving her of full-time employment after she voluntarily transferred to a new part-time position with benefits for the 2016-17 school year. Petitioner subsequently took an approved maternity and childcare leave and sought to continue in her part-time position with benefits for the 2017-18 school year. When she was told that she would need to return to a full-time position in order to keep her health care benefits, petitioner opted to extend her maternity leave through the 2017-18 school year. When petitioner sought to return for the 2018-19 school year, she was told that she was entitled to a part-time position with no benefits, but not to a full-time position with benefits, and if such a position opened up, she would need to apply for it. The matter was transmitted to the OAL as a contested case.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:28-9, a tenured teacher may be dismissed through a reduction in force (RIF) for economic reasons; when a teacher has been subject to a RIF, she has the right to return to her prior position when a vacancy occurs; a reduction of a full-time teacher's hours to part-time constitutes a RIF; however, fundamental to a finding that a RIF occurred is a determination that the action at issue was initiated by the school board, not by the impacted teacher; it is undisputed that in this case, petitioner voluntarily moved to a part-time position because it suited her family's needs; and petitioner's contention that she should be entitled to return to a full-time position because the Board failed to warn her of the consequences of her decision to move to a part-time position is without merit, as she has cited no statutory provision that could require the notice she claims ought to have been provided. The ALJ concluded that the petitioner is not eligible to return to her full-time position because she was not the subject of a RIF and had voluntarily accepted her part-time position; accordingly, the petition was dismissed.

Upon comprehensive review, the Commissioner found, *inter alia,* that: petitioner did not knowingly and voluntarily waive her right to a full-time teaching position, and her choice to continue her maternity leave for the 2017-18 school year did not constitute a waiver of her tenure rights. Accordingly, the Commissioner reversed the Initial Decision of the OAL, and ordered the Board to reinstate petitioner to her position as a full-time teacher retroactive to the 2018-19 school year, with full back pay, benefits, and emoluments of employment, less mitigation.

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

February 19, 2020

OAL Dkt. No. EDU 09744-18
Agency Dkt. No. 119-5/18

New Jersey Commissioner of Education

Final Decision

Catherine Parsells,

Petitioner,

v.

Board of Education of the Borough of Somerville, Somerset County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto have been reviewed.

Petitioner was employed by the Board as a full-time preschool teacher for six years before voluntarily taking a part-time position with health benefits for the 2016-17 school year. In February 2017, just before beginning a maternity leave and child care leave of absence that was planned to extend through June 2017, petitioner expressed her interest in continuing as a part-time teacher for the 2017-18 school year, provided that the position continued to include health benefits. In July 2017, petitioner was informed by the outgoing superintendent that the part-time position no longer offered health benefits, so petitioner had to choose between a part-time position with no benefits or a full-time position with benefits. Petitioner chose to extend her maternity leave for another year. In April 2018, the new superintendent spoke with petitioner regarding her return to school for the 2018-19 school year and informed her that she was entitled to a part-time position with no benefits and that if a full-time position were to become available, she would need to apply for it.

Petitioner completed an application and participated in interviews, but the Board did not select her for either of the two full-time positions that were open and instead hired non-tenured individuals who had not previously worked in the district.[1] Petitioner appealed, arguing that the Board violated her tenure rights by hiring untenured teachers for the full-time positions and that she had not voluntarily relinquished her tenure rights by accepting a temporary placement in a part-time position. The ALJ found that the job change was voluntarily undertaken by petitioner and not mandated by the Board, so petitioner was not the subject of a reduction in force (RIF), and she was therefore not eligible to return to her full-time position.

In her exceptions, petitioner argues that the ALJ improperly framed the issue as whether she voluntarily reduced her hours rather than whether she voluntarily waived tenure rights to her full-time position. Petitioner cites to cases holding that the waiver of tenure rights must be voluntary and intentional to be effective. According to petitioner, the facts are clear that she never knowingly or voluntarily waived her tenure rights to her full-time position, but instead moved to part-time status on what she believed and intended to be a temporary basis. Petitioner argues that although she was not RIF'd when she initially moved to part-time status, she was effectively RIF'd when the Board denied her the opportunity to return to full-time status after her leave of absence. Petitioner contends that the ALJ incorrectly held that the New Jersey Supreme Court's decision in *Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan School Dist., Somerset Cty.*, 221 *N.J.* 349 (2015), requires the petitioner to identify a statutory provision obligating the Board to provide her with notice of the tenure consequences of her decision to move to part-time status. Petitioner points out that the Bridgewater-Raritan Board of Education argued in that case that notice could not be required because the statute did not expressly require it, but the Court rejected that argument. Petitioner cites to the Court's statement that "keeping teachers in the dark" is inconsistent

[1] Petitioner has also applied for approximately six open full-time positions in the district since then, but she was not selected for any of them.

with the broader purpose of the tenure statute and argues that this principle should apply to prevent the school board and administrators – who have training and experience in tenure and seniority law that she lacks – from depriving her of tenure rights to her full-time position.

In reply, the Board argues that petitioner was not subject to a RIF and the Board did not take any action that would have triggered her tenure rights, as her move to a part-time position was voluntary. The Board further contends that the ALJ correctly interpreted the decision in *Bridgewater-Raritan, supra,* to require petitioner to identify a statutory provision obligating the Board to give teachers notice regarding their tenure status. According to the Board, because petitioner did not identify any such statutory provision, it had no notice obligation to petitioner.

Upon review, the Commissioner reverses the Initial Decision and finds that petitioner did not knowingly and voluntarily waive her right to a full-time position and the compensation associated with it; she is therefore entitled to return to a full-time position. The Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, "should be liberally construed to achieve its beneficent ends." *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63, 74 (1982). That liberal construction has resulted in a long line of cases holding that tenure rights can only be waived knowingly and voluntarily through a clear, unequivocal, and decisive act. *See, e.g., O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402 (1986); *Rieder v. Bd. of Educ. of Caldwell-West Caldwell, Essex County*, Commissioner Decision No. 70-99, decided March 10, 1999, *aff'd* State Bd. of Educ, July 7, 1999. The Initial Decision is based on the fact that petitioner's move to a part-time position was voluntary and thus not a RIF. But by framing the issue around whether a RIF occurred, the Initial Decision fails to answer the critical question of whether petitioner knowingly and voluntarily waived her tenure rights to her full-time position.

The New Jersey Supreme Court recently cautioned against "the ability of labels to cloud an analysis." *Melnyk v. Bd. of Educ. of the Delsea Reg'l High School Dist., Gloucester Cty.*, slip op. at 1 (2020). In that matter, labeling a position as "extracurricular" and finding that the position was not tenurable based on that label resulted in "short-circuiting" the analysis and

improperly ignoring the statutory criteria for obtaining tenure. *Id.* at 4. Here, the Initial Decision ended the analysis by labeling petitioner's decision to move from a full-time position to a part-time position as "voluntary," thereby disregarding the circumstances surrounding her decision – which clearly demonstrate that she did not knowingly and voluntarily waive her right to a full-time position. Under *N.J.S.A.* 18A:6-10, compensation for a tenured position cannot be reduced "without compliance with the procedural protections of the Tenure Act." *Id.* at 27. Those procedural protections must include a determination regarding whether any alleged waiver of petitioner's right to compensation associated with a full-time position was voluntary.

In finding that petitioner did not waive her tenure rights, the Commissioner distinguishes the facts of this case from those of *DeFrehn v. Bd. of Educ. of Wildwood Crest Sch. Dist.*, 94 *N.J.A.R.*2d (EDU) 194 (December 30, 1993), in which a teacher who had voluntarily transferred from a teaching position to a learning disabilities teacher-consultant position was not entitled to return to her original position when the transfer was voluntary and "lacking in any indication of temporary intent."[2] Here, petitioner made her temporary intent clear, writing in her first letter to the administration that she was interested in a part time position "until my family decides that full-time work would be in our best interest again" and referring to her son's "precious first few years." It was also clear from this letter that the availability of health benefits was critical in petitioner's decision to move to the part-time position, and she reiterated this information in her second letter later that year in which she indicated that she would be interested in continuing in the part-time position if it continued to provide health benefits. Moreover, the ALJ found as fact that petitioner assumed that the part-time position would include health benefits beyond the first year and found credible her testimony that she would not have pursued the part-time position if it did not offer health benefits. Even the choice presented to petitioner at the end of her original period of maternity

[2] There is also no indication in *DeFrehn* that the transfer involved a reduction in compensation, as the move from full-time to part-time did for petitioner here, so the analysis did not implicate the protection against reduction in compensation provided for by *N.J.S.A.* 18A:6-10.

leave was one between a part-time position without benefits or a full-time position with benefits, reinforcing her belief that she could return to a full-time position.

The Commissioner disagrees with the ALJ's interpretation of the Court's holding in *Bridgewater-Raritan, supra.* The teachers in *Bridgewater-Raritan* argued that time served as replacement teachers should count toward their acquisition of tenure because they had been told by high-level district administrators that it would. The Board contended that other school-related statutes expressly require notice to teachers, but the replacement teacher statute did not, so the Legislature did not intend to require notice to replacement teachers. The Supreme Court held that *N.J.S.A.* 18A:16-1.1 requires a board of education to "designate" the replacement employee, and that the plain meaning of "designate" includes an obligation to give the replacement employee notice that time serving in the position will not count towards the acquisition of tenure. Here, the ALJ interpreted the *Bridgewater-Raritan* decision to mean that boards of education must only provide notice if a statute requires such notice. But this interpretation ignores the fact that the Court rejected essentially the same argument from the Bridgewater-Raritan Board of Education, stating, "[w]e are unpersuaded that the specific type of notice required in [other] statutes compels the conclusion that the Legislature intended to forgo any notice obligation under" the statute at issue. *Bridgewater-Raritan, supra,* at 362.

Here, the Commissioner is similarly unpersuaded that the Board has no notice obligation in the circumstances at issue. Petitioner made clear that her interest in a part-time position was temporary and contingent on the continued inclusion of health benefits. In the face of that information, the Board approved her transfer to a part-time position that included benefits, only to take away those benefits one year later; it then offered her a full-time position with benefits, only to take away that option one year later. The Court in *Bridgewater-Raritan* noted that "keeping teachers in the dark as to their employment status effectively negates what the Legislature has endeavored to address by the tenure statute, namely, 'prevent[ing] school boards from abusing their superior

bargaining power over teachers in contract negotiations.'" *Id.* at 361. Petitioner knowingly moved to a part-time position, but it is evident that she did not know that the Board would refuse to allow her to return to her full-time position. The Board, on the other hand, had all of the information and nonetheless kept petitioner in the dark. The fact that the Legislature has not enacted a statute to define a board of education's notice obligations regarding changes from full-time to part-time employment is not dispositive in light of the broad protective purpose of the Tenure Act.

Finally, the Board argued below that petitioner relinquished her tenure rights when she declined the offer to return to a full-time position for the 2017-18 school year.[3] The ALJ did not reach this issue because the case was resolved by the conclusion that petitioner was not the subject of a RIF and thus was not entitled to return to the full-time position. However, as the Commissioner has reversed that portion of the decision, it is necessary to address the question of whether a waiver occurred at the time the superintendent offered petitioner a full-time position for the 2017-18 school year. The Commissioner finds that petitioner's choice to continue her maternity leave for the 2017-18 school year does not constitute a waiver of her tenure rights.[4] While an employee who has been placed on a recall list can waive her tenure rights if she is offered a position and declines it, those circumstances are simply not equivalent to an employee choosing to continue a maternity leave, which she has a right to do under her contract. A leave of absence is, by definition, a temporary situation, and petitioner expressly stated her intention to return to employment with the district

[3] It is not clear from the testimony whether a full-time position was available for the 2017-18 school year. The outgoing superintendent informed petitioner in a voicemail that she had to "be full-time [with benefits] or part-time without the benefits." The incoming superintendent informed petitioner that the district might add a full-time position but that he would not know for two weeks. Because the Board has argued that petitioner declined an offer, the Commissioner presumes that a full-time position was available and was offered to petitioner. However, if no offer was actually made to petitioner, then she could neither be deemed to have rejected an offer of employment nor found to have knowingly waived her tenure rights. *Tribbett v. Bd. of Educ. of the Twp. of Willingboro, Burlington Cty.*, Commissioner Decision No. 301-12, decided August 1, 2012.

[4] However, having chosen to continue her maternity leave for the 2017-18 school year, petitioner is limited for that school year to the pay, benefits, and emoluments to which she is entitled under her contract or applicable law during a period of leave. There is no indication in the record that the Board has outstanding obligations to the petitioner during the time of her leave.

following her leave. She had no reason to believe that she would not have the same options upon her return for the 2018-19 school year as those offered to her for the 2017-18 school year: a full-time position with benefits or a part-time position without benefits.

Accordingly, the Initial Decision of the OAL is reversed. The Board is ordered to reinstate petitioner to her position as a full-time teacher retroactive to the 2018-19 school year, with full back pay, benefits, and emoluments of employment, less mitigation.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 2/19/20
Date of Mailing: 2/20/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09744-18
AGENCY DKT. NO. 119-5/18

CATHERINE PARSELLS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,
Respondent.

Keith Waldman, Esq., for petitioner (Selikoff and Cohen, attorneys)

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith and King, LLP, attorneys)

Record Closed: October 11, 2019 Decided: November 25, 2019

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Catherine Parsells, filed a petition in which she alleged that the respondent, Somerville Borough Board of Education, violated her tenure and seniority rights by depriving her of full-time employment.

PROCEDURAL HISTORY

Petitioner was notified of the respondent's determination concerning her employment status on April 6, 2018. She filed an appeal on May 15, 2018, and the Office of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 9, 2018, as a contested case. N.J.S.A. 52:14B-1 to-15; N.J.S.A. 52:14F-1 to-13. On April 8, 2019, the respondent filed a motion for summary decision. Petitioner filed an opposition brief on May 6, 2019, and the respondent filed a reply brief on May 23, 2019. An Order Denying Summary Decision was issued June 28, 2019.

A hearing was held on August 5, 2019, and August 7, 2019, and the record was held open for parties to receive transcripts and submit post-hearing briefs. All briefs were received by October 11, 2019, and the record closed that day.

FACTUAL DISCUSSION AND FINDINGS

The parties jointly stipulated to the following. Accordingly, I **FIND** the following **FACTS:**

1. The Somerville Public School District ("District") is a pre-K to 12 district located in Somerset County, New Jersey.

2. Dr. Timothy Teehan has served as Superintendent of Schools for the District since July 1, 2017. Prior to that time, Teehan served as the District's Academic Achievement Officer for approximately five years.

3. Dr. Timothy Purnell was the prior Superintendent of Schools. He commenced employment in February 2011, and separated from employment on or about June 30, 2017.

4. Petitioner Catherine Parsells has been employed by the Somerville Board of Education ("Board") as a full-time preschool teacher serving under her pre-K

endorsement from September 2010 to June 2016 and as a part-time preschool teacher at Van Derveer Elementary School from June 2016 to the present.

5. On or about May 2, 2016, petitioner, who was a full-time preschool teacher at the time, wrote to then-Superintendent Purnell to express her interest in a part-time preschool position with benefits that the District had posted. In her letter, petitioner explained that she, "would be interested in this position for as long as it is available, or until my family decides that full-time work would be in our best interest again" and stated that she was, "very appreciative of being given the opportunity to be considered for a position that would allow me to continue working as a teacher pursuing my career goals while also being able to spend time with my son during his precious few years." JT[1]-A.

6. Petitioner was not expressly told by any Board member or administrator that she would be entitled to return to her full-time position once she voluntarily took the part-time preschool position, nor was petitioner told by any Board member or administrator that she would be waiving her right to a full-time position by taking the part-time position.

7. At the Board meeting on May 17, 2016, the Board approved petitioner's transfer from the position of full-time preschool teacher to the position of part-time (.5) preschool teacher for the 2016-17 school year. JT-B.

8. At the Board meeting on July 26, 2016, petitioner was also appointed as a Preschool Team Leader for the 2016-17 school year. JT-C.

9. On or about November 18, 2016, petitioner requested and was subsequently granted maternity leave followed by a child care leave of absence, effective February 2, 2017 to June 30, 2017. JT-D.

10. On February 1, 2017, petitioner expressed her interest in continuing to work as a

[1] "JT" refers to the exhibits to which the parties jointly stipulated.

part-time teacher during the 2017-18 school year, provided the position continued to include benefits. JT-E.

11. On or about July 5, 2017, former Superintendent Purnell left a voicemail for petitioner that addressed her position during the upcoming school year (*i.e.* 2017-18). He stated she had to either be full-time with benefits or part-time without benefits. JT-F.

12. On or about July 6, 2017, Superintendent Teehan left a voicemail for petitioner explaining that the Board could no longer justify offering benefits with the part-time position and that a full-time position might be added shortly. JT-G.

13. Petitioner ultimately declined the full-time position because she was nursing and the baby would not take a bottle. Therefore, she could not be away from her home from 7 a.m. until 4 p.m.

14. On July 13, 2017, petitioner wrote to Teehan to extend her maternity leave for the entire 2017-18 school year based on the fact that she would no longer receive health benefits as a part-time employee, and the needs of her family. JT-H. The extension was granted.

15. In mid-April 2018, Teehan spoke to petitioner regarding her work status for the 2018-19 school year. He told petitioner that she was entitled to a part-time position with no benefits and that if a full-time position were to become available, she would need to apply for it.

16. On April 17, 2018, Teehan sent an email about his conversation with petitioner to her Principal, Susan Haynes. In the email, he stated in pertinent part:

> So, I spoke with Katie the other day as a return to the call she had made to me. I am not sure why, but she was under the impression that she had the option of coming back full-time if she wanted to. I had never stated any such thing when I told her in the beginning of July that she would not

> have benefits anymore. During this recent conversation, I explained as best as I could that she is entitled to the same type of position, which she left - P/T and no benefits. I explained that the position doesn't need to be even preschool - it just needs to be something that she is certified to teach. However, I did explain that an individual was hired to be her replacement until June 30. The person knows that her time in the position will come to an end at that time. It is this position which she would be returning to since the position remains in our preschool structure.
> JT-I.

17. Teehan wrote in the same email:

> I spoke with Purnell to find out again why he gave [petitioner] benefits as a part-time employee and why we pulled them away. I understand that as a part-time employee you are not entitled to benefits and shouldn't have them. He explained that [petitioner] was originally given benefits because you [Haynes] and he had discussed how the preschool staff was new, [petitioner] was the team leader, and there was a concern about consistency for the students. It was expected that she would work beyond the normal day to attend to team leader responsibilities, which he justified as the reason why she was more than part-time and would have the benefits. However, when she was no longer the team leader, she no longer would be working extra and would not be entitled to benefits. He said the providing of benefits for the part-time position was not a forever guarantee.
> Ibid.

19. Teehan also wrote in the email:

> [Petitioner] shared how she put deposits on daycare and made necessary arrangements. I am not sure why one would do such a things [sic] when they do not have a full-time position. She shared how she thought she had the option of being part-time or full-time, both with benefits. Not the case. She stated that if she had known all of this before changing to part-time, she would not have made the change.
> Ibid.

20. Petitioner returned to her part-time teaching position on or about September 1, 2018.

Testimony

For petitioner:

Petitioner, **Catherine Parsells,** became a tenured teacher with the Somerville Board of Education in September 2013. She was a full-time preschool teacher in 2016, when Principal, Susan Haynes, told the preschool teachers the school intended to reduce the number of full-time preschool teachers and add two part-time teachers. Petitioner expressed interest in a part-time position, as long as it offered health benefits. Haynes confirmed that the part-time position would offer health benefits.

Petitioner voluntarily sought the part-time position because she had a four-month old son. A part-time position would enable her to care for her son while continuing with her career. She would not have pursued the part-time position if it did not offer health benefits.

No one discussed tenure with petitioner and she was not advised that she would be unable to return to her full-time position. She would not have pursued the part-time position had she known there was a risk that she would be unable to return to her full-time position.

Petitioner took an extended maternity leave during the 2017-2018 school year. She did not initially plan to do this, as she intended to return to work at the beginning of that school year. However, in July 2017, Purnell advised, by way of a voice mail message, that she would not receive health benefits if she remained in her part-time position. He told her she could apply for a full-time position, which would provide health benefits. Based on Purnell's message, she believed she had the option of returning to a full-time position with benefits or a part-time position without benefits, in September. He did not indicate in his message that she would waive her right to return to the full-time position if she took the part-time position.

Teehan left petitioner a voice mail message in which he explained why the part-time position no longer offered health benefits. He also referenced a possible full-time

position. Based on this, petitioner believed she had the option to return to either a full-time position with benefits or a part-time position without benefits.

Based on these messages, petitioner opted to extend her maternity leave, as her infant daughter was not taking a bottle and additional leave time was authorized. She, thus, planned to return to work as a full-time employee in September 2018. She did not believe she had waived her right to a full-time position.

After her maternity leave, Haynes and Teehan told petitioner she could not return to the full-time position and she would need to apply for a full-time position. She was told employees who move between full-time and part-time positions must apply for new positions. She was "blindsided" and shocked, as she believed she had tenure in a full-time position and because her family relied upon her for health benefits.

Petitioner applied online for her former position and all other positions for which she was certified. She was interviewed and gave a demonstration lesson. She was not selected for a full-time position. Instead, two people were hired from outside the district for preschool positions. She applied for approximately six full-time positions each year and was not selected for any of them. She also applied for positions in other districts but none was offered to her. Consequently, petitioner and her family have incurred substantial medical expenses, including monthly premiums for health insurance. P-1.

On cross-examination, petitioner acknowledged that her February 1, 2017, letter, in which she expressed interest in continuing as a part-time position, did not specify an end date. She did not believe she was required to provide an end date. She explained that she would have stayed in a part-time position indefinitely if it offered health benefits. She acknowledged that, for the 2017-2018 school year, she was able to choose between the full-time position and part-time position, and she chose to extend her maternity leave. In her July 13, 2017, letter to Teehan, in which she advised that she would extend her maternity leave, she did not write that she wished to return to a full-time position.

Petitioner also acknowledged that no one from the Board promised her that she would be able to automatically return to a full-time position whenever she wanted. Further, she did not ask anyone, including her union, whether she would be able to automatically return to her prior job.

Petitioner did not think that she had applied for the part-time position in 2016. She did not submit an application by way of the official online application system or other application process. She, thus, thought she merely transferred to a new position. She did not believe that tenured, full-time employees should be removed from their positions to create an opening for her. However, she believed she had seniority over the untenured teachers who were hired for the full-time positions she sought. She also believed that several positions had openings such that no one would need to be removed.

For respondent:

Dr. Timothy Teehan, Superintendent, became Superintendent on July 1, 2017. He explained that petitioner's move from full-time to part-time status was not the result of a reduction in force (RIF). Rather, she applied for the part-time position by way of her letter of interest to Purnell. Her move to the part-time position was voluntary.

Over the preceding "couple" of years, approximately seventeen staff members had moved between full-time and part-time positions. T1[2] 62:3. Such moves were treated as a "brand new hires" and the employees were not asked how long they intended to remain in the new position. T1 61:2. Teehan did not advise those employees that they would not have an automatic right to return to their prior position and would be required to submit an application to return to the prior position. Rather, the Somerville Education Association, an entity associated with the New Jersey Education Association, advised staff concerning leaves of absences, maternity leaves, health, and pension benefits, among other issues.

[2] "T1" refers to the transcript of the August 5, 2019, hearing in this matter. "T2" refers to the transcript of the August 7, 2019, hearing. The citations include the page and line number(s) of the transcripts referenced in this Initial Decision.

If the school district were required to retain petitioner's full-time position for her until the time she decides to return to it, the district could be required to remove a tenured teacher from that position. The district would be required to "at the very least pay that person sixty days, the only other option we would have would be to add on a position which we wouldn't have budgeted." T1 65:9-12. Alternatively, a leave replacement teacher, who may not earn tenure, could be placed in a temporarily vacant position if there are stated start and end dates for that position. In that instance, the position would be posted as a "leave replacement" position and the hired person would be advised of the start and end dates.

If a teacher who changed from a full to part-time position, or part to full-time position, were permitted to return to his prior position at any time, the district would lose the benefit of candidates who are committed to serving the district. Hired teachers would have an incentive to move to other districts.

With respect to the hiring process for teachers, a personnel committee comprised of teachers screened applicants and selected the applicants to be interviewed. Two rounds of interviews are conducted. A member of the Personnel Committee and an administration representative participate. The applicants also conduct a demonstration lesson. One to three candidates are selected for an interview by the superintendent, who makes a recommendation concerning the selected candidate to the Board of Education, which determines whether a job offer will be extended to the candidate. Petitioner's applications for full-time positions were not referred to him for his review.

On cross-examination, Teehan clarified that, at the time of the hearing, there were seventeen staff members who had moved between full and part-time positions. Eight teachers made this type of change while he was superintendent. Other staff members did so before he became superintendent. While he was superintendent, he did not advise any of the teachers that this type of change would cause them to waive tenure rights. The teachers who moved from full to part-time would have been told by an administrator, if the teacher did not already know, that the change would impact their health benefits, and health benefits were not associated with part-time positions. With

respect to those teachers who moved from full to part-time, none, other than petitioner, inquired about returning to their full-time positions.

Dr. Timothy Purnell was the District Superintendent until June 30, 2017. He served in that capacity for seven and one-half years. Haynes told him she discussed restricting of the preschool staff with the teachers and that petitioner wanted to move from her full-time position to a part-time position. Purnell did not interview petitioner for the part-time position; his understanding of the transaction was limited to his conversation with Haynes and a brief conversation he had with petitioner when she delivered her May 2, 2016, letter. Their conversation was limited to an exchange of "pleasantries." T2 28:10. He understood from her letter that her goal was to spend time with her infant son.

This, "was a restructuring of the preschool positions so, to my knowledge, we didn't post any new positions, but rather, used internal personnel to shift that personnel to best meet the needs of the community, based on their interest and the conversations that Susan Haynes had with her team." T2 22:10-15. Purnell explained, "This was not a new position posted for external applicants, so our regular application procedures would not apply to this situation."[3] T2 23:7-10.

Had petitioner not already been a district employee, the district's application and vetting procedure would have been implemented. The procedure involved an application acceptance period, after which a personnel committee would evaluate the applications and select some applicants for interviews. One or two rounds of interviews would be conducted. Selected candidates would next be interviewed by the principal, and demonstration lessons may be required. Two candidates would be selected for the last round, which involved an interview by the superintendent. The superintendent recommends the selected candidate to the Board of Education, which must approve or reject the selection.

[3] Each year, around the time of petitioner's May 2, 2016, letter, school administrative staff inquired, by email, whether staff members were interested in switching positions.

Purnell did not discuss with petitioner whether the move to part-time employment would impact her ability to return to her full-time position. He did discuss with her that she would receive health benefits while in the part-time position because she would serve as team leader. He did not "[look] towards her not having" benefits. This exchange occurred briefly during their conversation when they mostly exchanged pleasantries. Otherwise, petitioner's conversations about the move were with Haynes. Purnell did not know about the nature of Haynes' conversation with petitioner and whether it was considered an interview. He was not aware that petitioner was ever told she would need to reapply to return to her full-time position. He would not opine about the impact of petitioner's move on her full-time employment.

Because the action at issue was a "restructuring of personnel," Purnell was required to present the "recommendation of the building principal to the Board of Education for approval of the restructuring." T2 26:19-22. He presented and recommended petitioner's move to a part-time position to the Board. He recommended "to the Board, with no end of time, for her to be part-time and have benefits and serve as team leader." T2 30:23-25. The benefits associated with the part-time position were linked to her status as team leader.

Before his employment with the district ended, he learned Haynes or her team determined petitioner would no longer serve as team leader. Purnell left petitioner a phone message in which he explained she would no longer be entitled to health benefits but could take a full-time position that would provide health benefits. He characterized his communication as an "offer" of a "full-time [position], which would include the benefits." T2 37:17-18. Although he "offered" her the position, he did not know that she wanted to return to a full-time position. T2 38:2. He "offered her a position because – out of concern of well-being, that she may want health benefits, so I offered her a full-time position. I didn't have any discussions with her at all." T2 38:4-8. He did not speak with her after he left the message.

On cross-examination, Purnell clarified that petitioner's May 2, 2016, letter was an application or expression of interest in a transfer. He further clarified that, in May of each year, the district asked employees if they wished to transfer positions within the

district. Such transfers were not guaranteed. An employee who fills a position on a temporary basis – who holds a leave replacement position – would be approved in that position for a specific period of time, subject to Board-approved extensions. Purnell never told an employee who moved from full to part-time or from part to full-time that he would have an automatic entitlement to return to their prior position at any time.

On re-direct examination, Purnell testified that approximately ten to fifteen employees transferred from full to part-time positions while he was superintendent. Tenure was not discussed with any of those staff members. He assumed Haynes discussed health benefits with petitioner. He did not know who "initiated that." T2 47:15.

He was unaware of any other employee who retained health benefits after transferring to a part-time position. He was also unaware of any case in which a move to a part-time position was considered to be temporary. He did not make personnel changes that were temporary. He was also unaware of a circumstance in which an employee initiated a discussion about returning to a full-time position.

Additional Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp, 53 N.J. Super. 282, 287 (App. Div. 1958).

As the fact finder, I had the ability to observe the demeanor, tone, and physical actions of the petitioner during the hearing. She testified in a clear and straightforward

manner. Her demeanor suggested that she sought to relay all facts honestly. She was not unduly emotional but appeared appropriately upset, given the impact this matter has had on her and her family's life.

Petitioner acknowledged that she did not seek the advice of administrators, other Board personnel, or the Somerville Education Association about the consequences that might flow from her voluntary move to a part-time positions. She also acknowledged that no one from the Board guaranteed that she would be able to return to a full-time position when she wanted. She was also candid about the motivation for her decisions and she recognized that she was offered an opportunity to return as a full-time teacher for the 2017-2018 school year yet chose instead to extend her maternity leave.

Fundamentally, petitioner credibly conveyed that she made decisions based on her understanding of the process, whether that understanding was correct or incorrect, and in response to her family's needs at the time. I find her testimony to be credible.

Teehan testified credibly. He relayed the relevant facts and his involvement in the matter in a straightforward manner. His testimony was consistent with the documentary and other evidence produced during the hearing.

Purnell relayed a reluctance to answer questions. He sought clarification of questions that were concise and clear. Nonetheless, his testimony was credible as it was consistent internally and with the documentary and other evidence produced during the hearing.

Additional Findings

Having considered the testimony and documentary evidence, I **FIND** the following additional **FACTS**:

1. Petitioner voluntarily requested to be transferred to a new, part-time teaching position with benefits.

2. Petitioner was not asked by anyone from her school district to resign or otherwise leave her full-time position.

3. The Board approved petitioner's transfer to the new, part-time teaching position.

4. The Board also approved petitioner's appointment as team leader for the 2016-2017 school year.

5. Petitioner accepted the new position as a part-time teacher.

6. Petitioner assumed she would be able to return to her former full-time position when she no longer wanted to have a part-time schedule.

7. Petitioner assumed the part-time position would be accompanied by health benefits after the 2016-2017 school year.

8. On July 5, 2017, and July 6, 2017, the former and current superintendents advised petitioner that she was no longer eligible for health benefits through her part-time position. This was because there was no longer a need for her to serve as team leader. They advised her she was eligible for a full-time position at that time.

9. On July 13, 2017, petitioner advised the current superintendent, in writing, that she would extend her maternity leave through the 2017-2018 school year.

10. Petitioner did not ask her supervisors or other personnel how her voluntary transfer to a part-time position would impact her ability to return to a full-time position.

11. Petitioner did not ask her union representative or other representative of the Somerville Education Association how her voluntary transfer to a part-time position would impact her ability to return to a full-time position.

12. None of petitioner's supervisors or other Board personnel advised petitioner how her voluntary transfer to a part-time position would impact her ability to return to a part-time position.

13. None of petitioner's supervisors or other Board personnel promised petitioner that she would be able to return to a full-time position when she requested.

14. Petitioner did not accept the full-time position that she was offered in July 2017.

15. Rather than accept the offered full-time position, petitioner opted to extend her maternity leave.

16. Petitioner understood that she was authorized to extend her maternity leave through September 2018, and intended to return to work then.

Parties' Arguments

The Board contends the petitioner was not entitled to return to a full-time position because she was not the subject of a RIF. Her tenure and seniority rights would have been at issue had the Board instituted a RIF or taken other adverse action. However, because she was not subject to a RIF or other adverse action, she was not entitled to return to her full-time position. The Board also argues that petitioner's failure to accept an offer for a full-time position constitutes abandonment of any right she might have had to such employment.

Petitioner contends that she could only relinquish her tenure rights voluntarily and that she did not do so. She did not know that changing from a full-time to a part-time position would impact her tenure rights and the Board did not inform her of this consequence, notwithstanding its obligation to do so. She also argues that she did not request or accept a permanent job change and she was merely placed temporarily in the part-time position rather than hired for a new position. Finally, she claims she did not abandon her position when she extended her maternity leave and she was

effectively subject to a RIF when she was told she could not return to a full-time position.

LEGAL ANALYSIS AND CONCLUSION

The purpose of the teaching staff tenure laws, N.J.S.A. 18A:28-1 to -18, is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). Our courts have held that "the widest range should be given to the applicability of the [tenure statutes] law." Sullivan v. McOsker, 84 N.J.L. 380, 385 (E. & A. 1913). See also Barnes v. Bd. of Educ. of Jersey City, 85 N.J. Super. 42, 45 (App. Div. 1964). "[B]ecause of its remedial purpose, the Tenure Act should be liberally construed to achieve its beneficent ends. Spiewak v. Bd. of Educ., 90 N.J. 63, 74-75 (1982).

In order to acquire tenure, a teaching staff member "must comply with the precise conditions articulated in the [tenure] statute." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). Thus, a teaching staff member "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." Spiewak, 90 N.J. at 74. N.J.S.A. 18A:28-5 provides:

> [t]he services of all teaching staff members employed . . . in the position[ ] of teacher . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> > (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

> (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than three academic years within a period of any four consecutive academic years.

The Tenure Act provides two ways a tenured teacher may be dismissed: 1) for inefficiency, incapacity, conduct unbecoming, or other just cause, pursuant to N.J.S.A. 18A:28-5; and 2) by a RIF for economic reasons, pursuant to N.J.S.A 18A:28-9.

The latter provision provides that boards are permitted 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. When a teacher has been subject to such a RIF, he will have a right to return to his prior position when a vacancy occurs:

> 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 and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service[.]
> N.J. S. A. 18A:28-12.

Seniority is a "mechanism for ranking all tenured teaching staff members so that reductions in force can be effected in an equitable fashion and in accord with sound educational practices." Lichtman, 93 N.J. at 368, n.4.

A reduction of a full-time teacher's hours to that of a part-time teacher constitutes a RIF. See Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987)(school board reduced a tenured teacher's schedule to part-time; because the

teacher had not volunteered for the reduction in hours, the Board's action was deemed a RIF and the teacher was entitled to a position held by a non-tenured teacher).

Fundamental to a finding that a RIF occurred is a determination that the action at issue was caused by the school board, not by the impacted teacher. See Carpenito v. Bd. of Educ. of Borough of Rumson, Monmouth Cty., 322 N.J. Super. 522 (App. Div. 1999)(A teacher may be dismissed by a RIF only if "her school board reduces her tenure rights through dismissal or a reduction in tangible employment benefits."); Alfieri and Mezak v. Board of Education of the Township of Saddle Brook, 2003 N.J. AGEN LEXIS 1114, *5-6 (2003), EDU No. 11677-98 and 1161-99 (consolidated) (teachers "did not have a tenure entitlement to the full-time positions they seek because they were not subject to a reduction in staff under N.J.S.A. 18A:28-9").

A part-time teacher may be tenured and have an entitlement to move to a full-time position if he is subject to a RIF. In Lichtman v. Board of Education, 93 N.J. 362 (1983), the teacher was a tenured, part-time librarian. When the part-time position was to be eliminated, she applied for a full-time librarian position, for which she was also certified. The Board determined she held no seniority rights for a full-time position and instead hired a non-tenured applicant for the full-time librarian position. The New Jersey Supreme Court rejected this conclusion, holding that "a tenured part-time teaching staff member with proper certification can claim, as against a non-tenured applicant, seniority rights in seeking appointment to a full-time position that is within the specific categories covered by the certification and that has responsibilities identical to those of the part-time position in which employment was actually held." 93 N.J. at 364.

Here, it is undisputed that the school principal presented petitioner with the option of moving to a part-time position. Neither the principal nor anyone else on behalf of the District mandated the change. Petitioner volunteered for the position, as it suited her family's needs. She submitted a request for approval of the new position, which the superintendent and Board reviewed and approved.[4] The job change at issue, therefore,

[4] Petitioner contends she did not effectuate a permanent job change but, rather, only changed jobs temporarily. However, the Board approved her application for a new position with no reference to a temporary position or approval.

was voluntarily undertaken by petitioner and not mandated by the Board. Accordingly, I **CONCLUDE** petitioner was not the subject of RIF.

Petitioner contends she should be entitled to return to a full-time position because respondent failed to warn her of the consequences of her decision. Petitioner has not cited, nor have I discovered, any authority for the proposition that school boards must notify tenured employees of the consequences of such actions The Legislature has required notice in specific contexts: See N.J.S.A 18A:6-4.15 (requiring notice for criminal history background check results); N.J.S.A 18A:6-11 (requiring written notice for dismissals or reductions in salary); and N.J.S.A 18A:27-10 (requiring notice for renewal or non-renewal of employment contracts). Had the Legislature wanted to impose a notice requirement in matters such as this, it would have done so explicitly. See In re Plan for the Abolition of the Council on Affordable Housing, 214 N.J. 444, 470 (2013)(When "the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded")(citations omitted).

This maxim, however, was not endorsed by the New Jersey Supreme Court in Bridgewater-Raritan Educ. Ass'n v. Board of Educ. of Bridgewater-Raritan School Dist., Somerset County, 221 N.J. 349 (2015). In that case, the Court found that the language of the controlling statute, N.J.S.A 18A:16-1.1, "must be given its plain meaning." 221 N.J. at 361. The statute created an exception to the general tenure eligibility statute and also required designation of temporarily-assigned replacement teachers. This compelled a finding that its plain meaning required districts to provide teachers notice of the designation. Petitioner has not identified a statutory provision that could similarly require the notice she claims ought to have been provided. Accordingly, I **CONCLUDE** petitioner is not eligible to return to her full-time position because she was not the subject of a RIF and she voluntarily accepted her part-time position.[5]

[5] I note that respondent also contends petitioner relinquished her tenure right when she rejected an offer to return to a full-time position. As the question at issue has been resolved for the reasons stated above, I need not address this argument.

ORDER

Based upon the foregoing, it is **ORDERED** that petitioner is not entitled to the relief she seeks. It is further **ORDERED** that the petition be and is hereby **DISMISSED**.

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

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

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

November 25, 2019
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Received at Agency: 11/25/19

Date Mailed to Parties: 11/25/19

/vj

APPENDIX

List of Witnesses

For petitioner:

Catherine Parsells

Dr. Timothy Purnell

For respondent:

Dr. Timothy Teehan

List of Exhibits

Joint

JT-A May 2, 2016, letter Parsells to Purnell

JT-B May 18, 2016, letter Purnell to Parsells with excerpt of Board minutes

JT-C Excerpt of Board minutes

JT-D November 18, 2016, letter Parsells to Purnell

JT-E February 1, 2017, letter Parsells to Purnell

JT-F Excerpts of interrogatory answers

JT-G Excerpts of interrogatory answers

JT-H July 13, 2017, letter Parsells to Teehan

JT-I April 17, 2018, email Teehan to Haynes

For petitioner:

P-1 Out of pocket medical expenses summary sheet/supporting documents

For respondent:

None

New Jersey Commissioner of Education

Final Decision

D.W., on behalf of minor child, Y.T.,

Petitioner,

v.

Board of Education of the City of Millville, Cumberland County,

Respondent.

Synopsis

In June 2019, *pro se* petitioner filed an appeal for due process on behalf of her foster child, Y.T., in which she sought an order directing the respondent Board to allow Y.T. to participate in her eighth-grade promotion ceremony. The emergent matter was heard on June 19, 2019, and emergent relief was granted. The file was retained by the OAL for additional proceedings as needed.

Following a conference call in October 2019, the ALJ found that no issues remain open in this matter, as the final emergent decision had resolved the controversy. The ALJ further concluded that the petition should be dismissed, and the file returned to the transmitting agency.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case, and the petition was dismissed.

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

February 20, 2020

68-20

OAL Dkt. No. EDU 8263-19
Agency Dkt. No. 138-6/19

New Jersey Commissioner of Education

Final Decision

D.W., on behalf of minor child, Y.T.,

Petitioner,

v.

Board of Education of the City of Millville, Cumberland County,

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 2/20/20
Date of Mailing: 2/20/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08236-19
AGENCY DKT. NO. 138-6/19

D.W., ON BEHLAF OF MINOR CHILD, Y.T.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF MILLVILLE,
CUMBERLAND COUNTY,
Respondent.

D.W., petitioner, pro se

Matthew J. Robinson, Esq., for respondent (Robinson and Robinson, attorneys)

Record Closed: January 10, 2020 Decided: January 27, 2020

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

D.W. (petitioner) filed a petition for due process on behalf of her foster child, Y.T., a minor, seeking an order directing the Millville Board of Education (respondent) to allow Y.T. to participate in her eighth-grade promotion ceremony.

On June 17, 2019, petitioner's petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergent relief. On June 18, 2019, the emergent matter was filed along with the due process request with the Office of Administrative Law (OAL). The emergent relief request was scheduled for oral argument, which was held on June 19, 2019. Petitioner's emergent relief request was **GRANTED**. An order on emergent relief was issued and **ADOPTED** by the Commissioner of Education. The file was retained at the OAL for determination of what if any proceedings the parties and the undersigned felt were necessary to bring the matter regarding the underlying petition to closure.

A conference call was held on October 15, 2019. At that time the parties agreed that no issues remained open or before this tribunal, and that the emergent hearing held on June 19, 2019 and the ensuing initial and final emergent decisions had resolved all issues. It was further agreed that the matter should be returned to the transmitting agency.

Counsel for respondent provided a confirming letter to that effect later that same date, and no further communication or objection has been received.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

Considering the foregoing, I **FIND** that no issues remain open in the current matter and **CONCLUDE** that the petition in this matter should be **DISMISSED** and the file returned to the transmitting agency.

ORDER

I hereby **ORDER** that the petition in this matter be **DISMISSED** and that the file be returned to the transmitting agency.

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

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

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

1/27/2020
DATE


ELIA A. PELIOS, ALJ

Date Received at Agency: January 27, 2020 (emailed)

Date Mailed to Parties: January 27, 2020 (emailed)

/mel

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

For Court:

C-1 Confirming Letter from Respondent's Counsel

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

Synopsis

Pro se petitioner appealed the respondent Board's decision to retain her son in the seventh grade for the 2017-2018 school year. C.B. was informed that J.B. would be held back during a meeting on September 12, 2017. The class placement determination was made after J.B. was removed from special education classes at the end of the 2016-2017 school year, at the insistence of C.B. and against the advice of school district personnel. The within appeal was filed on February 20, 2019. Petitioner had filed an earlier petition on the same topic, but withdrew it after appearing for an emergent hearing in October 2018. The Board filed a motion for summary decision, contending that the within petition is time-barred under the 90-day rule, *N.J.A.C.* 6A:3-1.2(i) and should be dismissed.

The ALJ found, *inter alia*, that: there are is no genuine issue as to any material fact here, and the case is ripe for summary decision; under *N.J.A.C.* 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency that is the subject of the case; it is uncontested that the petition herein was filed on February 20, 2019, some 17 months after petitioner was informed that her son would be retained in the seventh grade; further, the matter is moot as J.B. is now in the 9th grade for the 2019-2020 school year. The ALJ concluded that the petition should be dismissed in its entirety. Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition.

Upon careful and independent review of the record and the ALJ's recommended decision, the Commissioner concurred with the ALJ's determinations and adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

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

February 20, 2020

OAL Dkt. No. EDU 04507-19
Agency Dkt. No. 315-12/18

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

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

Upon review, the Commissioner concurs with the ALJ that the petition is time-barred pursuant to *N.J.A.C.* 6A:3-1.3(i), which requires petitions to be filed no later than 90 days from the date of receipt of the action that is the subject of the case, and *Giannetta v. Bd. of Educ. of Egg Harbor*, Commissioner Decision 147-05 (April 25, 2005), which holds that negotiations do not toll the time limitation.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/20
Date of Mailing: 2/20/20

[1] Exceptions filed by petitioner were not timely pursuant to *N.J.A.C.* 1:1-18.4 and were therefore not considered by the Commissioner. Respondent timely filed a reply, arguing that petitioner's exceptions merely reassert facts already presented below.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 04507-19

AGENCY DKT. NO. 315-12/18

C.B. ON BEHALF OF MINOR CHILD, J.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

C.B. on behalf of J.B, petitioner pro se

Bernard Mercado, Esq. for respondent

Record Closed: December 20, 2019 Decided: January 16, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The appeal was transmitted to the Office of Administrative Law (OAL) by the NJSP, where it was filed on April 1, 2019, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I held a prehearing conference at the OAL with both parties attending on June 5, 2019, and entered a prehearing order on June 12, 2019. A hearing date was scheduled for September 30, 2019. The parties

attempted to resolve the matter which resulted in the hearing being adjourned to December 20, 2019.

Newark Public Schools submitted a Motion for Summary Decision, Certification and Brief in support of same on December 6, 2019. Petitioner C.B. filed a timely response on December 12, 2019, and argument on the motion was heard on December 20, 2019. Testimony by C.B. and by J.B, which would be permitted to be supplemented at the continued hearing, was also given. The record on the motion was closed that date.

MOTION UNDER CONSIDERATION

The respondent requests that summary decision be granted and that the petition of C.B. on behalf of J.B. be dismissed for the following reasons; the petition which complains that J.B. was wrongfully retained at elementary school 7th grade for the 2017-2018 year is time barred under the 90-day rule, and C.B. contributed to J.B. being retained that year because, in June 2017,[1] she removed J.B. from special education which he had been receiving from Newark Public Schools since 2012. The Prehearing Order records that the issues to be resolved at the hearing were: 1) Was J.B., currently 16, wrongfully denied advancement to the 8th grade for the 2017-2018 school year? 2) Was C.B.'s petition on behalf of J.B. timely? 3) What effect did C.B.'s revocation of consent for Special educational services have on J.B.'s ability to advance? 4) Are there any other rights of J.B. that were violated? 5) What has J.B.'s status as an 8th grader in 2018-2019 and if graduated as a 9th grader in 2019-2020 have to the issues complained of?

FACTUAL DISCUSSION

Based on the pleadings of the petitioner and upon facts up of the motion papers as to facts that are not contested, or are incontestable, and argument and testimony of the petitioner on the motion, I rely upon the following relevant facts.

[1] Petitioner claims she did so in May 2017, not June 2017.

J.B. was removed from Special education classes provided for at J.B.'s elementary school at C.B.'s insistence in either May or June or 2017. C.B. was informed at a meeting at the school held September 12, 2017 that C.B. was being retained in the seventh grade for the duration of the 2017-2018 school year. C.B. and representatives of the elementary school discussed in the Fall of 2017 the possibility of J.B. advancing to the 8th grade in February of 2018; however, the advancement did not take place.

On or about July 19, 2018, C.B. on behalf of J.B. filed a Petition of Appeal ("first Petition") with the Department of Education, (Respondent's motion, Exhibit A, Notice of Filing), which was referred to the OAL on or about September of 2018. After appearing for an emergent hearing on that petition in October,2018 C.B. withdrew the petition. She insists she did so without knowing she was doing so, and that she was told by the Administrative Law Judge (ALJ) that her withdrawal would be without prejudice. Further she believes she was "tricked misled manipulated" by the ALJ, along with the attorney for the Newark School Boards, which induced her to withdraw her claims. She claims she was "taken advantage of" because of her "ignorance." When she realized that her withdrawal was with prejudice, C.B. filed another petition ("current petition") with the Commissioner of Education on February 20, 2019 (Respondent's Exhibit B, Notice of Filing) wherein she repeated the allegations of the first petition.

Because the respondent does not argue that this matter has already been litigated, and therefore cannot be heard again, I shall not address that possibility. For the same reason, I shall also not address the possibility that the petitioner does not state a claim upon which proper relief may be granted (except for certain ancillary issues which I shall address) because J.B. is now in the middle of the 9th grade and C.B.'s claim addresses his failure to advance from the seventh grade. Further, because it is not at all clear to what extent C.B.'s decision to withdraw J.B. from special education had on the decision to retain him in 7th grade, and not enough facts have been advanced upon on which it could be decided, I shall not address respondent's second theory that C.B. had no right to complain about the decision. Therefore, I shall only address the narrow question of whether the current petition filed in February 2019

is a time bar to C.B.'s complaint that J.B. was wrongfully retained in the seventh grade for the 2017-2018 year.

ANALYSIS AND CONCLUSIONS OF LAW

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

If there is no genuine issue as to any material fact, a moving party is entitled to prevail on a motion for summary disposition as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Id. The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party...are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill, 142 N.J. at 523. And even if the non-moving party comes forward with some evidence, the forum must grant summary decision if the evidence is "so one sided that [the moving party] must prevail as a matter of law. Id. at 536 (citation omitted).

Under N.J.A.C. 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency that is the subject of the case.

As case law makes clear, such a time limitation confers due process, is both meaningful and reasonable, and provides finality in education matters, which negotiations do not toll. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 583–88 (1983). As such, this time limitation has long withstood challenge. See, e.g., Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373, 381–82 (App. Div. 1994), certif. denied, 137 N.J. 315 (1994) (where the court stated that the time limitation is not inherently arbitrary or capricious, and to rule otherwise would deprive district boards of education the security of the rule). Moreover, negotiations do not toll this time limitation. See, e.g., Giannetta et al. v. Bd. of Educ. of Egg Harbor, No. #147-05, Comm'r Decision (April 25, 2005), https://www.nj.gov/education/legal/commissioner/ (where the Commissioner of Education explicitly stated, citing Kaprow, 131 N.J. at 588, that attempts to resolve a claim through negotiation with a board of education do not negate receipt of adequate notice or toll the running of the time limitation).

The above-recitation of the uncontested or indisputable essential facts make this matter ripe for summary decision. J.B. was held back in the seventh grade by action taken between the time J.B. was removed from special education in May or June 2017 and September 12, 2017 when C.B. by her own claims she was first informed of that decision. Assuming *arguendo,* that the "first petition" is relevant in its first raising the claim that J.B was wrongly retained, I **FIND** that C.B. would have had to have filed that claim with the Commissioner of Education on or before December 11, 2017. However, petitioner did no such thing. In fact, her own petition and response to the motion for summary decision indicate she used the time between the original decision to retain J.B. in the 7th grade to attempt to negotiate with the school's representatives to have J.B. advance to the 8th grade by February 2018. However, as indicated in the above cited case law, negotiations to not toll this time limitation. Thus, even if there was any validity to C.B.'s claim that she was "tricked" into withdrawing that petition it was time barred as it was filed on July 19, 2018, seven months after the 90-day time limitation.

Turning to the current petition, which again repeats the claim that J.B. was wrongfully retained in the seventh grade for the 2017-2018 year, it is uncontroverted that it was filed with the Commissioner of Education on February 20, 2019, 17 months

after C.B. was informed on September 12, 2017 that J.B. was being retained in the seventh grade. Petitioner has no special right or privilege to file a petition 14 months beyond the 90-day limitation simply because she feels she "was taken advantage of" or for whatever reason, didn't know that she had to act within the governing law on the subject matter. I **FIND** that petitioner's claim against Newark Public schools for their decision to retain C.B. in the seventh grade for the 2017-2018 year violated J.B.'s rights or was otherwise unlawful, is plainly time barred by N.J.A.C. 6A:3-1.3(i).

Further, this claim should be dismissed because it is moot. It is uncontroverted that J.B. was retained in the seventh grade for the 2017-2018 school year. J.B. is now in the 9th grade of the 2019-2020 school year. A hearing on this matter cannot have any practical effect since it would not be reasonable to promote him to the 10th grade by "skipping" a year without the benefit of the academics that other 9th graders are getting. I also **FIND** this matter is not appropriate for hearing based on the limited and narrow exception to the general doctrine of mootness since promotion and retention issues are challenged with sufficient regularity to reserve judicial review for live controversies where such relief is available.

There remains the ancillary issues which can be gleaned from C.B.'s pleadings. They are at best a jumble of vague ideas and notions, and like the claim of wrongful retention issue, appear, if they are cognizable claims, to be time barred at well. These ancillary claims are best summarized in C.B.'s description of the relief she seeks on page 4 of her written response to the motion for summary decision. As stated therein 1. J.B. "did not receive the aggressive counseling" and J.B.'s school transcripts that he was classified for special education be changed to general education as he was misclassified" 2. All parties should be "held accountable for their actions." 3. Her petitions took "so long to be heard." 4. J.B. should "receive the aggressive counseling." 5. C.B. says "no" to J.B. attending "small group instructions or a reading intervention".

Claims 2 and 3 both fail to state a claim or cause of action upon which relief may be granted and must therefore any portion of the Petition which restates this claim must be dismissed. The first part of claim 1, and claims 4 and 5 do not relate to anything in

the Second Petition, but rather involve issues that were discussed during settlement negotiations after this matter was referred to the OAL. The second part of claim 1, wherein petitioner seeks to have the special education classification in J.B.'s student records removed is also clearly time barred for the same reasons as stated above as the classification for J.B. concerned actions taken by respondent between 2012, when he first started receiving special education and May or June of 2017, when he was removed from that classification.

Accordingly, I **CONCLUDE** as a matter of undisputed fact and law that the Petition in its entirety should be **DISMISSED**.

ORDER

For the reasons set forth above, the motion for summary decision filed by the respondent Newark Public Schools is and the same be hereby **GRANTED** and the Petition of Appeal **DISMISSED**.

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

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

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

January 16, 2020
DATE

Ernest M Bongiovanni
ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 1/16/2020

Mailed to Parties: 1-22-20

id

APPENDIX

List of Moving Papers

For Petitioner:

None

For Respondent:

R-1 Notice of Filing July 19, 2018

R-2 Notice of Filing February 26, 2019

70-20

New Jersey Commissioner of Education

Final Decision

Timothy Vandergast,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent, New Jersey Department of Education, Office of Student Protection (OSP), that he is permanently disqualified from public school employment. Petitioner was disqualified as the result of information revealed during a criminal history background check pursuant to *N.J.S.A.* 18A-6.7.1. Respondent filed a motion to dismiss the petition.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner's criminal history background check revealed that in 1985, he was convicted of two disqualifying offenses in the State of North Carolina; at the time, petitioner was 17 years old; petitioner acknowledged that the findings from 1985 are accurate, and did not attempt to challenge the accuracy of his criminal history record; however, petitioner requested that the Commissioner consider the facts surrounding his past crimes and his rehabilitation since that time; further, petitioner sought to demonstrate his rehabilitation through mitigating evidence of his subsequent educational and career achievements; however, the controlling statute here mandates permanent disqualification and does not provide any leniency or discretion in regard to its application. The ALJ concluded that petitioner has failed to advance any basis for relief and the appeal must be dismissed. Accordingly, the ALJ granted the OSP's motion for summary decision, and dismissed the petition with prejudice.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was 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.

February 20, 2020

70-20
OAL Dkt. No. EDU 13245-19
Agency Dkt. No. 192-8/19

New Jersey Commissioner of Education
Final Decision

Timothy Vandergast,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection

Respondent.

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

Upon review, the Commissioner concurs with the ALJ that petitioner is permanently disqualified from employment in any educational institution under the supervision of the Department of Education. Petitioner does not challenge the accuracy of his criminal history record but seeks only to present evidence of rehabilitation, which is not permitted under *N.J.S.A.* 18A:6-7.1.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/20
Date of Mailing: 2/20/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13245-19
AGENCY DKT. NO. 192-8/19

TIMOTHY VANDERGAST.,
Petitioner,
v.
DEPARTMENT OF EDUCATION OFFICE OF STUDENT PROTECTION,
Respondent.

Timothy Vandergast, petitioner, pro se

Michael Czarneck, Esq., Deputy Attorney General, for respondent (Gubir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: December 18, 2019 Decided: January 15, 2020

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Petitioner, Timothy Vandergast, challenges the action of the New Jersey Department of Education Office of Student Protection (respondent/OSP), decision that permanently disqualified him from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education, or with a

contracted service provider under contract with said school or educational facility as a result of information revealed during a criminal background check under N.J. Stat. § 18A:6-7.1.

On June 29, 2019, petitioner filed a response to respondents' disqualification notice of June 26, 2019. On September 13, 2019, the Board filed a Motion to Dismiss the Petition of Appeal. Petitioner requested oral argument on the Motion to Dismiss (that will be addressed as a summary decision motion) that was held on December 18, 2019, on which date the record closed.

The Board seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." These provisions mirror the language of Rule 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J 67 Agency Final Decision (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. For the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Co. of American,142 N.J 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Petitioner sought a license to teach in the State of New Jersey. The Board sent a notice to Petitioner dated June 26, 2019, that stated his fingerprint search returned results of a

felony conviction and in turn he is permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education, or with a contracted service provider under contract with said school or educational facility. The Board attached Addendum A, which displays that Petitioner was convicted of crimes in North Carolina in 1985.

Petitioner was convicted of larceny of a firearm, and a crime considered to be disqualifying in nature, breaking and entering a vehicle, which is akin to burglary under N.J. Stat. § 2C:18-2. Petitioner initiated a pro se appeal of the Board's decision on August 1, 2019. Petitioner acknowledged that "the findings from 1975 are accurate" and does not attempt to challenge the accuracy of his criminal history record. See Ex. C. In his appeal, Petitioner simply requests that the Commissioner of Education consider the facts surrounding his past crimes and his rehabilitation since then.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the respondent is entitled to judgment as a matter of law.

Petitioner has failed to set forth any grounds to contest the decision in this matter since he does not challenge the accuracy of his criminal record, nor the Department of Education's classification of his offenses being akin to burglary under N.J.S.A. 2C:18-2 and therefore disqualifying. This mandates permanent disqualification of any public-school employee who has regular contact with pupils where that person has been convicted of a third-degree crime as set forth in Chapter 20 of Title 2C of the NJ Statutes. Burglary, a third-degree crime under the statute, is specifically listed as a disqualifying offense under N.J.S.A. 18A:7-7.1(c)(2). The statute only provides for the petitioner to appeal the accuracy of the disqualifying criminal history record. Here, petitioner does not challenge the accuracy or OSP's determination that he was convicted of the crime so stated, nor does he contest that those crimes are substantially equivalent to those enumerated in N.J.S.A. 18A:6-7.1(c)(2). The petitioner instead requests a review of his case and a chance to demonstrate his rehabilitation by using mitigating evidence. The statute mandates permanent disqualification and does not

provide any leniency or discretion in regard to its application. Therefore, because Petitioner has failed to advance any basis for relief, the appeal must be dismissed with prejudice.

ORDER

Based upon the foregoing, respondent's motion for summary decision is hereby **GRANTED**. Accordingly, the petition filed in this matter is **DISMISSED WITH PREJUDICE**.

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

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

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

January 17, 2020
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: January 15, 2020

Date Mailed to Parties: January 16, 2020

ljb

71-20

New Jersey Commissioner of Education

Final Decision

Carmen Thomas-Henderson,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that she had not met the requirements for issuance of a Supervisor Certificate. The SBE denied petitioner's application for certification due to her failure to complete the required number of credits in curriculum design and development pursuant to *N.J.A.C.* 6A:9B-12.6(a)(2)(ii)(2). A hearing was held in this matter on January 8, 2020.

The ALJ found, *inter alia*, that: Pursuant to *N.J.A.C.* 6A:9B-3.2, the New Jersey State Board of Examiners is responsible for issuing appropriate certificates to teach or to administer, direct, or supervise, the teaching, instruction, or educational guidance of pupils in public schools operated by district boards of education; here, the SBE determined that petitioner fell short of completing all requirements for the Supervisor Certificate because she is missing three credits in curriculum design and development required pursuant to *N.J.A.C.* 6A:9B-12.6(a)(2)(ii)(2); petitioner holds both a master's and a doctorate degree in education; petitioner provided testimony as to the education that she completed and why she believes that her coursework meets the requirement of the regulations; petitioner provided a syllabus of several courses she completed at Gwynedd Mercy University, which she claimed involved curriculum development in preschool through grade 12; petitioner was not able to indicate where in any of the detailed syllabus there was mention of curriculum development, but argued that program development, planning, evaluations, and placement were words synonymous with curriculum; the SBE maintained that the coursework completed by petitioner did not satisfy the requirement for three graduate elective credits in curriculum design and development, and pointed to a description for a course in the same program at Gwynedd Mercy University that petitioner had completed, entitled "Curriculum and Instructional Supervision"; petitioner did not take this course, which would have counted towards the requirement. The ALJ concluded that petitioner had not met her burden by a preponderance of evidence, and the SBE's denial of petitioner's application for the Supervisor Certificate was appropriate. Accordingly, the ALJ affirmed the SBE's decision to deny the issuance of the certificate.

The Commissioner concurred with the findings and determination of the ALJ herein; accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. 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.

February 20, 2020

71-20

OAL Dkt. No. EDU 09021-19
Agency Dkt. No. 104-5/19

New Jersey Commissioner of Education

Final Decision

Carmen Thomas-Henderson,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the New Jersey State Board of Examiners did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application for a Supervisor Certificate. The Commissioner further concurs with the ALJ that petitioner did not meet the requirements for a Supervisor Certificate because she failed to complete the required number of credits in curriculum design and development pursuant to *N.J.A.C.* 6A:9B-12.6(a)(2)(ii)(2).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/20
Date of Mailing: 2/20/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09021-19
AGENCY DKT. NO. 104-5/19

CARMEN THOMAS-HENDERSON,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Carmen Thomas-Henderson, petitioner, pro se

Michal Czarnecki, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 8, 2020 Decided: January 21, 2020

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

The petitioner appeals the denial of her request for the issuance of a Supervisor Certificate by the respondent, New Jersey Department of Education, State Board of Examiners (Board) because the petitioner did not satisfy the requirement of three

graduate elective credits in general principles of curriculum design and development for preschool through grade twelve, pursuant to N.J.A.C. 6A:9B-12.6(a)(2)(ii). The petitioner asserts that she is qualified for certification based upon master course work equivalent to the deficiencies stated by the Board.

PROCEDURAL HISTORY

The petitioner filed an appeal of the denial of her request for the issuance of a Supervisor Certificate and requested a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL, where it was filed on July 5, 2019, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13.

The respondent filed a Motion for Summary Decision on July 1, 2019, and due to the failure of the pro se petitioner responding and the scheduling of the hearing, the motion was not ruled on until January 8, 2020. The undersigned denied the motion and ruled that a factual question as to the sufficiency of the coursework to satisfy the requirement of the regulations existed and a hearing was necessary to determine this factual issue. The fair hearing was conducted on January 8, 2020, and the record closed at that time.

FACTUAL DISCUSSION AND FINDINGS

The petitioner filed an application for Supervisor Certificate with the New Jersey Department of Education, State Board of Examiners (Board). The Board reviewed the petitioner's application and determined that the petitioner had not completed the required three graduate level elective credits in staff supervision and three credits in curriculum design and development. Upon reconsideration of certain coursework, the Board approved the course work in the staff supervision. However, the Board maintained the petitioner had not completed three credits of graduate course work in the area of curriculum design and development.

Testimony

For petitioner:

Carmen Thomas-Henderson, Ph.D. is employed as an education consultant. She also teaches at Rowan University. She has received her masters as well as her doctorate in education. She provided testimony as to the education that she has completed and why she believes that the coursework that she has successfully completed meets the requirement of the regulations. Specifically, she provided a syllabus of several courses that she completed at Gwynedd Mercy University, which she claims involved curriculum development in the preschool through grade 12. Specifically, she produced and testified about the following courses:

> EDU 844: The Neuroscience of Learning: A re-examination of programs and services for diverse learning form the viewpoint of cognitive neuroscience of learning. Viewing learning as essentially a process of neurological change, neurological research about learning offers practicum and a policy makers insights and perspectives to change educational practice. (P-1.)
>
> EDU 841: Designing intervention and assessment: Through a review of research and local practices, this course offers an in-depth study, analysis, and discussion of intervention programs and outcomes for students with special needs. Students will examine the organization and administration of special education programs with emphasis on the role of the special education leader within the local agency. A review of the development, implementation and evaluation of effective program designs will prepare students to make recommendations for future practice. (P-2.)
>
> EDU 808: Technology, Data & Program Evaluation: Further focused exploration of learning technology, gathering and using data to drive instructional improvement, and evaluation of educational programs. (P-3.)
>
> EDU 801: Educational Policy in Research & Practice in the US: The course provides an analysis of educational programs and research as it relates to the organizing, governance, and delivery of educational services in the US. Students shall examine the role of the federal government, state department

> of education, intermediate education units, local school districts, charter schools, private schools, higher education, nonprofit organizations and schools for profit with an emphasis on identifying the underlying influence that drive them. Models for the organization and delivery of educational services with be analyzed. Major issues explored and analyzed in this course include school finance and equitable school funding, trends in Pre-K -12 and higher education policy and practice, and the changing role of large and small school districts, private schools, charter schools, colleges and universities and educational providers of all sorts. (P-4.)
>
> EDU 848: Special Education Practicum 1: The course provides field experience in a school setting to perform the function required of a special education supervisor in local education agencies (LEAs) including charter schools, private schools, and intermediate units. The student enrolled in this course will be supervised by/or by and approved mentor. The students will be provided with experience in the self-evaluations and reflection, administrative shadowing, departmental and school improvement plans, student evaluation land placement process in special education, staff observation and supervision, clinical supervision of a peer and development and planning for staff professional development. (P-5.)

The petitioner testified that all of these classes involve general curriculum development. However, she could not indicate in any of the detailed syllabus where there was a mention of curriculum development. She argued that program development, planning, evaluations, and placement were words that were synomous with curriculum. The petitioner also provided a letter from the Program Director for Graduate Education at Gwynedd Mercy University which indicated that she has successfully completed the Ed Leadership program, and that same follows standards and is aligned with NJAC 6A:9-3.4. The final exhibit entered into evidence was the petitioner's transcript indicating her classes from Gwynedd Mercy University.

For respondent:

The respondent did not provide any direct witnesses but submitted R-1 though R-5 into evidence without objection. The documents were the departments file in connection with the application for supervisors' certificate. The final document which was entered

into evidence during the petitioner's case as R-5, was a list of Classes at Gwynedd Mercy University. The petitioner was questioned about EDU 572, which was entitled "Curriculum and Instructional Supervision." The Course description is as follows: "instructional leadership is critical to school success. It includes curriculum development and implementing, staff development and instruction supervision. The course will deal with curriculum trends, new approaches to organizing schools, professional learning communities, instructional methodologies, and research on improving student performance." (20 hours embedded field experience required.) (R-5.)

The Board determined that the petitioner had satisfied all requirements toward certification except for three graduate elective credits in curriculum design and development. They maintain that the coursework provided including the foregoing P-1 through P-5 did not satisfy the requirements of curriculum development. Accordingly, the denial of the Supervisor Certificate was proper.

The foregoing is found as **FACT**.

LEGAL ANALYSIS AND CONCLUSION

Pursuant to N.J.A.C. 6A:9B-3.2, the New Jersey State Board of Examiners is responsible for issuing appropriate certificates to teach or to administer, direct, or supervise, the teaching, instruction, or educational guidance of pupils in public schools operated by district boards of education.

N.J.A.C. 6A:9B-12.6(a) provides, in pertinent part, to be eligible for the standard administrative certificate with a supervisor endorsement, a candidate shall:

1. Hold a master's or higher degree from a regionally accredited college or university;

2. Successfully complete one of the following:

    i. A Commissioner-approved college curriculum that specifically prepares the candidate for the endorsement;

ii. Twelve graduate-level semester-hour credits, including the following:

(1) Three credits in general principles of instructional staff supervision in preschool through grade 12;

(2) Three credits in general principles of curriculum design and development for preschool through grade 12;

(3) Three elective credits in curriculum design and development; and

(4) Three elective credits in instructional staff supervision and/or curriculum design and development; or

iii. A Commissioner-approved training program that is implemented by a Commissioner-approved provider and specifically prepares the candidate for the endorsement; and

3. Hold a standard New Jersey instructional or educational services certificate, or its out-of-State equivalent, and complete three years of successful, full-time teaching and/or educational services experience. Teaching and/or educational services experience completed in a New Jersey school district must have been under an appropriate New Jersey certificate.

Here, the Board determined that the petitioner did not satisfy the requirement for three graduate elective credits in principles of curriculum design and development for pre-school through grade 12, pursuant to N.J.A.C. 6A:9B-12.6(a)(2)(ii)(2). The petitioner has argued that certain courses that she took at a Gwynedd University satisfy the requirement for certification. There was no expert testimony on the definition of the term curriculum. However, the term did not appear anywhere in the lengthy course descriptions of the courses which petitioner argues satisfy this requirement. Moreover, there is a course taught by Gwynedd in the same program for which petitioner was enrolled in which is described as "curriculum instruction" and contains the term "Curriculum" in its title as well as throughout the course description. Accordingly, I am not satisfied that the courses for which the petitioner refers to in P-1 though P-5, include curriculum development or satisfy the New Jersey State requirements for curriculum development. Moreover, I must defer

to the expertise of the Board, and there was no evidence that the decision was arbitrary, capricious or unreasonable.

Accordingly, I **CONCLUDE** that the petitioner has not met her burden by a preponderance of the evidence, and I **CONCLUDE** that the Board's denial of the petitioner's request for the issuance of a Supervisor Certificate was appropriate.

ORDER

It is hereby **ORDERED** that the Board's denial of the petitioner's request for the issuance of a Supervisor Certificate be **AFFIRMED**.

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

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

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

January 21, 2020
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: January 21, 2020

Date Mailed to Parties: January 21, 2020

SGC/cb

APPENDIX

WITNESSES

For petitioner:

Carmen Thomas-Henderson

For respondent:

None

EXHIBITS

For petitioner:

P-1 EDU 844: The Neuroscience of Learning, Summer 2017 - Syllabus

P-2 EDU 841: Designing Interventions and Assessments, Faculty Instructional Guide

P-3 EDU 808: Technology, Data, & Program Evaluation, Course Syllabus

P-4 EDU 801: Educational Policy in Research & Practice in the US, Faculty Instructional Guide

P-5 EDU 848: Special Education Practicum I, Faculty Instructional Guide

P-6 Letter rom Dr. Carol Etlen, Confirmation of Ed Leadership Program Completion, dated October 3, 2018

P-7 Transcript, dated August 16, 2018

For respondent:

R-1 Re-evaluation of Credentials, dated September 28, 2018

R-2 Credentials Review Summary

R-3 State Board of Examiners Consideration, dated April 16, 2019

R-4 Gwynedd Mercy University Faculty Guide, September 2016

R-5 Gwynedd Mercy University Graduate Catalog, page 73

73-20L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

February 21, 2020

VIA EMAIL ONLY

Brenda C. Liss, Esq.
Riker Danzig Scherer Hyland Perretti LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981

Steven P. Goodell, Esq.
Parker McCay
3840 Quakerbridge Road
Suite 200
Hamilton, New Jersey 08619

Re: *Board of Education of the City of Newark, Essex County v. New Jersey State Interscholastic Athletic Association*, Agency Dkt. No.15-1/20

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the petitioner, the Newark Board of Education, in the above-captioned matter. The petitioner is appealing the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying the petitioner's request for a waiver of the NJSIAA's decision to disqualify the University High School girls basketball team (University) from participating in the NJSIAA Girls State basketball tournament (post season tournament).[1]

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

[1] The NJSIAA issued a parallel decision disqualifying the Essex County Vocational Technical Schools Newark Tech (Newark Tech) girls basketball team from the tournament. Newark Tech joined the petitioner in seeking a waiver before the Executive Committee and likewise has requested to join the petitioner in its current appeal.

Athletic competition in New Jersey's public schools is overseen by respondent, NJSIAA – a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics that are adopted annually by the member schools. Section 19 of the Specific Sport Regulations states:

> f. Any varsity team accumulating three or more player or coach disqualifications for flagrant unsportsmanlike conduct prior to the team's participation in an NJSIAA tournament will not be permitted to participate in same. Seeded teams forfeit their right to compete if a disqualified limit is reached prior to the start of the tournament for the team.

In appropriate cases, the NJSIAA may grant a waiver of its rules if the overall objectives of the association and its member schools will not be undermined. *See generally, Board of Education of the City of Union, Union County v. New Jersey Interscholastic Athletic Association*, Commissioner Decision No. 455-04, decided November 10, 2004.

In this case, it is undisputed that an incident occurred on January 9, 2020 during a game between University and Newark Tech in which there was pushing between players after a jump ball, followed by several adult fans running onto the court and causing a chaotic scene. All players from both teams left the bench during the incident. That night, the officials filed disqualification reports for the two players involved in the initial fight; the following day, the officials filed disqualification forms for the players who had left the bench. The disqualification notices for those athletes stated, "Reason: Unsportsmanlike flagrant misconduct, Explanation: Left the bench and went on the court during the fight." Since University accumulated more than three player disqualifications, the team was disqualified from participating in the post season tournament. Thereafter, the petitioner sought a waiver from the NJSIAA to enable University to participate in the post season tournament. The members of the Executive Committee voted 28-0 to deny the waiver request.

On appeal, the petitioner argues that the NJSIAA's team disqualification rule requires that the individual disqualifications be for conduct which is both flagrant and unsportsmanlike. Despite the language used in the disqualification notice, the individual disqualifications given to the athletes who left the bench cannot form the basis for team disqualification because they did not commit unsportsmanlike conduct. In support of its argument, the petitioner cites to the NJSIAA Rule/Policy set forth in Article IX of the NJSIAA By-Laws which defines "unsportsmanlike conduct." The petitioner also refers to the National Federation of State High School Associations Basketball Rules to emphasize that leaving the bench during a fight or when a fight occurs is a "flagrant foul," but it is not necessarily unsportsmanlike conduct. As such, the petitioner argues that the individual disqualifications for leaving the bench should be treated as a flagrant foul with no finding of unsportsmanlike conduct. With no such finding, the team disqualification may be appropriately waived.

The petitioner also contends that the team disqualification is contrary to the intent and spirit of the NJSIAA rules. Unlike in *Union City, supra*, the disqualifications here were not for serious fighting, and the players who left the bench did not join the brawl. It was not until the players witnessed adult spectators charge the court and attack one of their teammates that they reasonably left the bench and went to the locker room. To apply the team disqualification rule under such circumstances would broaden its application far beyond that intended in its adoption. Therefore, the failure to issue a waiver of the rule in this case would be arbitrary and capricious.

Upon review of the parties' submissions, I find that the petitioner has not met the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. It is well established that the Commissioner's scope of review in matters involving NJSIAA decisions is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, I may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may I substitute my own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1). Additionally, New Jersey courts have spoken as to the narrow scope of arbitrary, capricious, or unreasonable, noting that "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974) (citations omitted).

Based on the record before me and the standard of review that I am required to adhere to, I cannot find that the Executive Committee applied its rules in a patently arbitrary or unreasonable manner. The disqualification forms executed by the officials clearly state that the players were disqualified for "unsportsmanlike flagrant conduct." After reviewing these forms and the video evidence and affording the petitioner the opportunity to present its case, the Executive Committee found that both teams were appropriately disqualified from the post season tournament and denied the petitioner's waiver request. The petitioner's arguments regarding the meaning of "unsportsmanlike conduct" demonstrate only a disagreement with the decision and are insufficient to prove that the Executive Committee was arbitrary or unreasonable in the interpretation of its own rules. Accordingly, I find that the petitioner has not presented the requisite evidence that would enable me to overturn the Executive Committee's decision to deny the petitioner's waiver request.

Since all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the petitioner's request for emergent relief and an Order permitting the University girls basketball team to participate in the post season tournament is hereby DENIED.

Sincerely,



Lamont O. Repollet, Ed.D
Commissioner

c: County Superintendent
State Law Library

Pursuant to Referral by the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Rene Chakmakian	:
and	: **Docket No. 238-9/19**
School District of the Borough of Englewood Cliffs, Bergen County	:

Decision and Award

Appearances:

On behalf of Rene Chakmakian:
Stephen B. Hunter, Esquire
Detzky, Hunter & DeFillippo, LLC
1 Eastern Avenue, Floor 2W
Somerville, NJ 08876

On behalf of School District of the Borough of Englewood Cliffs, Bergen County:
Stephen R. Fogarty, Esquire
Fogarty & Hara
21-00 Route 208 S
Fair Lawn, NJ 07401

Introduction

This matter arises from tenure charges of unprofessional and unbecoming conduct sufficient to warrant dismissal against **Rene Chakmakian**, (Respondent) certified by the **Englewood Cliffs Board of Education**, (the District) and an October 10, 2019 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Office of Controversies and Disputes pursuant to *N.J.S.A. 18A:6-16.*

By Order dated November 9, 2019, the undersigned denied Respondent's Motion to Dismiss. Thereafter, a hearing in the matter was conducted on November 12, 15, 20, 22, December 3 and 13, 2019 in Hackensack, New Jersey and December 12, 2019 in Englewood Cliffs, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Rene Chakmakian was present for the entire hearing and testified on her own behalf. A transcript of the hearing was taken, At the close of the hearing on December 13, 2019, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on January 23, 2019 the matter was deemed submitted.

This Decision and Award is made following my careful consideration of the entire record in the matter, including the undersigned's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if so, what is the appropriate discipline, if any?

The Tenure Charges

The tenure charges in this matter were filed by Dr. Jennifer Brower, Superintendent of Schools, of the District on September 12, 2019. The six Charges filed by the Board (less their respective included statements/allegations of fact) provide:

Charge No. 1

Rene Chakmakian, a tenured teaching staff member in the employ of the Englewood Cliffs Board of Education, engaged in unprofessional and unbecoming conduct throughout the 2014-2015, 2015-2016, 2016-2017 and 2017-2018 school years when she repeatedly violated students' rights under the Family Education Rights and Privacy Act, and intentionally memorialized disrespectful and abhorrent comments about students, community members, and her colleagues in emails to another staff member, on the Englewood Cliffs School District's server, which warrants her dismissal according to N.J.S.A. 18A: 6-10 based on conduct unbecoming a teaching staff member.

Charge No. 2

Rene Chakmakian, a tenured teaching staff member in the employ of the Englewood Cliffs Board of Education, failed to meet the standards set forth in the new Jersey Professional Standards for Teachers, N.J.S.A. 6A:9-3.3, specifically Standards One, Three, Nine, Ten and Eleven, as evidenced by her inability to address the performances, essential knowledge, and critical dispositions embedded within those standards, when she wrote emails to Staff Member containing deplorable comments about her students, parents of students, and her colleagues, which warrants her dismissal as a teaching staff member pursuant to N.J.S.A. 18A:6-10.

Charge No. 3

Rene Chakmakian, a tenured teaching staff member in the employ of the Englewood Cliffs Board of Education, willfully violated Board Policy 3281. "Inappropriate Staff Conduct," by disregarding her professional responsibility to a student's health, safety, and welfare when she knowingly blind copied Staff Members on emails containing confidential and sensitive information about specific students, warranting her dismissal as a teaching staff member pursuant to N.J.S.A. 18A:6-10.

Charge No. 4

Rene Chakmakian, a tenured teaching staff member in the employ of the Englewood Cliffs Board of Education, willfully violated the Family Education Rights and Privacy Act, 20 U.S.S. 1232g; 34 C.F.R. 99.31; N.J.S.A.18A:36-19; N.J.AC. 32-7.5; and Board Policies 8330 "Pupil Records" and 8335 "Family Education Rights and Privacy Act" when she blind copied Staff Member on emails she wrote to colleagues regarding shared students, despite the fact that Staff Member did not have educational interest over the students, thereby inappropriately infringing upon each student's privacy rights, thus warranting her dismissal according to N.J.S.A. 18A:6-10 based on conduct unbecoming a teaching staff member.

Charge No. 5

Rene Chakmakian, a tenured teaching staff member in the employ of the Englewood Cliffs Board of Education, engaged in *unprofessional and unbecoming conduct* throughout the 2015-2016, 2016-2017 and 2017-2018 school years when she repeatedly violated Board Policy 3321, "Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members," when she used the District computer server, during the District school day to draft and send emails to a fellow staff member's District-issued email address containing deplorable comments about District supervisors, District staff members, students and parents, which warrants her dismissal according to N.J.S.A. 18A:6-10 based on conduct unbecoming a teaching staff member.

Charge No. 6

Rene Chakmakian, a tenured teaching staff member in the employ of the Englewood Cliffs Board of Education, engaged in unprofessional and unbecoming conduct throughout the 2015-2016, 2016-2017 and 2017-2018 school years when she repeatedly violated

Board Policy 3211, "Code of Ethics," by disclosing pupil information, and by making malicious statements about colleagues, which warrants her dismissal according to N.J.S.A. 18A: 6-10 based on conduct unbecoming a teaching staff member.

Summary of the Facts[1]

These Tenure Charges concern the content of thirteen (13) emails and the manner in which they were sent or received by Respondent to her fiancé Dr. Mark Delcalzo – another teacher in the District – over a period of six school-years from 2012 to 2018, using District teacher-email accounts to either send or receive the emails. The District asserts that all of the emails violated the District's acceptable use policy relating to the District server and District owned computers[2] and that certain of the emails violated

---

[1] These findings of fact are based upon my consideration of the entire record in the matter including my observation of the demeanor of all witnesses.

[2] District Board Policy 3321 Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members provides in relevant part:

The Board recognizes that as telecommunications and other new technologies shift the manner in which information is accessed, communicated and transferred that those changes will alter the nature of teaching and learning. Access to telecommunications will allow teaching staff members to explore databases, libraries, internet sites, bulletin boards and the like while exchanging information with individuals throughout the world. The Board supports access by teaching staff members to information sources but reserves the right to limit in-school use to materials appropriate to educational purposes. The Board directs the Superintendent to effect training of teaching staff members in skills appropriate to analyzing and evaluating such resources as to appropriateness for educational purposes.

The Board also recognized that telecommunications will allow teaching staff members access to information sources that have not been pre-screened using Board approved standards. The Board therefore adopts the following standards of conduct for the use of computer network(s) and declares unethical, unacceptable, inappropriate or illegal behavior as just cause for taking disciplinary action, limiting or revoking network access privileges, instituting legal action or taking any other appropriate action as deemed necessary.

The Board provides access to computer network(s)/computers for administrative and educational purposes only. The Board retains the right to restrict or terminate teaching staff access to the computer network(s)/computers at any time for any reason. The Board retains the right to have the superintendent or designee, monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use.

FERPA and related state law and District confidentiality policy,[3] and/or New Jersey Professional Standards for Teachers,[4] the District's Code of Ethics[5] and the District's Inappropriate Staff Conduct policy.[6] The District asserts that Respondent's email conduct amounts to unbecoming conduct and warrants her dismissal according to N.J.S.A. 18A:6-10.

N.J.S.A. 18A:6-10 provides in relevant part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or

---

Standards for Use of Computer Network(s)

Any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action:

1. Using the computer network(s)/computers for illegal, inappropriate or obscene purposes, or in support of such activities. Illegal activities are defined as activities which violate federal, state, local laws and regulations. Inappropriate activities are defined as those that violate the intended use of the network(s). Obscene activities shall be defined as a violation of generally accepted social standards for use of publically owned and operated communication vehicles.

...

Violations

Individuals violating this policy shall be subject to appropriate disciplinary actions as defined by Policy No. 3150, Discipline which includes but are not limited to:

1. Use of computer network(s) computers only under direct supervision.
2. Suspension of network privileges;
3. Revocation of network privileges;
4. Suspension of computer privileges;
5. Revocation of computer privileges;
6. Suspension;
7. Dismissal;
8. Legal action and prosecution by the authorities; and/or
9. Any appropriate action that may be deemed necessary as determined by the Superintendent and approved by the Board of Education.

[3] District Policy No. 8335 provides that the District's policies and regulations shall be in compliance with FERPA. In relevant part, the Policy states that; "FERPA permits disclosure of pupil records without consent if the disclosure is to school officials with legitimate educational interests." The policy also notes that N.J.A.C.6A-32-7 incorporates the requirements of FERPA.

[4] N.J.A.C.6A:9-3.3

[5] Board Policy 321. The policy endorses the code of ethics published by the National Education Association.

[6] Board policy 3281 among other things, requires that "[s]chool staff conduct in completing their professional responsibilities shall be appropriate at all times."

> employment during good behavior and efficiency in the public school system of the state, …
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided…

Events Leading to the Charges

The District provides education to approximately 434 students, pre-K through eighth grade in two schools located in Englewood Cliffs, New Jersey; the Upper School for 3rd through 8th grades and the North Cliff school for K through 2nd grades. The District school board has nine members. The District employs approximately 50 teachers and five administrators. The District's administration is composed of Superintendent Dr. Jennifer Brower (Brower), Principal of Schools Siobhan Tauchert (Tauchert), Supervisor of Special Education Dawn Smith, Supervisor of Curriculum and Instruction Nicole Ferlise and Supervisor of Guidance Colin Winch.

Respondent is a tenured teacher and has been employed by the District as a full-time teaching staff member since August 2002. She is certified in elementary education and special education and has served the District as a general education teacher and a special education/resource center teacher. At the time of the Tenure charges, she was employed as a special education teacher.

Prior to the circumstances of the instant Tenure Charges, Respondent had no discipline in her record and consistently received good evaluations and observation results, (effective or highly effective). Respondent received the "Teacher of the Year"

award for her work during the 2017-2018 school year. Respondent worked primarily at the North Cliff school. Respondent and her fiancé Dr. Mark Delcalzo (Delcalzo) have been together as a couple for 12 years. They live together. At all times relevant, Delcalzo has taught physical education in the District. Delcalzo performs his job in both District schools, although primarily at the North Cliff School.

In late March 2019 District teacher Therese Najarian reported to Principal Tauchert that Delcalzo was not present for a scheduled responsive classroom professional development training and that another teacher had reported observing Delcalzo lying down on the couch in Respondent's classroom during the training. Tauchert looked into the matter and learned from the professional developer presenter that Delcalzo had signed into the training session, said his neck hurt and left the room saying he would be back, but that Delcalzo did not return to the training. The presenter also informed the principal that Delcalzo had also missed a full day of professional development in January 2019. Tauchert spoke with Delcalzo about both professional development days and the physical education teacher told her that on one of the days his neck hurt and on the other day he had a stomachache. The principal asked Delcalzo why he had not reached out to an administrator, that if he had come to her she would have told him to go home. Tauchert reported her findings to Brower. Brower responded by saying she would look into the District computer to see what Delcalzo's search histories were on the two days involved.

Brower thereafter had the District's network specialist grant the Superintendent access to Delcalzo's internet and email accounts on the District owned computer network. Brower reviewed Delcalzo's emails and internet usage on the dates of the development meetings, in her words; "to see if he was able to utilized his computer while

he was supposed to be so sick." As a result of her search, Brower discovered that Delcalzo, a licensed chiropractor, had spent significant time on the days in question looking up facts relating to chiropractic issues, performing on-line banking and receiving and sending emails. While reviewing Delcalzo's email activity, Brower noticed that Delcalzo was emailing Respondent a lot. By policy, District email accounts are supposed to be used for District purposes. Brower then performed a search in Delcalzo's account for emails to and from Respondent and discovered that the two staff members had emailed one another consistently over a long period using District accounts to send and/or receive emails. In addition to the number of emails involved, Brower became concerned that the two teachers were using the email service for what she believed were inappropriate purposes, including communications about students and what she felt were inappropriate comments. As a consequence, Brower determined to conduct an investigation into Respondent's email use.

Brower thereafter had the network specialist gain her access to Respondent's District email account. Between March 27 and April 1, 2019 Brower personally reviewed Respondent's email account including between 100 and 500 emails between the two teachers; some originating from or going to, one of the teacher's District email accounts and others originating from or going to one of the two teacher's personal Gmail accounts. As a result of her search, Brower became concerned that some of the emails sent to or from Gmail accounts addressed school-related and student-related matters that according to District policy and governing law should be kept exclusively on the District's confidential server and that other of the emails contained content that Brower found to be inappropriate; offensive; demeaning or derogatory of staff, students, or parents;

unprofessional and at times abhorrent. Of the up to 500 emails she reviewed covering a period from the 2012-2013 school year to the 2017-2018 school year, Brower identified thirteen emails upon which the instant Tenure Charges are based.

The Emails

The emails[7] identified by Brower included: (1) a blind copy of an email to Delcalzo of an email that forwarded a behavior chart of a student in Delcalzo's class; (2) a blind copy of an email to Delcalzo of an email to a parent concerning disruptive behavior of the parent's student/child and asking the parent to speak with the student; (3) an email to Delcalzo containing Respondent's response to a group email blind copied her by Delcalzo about a challenging student and –using vulgar and derogatory language about the student - recommended that if the student acted up Delcalzo should remove the student from his class; [8] (4) in an email to Delcalzo referred to a group of mothers of students in a pejorative manner and to their conduct in a vulgar way; (5) an email from Respondent's District account in reply to a blind copy from Delcalzo at his personal email referring to the Principal in an offensive and vulgar manner; (6) a blind copied email to Delcalzo of an email to the parent/guardian of a student explaining Respondent's intended strategies for tutoring the student; (7) a blind copied email to Delcalzo of an email to the parent/guardian of a student offering Respondent's available times for tutoring the student; (8) an email to Delcalzo that disparaged Delcalzo's supervisor[9] and

---

[7] Due to privacy considerations and a desire to avoid the potential of further impact of the emails, these are very generalized descriptions of the emails. They however do contain my relevant findings as to the character of the emails.

[8] Brower and District witnesses Tauchert and School Board President Shanna Jafri testified that they considered the content of this email to be "violent" in nature. I find that although the choice of words used by Respondent were forceful, they cannot be reasonably interpreted to communicate either an intent or a recommendation toward violence of any sort.

[9] The supervisor is no longer employed by the District.

concluded; "I can't wait til serve her head on a platter;" (9) an email to Delcalzo that disparaged another teacher and the teacher's children/district students; (10) a blind copied email to Delcalzo of a group email about a classified student's unpacking routine; (11) a reply to an email from Delcalzo about a grade question from a parent disparaging the parent and advising that he answer the email and move on, to which she added, "hate this place and kids and parents --- like my --- will never get additional help;" (12) a response to an email copied Respondent by Delcalzo about his potential training on a computer program by another staff member by mocking the staff member and disparaging the staff member's ability to do the training; (13) an email to Delcalzo that two teachers whom she described with unflattering nick-names were being two-faced in their treatment of another staff member.

Post Investigation Events

Brower conducted her review of the emails and thereafter concluded that Respondent should be subject to discipline. Brower informed the president of the School Board of the general findings of the investigation and of Brower's intention to suspend Respondent pending further consideration. On April 8, 2019 Respondent was asked to meet with the superintendent following a meeting of the staff. Respondent was told to bring her union representative. Respondent had no prior notice or knowledge of the subject of the unscheduled meeting. After the staff meeting, Respondent and her NJEA representative met with Brower and Tauchert. Brower handed Respondent a five-page "Evaluative Memorandum" written by Brower to:

> ...memorialize my serious concerns, profound disbelief, and deep disappointment with the content of emails you exchanged with another staff member during school hours on the District's server. These emails are in no uncertain terms shockingly

> inappropriate, vituperative, and completely antithetical to the respect and professionalism expected of teachers in our District. As a result of your conduct, I am placing you on a Professional Improvement Plan [PIP] for the remainder of the 2018-2019 school year and the first half of the 2019-2020 school year.

The Memorandum summarized seven of the subject emails (emails between Respondent and Delcalzo), then referenced Board Policy 3281, Inappropriate Staff Conduct, and advised that inappropriate conduct outside of a staff members professional responsibilities may be considered conduct unbecoming, and that Respondent's conduct was unacceptable. Next, the Memorandum notified that Respondents' conduct was inconsistent with certain of the State of New Jersey Professional Standards for Teachers as well as the District's Acceptable Use of Computer Networks/Computer and Resources, Policy 3321 and notified Respondent that as a part of her Performance Improvement Plan (PIP), she would be required to attend two professional development courses; one relating to creation of a safe and supportive environment and another on effective workplace interactions.

The Memorandum then reviewed four emails relating to students that Respondent blind copied to Delcalzo, and asserted that; (1) the emails violated the state's Teacher Standards, and (2) because Delcalzo had no "legitimate educational interest' in the involved students and Respondent had not received parental consent to forward the emails, the emails also violated FERPA. The Memorandum advised Respondent that if she had any question as to who may have a legitimate educational interest, she was encouraged to "seek guidance from your immediate supervisor before sending such emails."

The Memorandum concluded by informing Respondent:

> In closing, please be advised that this evaluative memorandum will be included as a component of your 2018-2019 annual summary evaluation. Pursuant to Board Policy No. 3152, "Withholding an Increment" this is formal notice that the within evaluative memorandum is a reasonable effort to inform you that the concerns expressed herein may result in the withholding of your increments for the 2019-2020 school year pursuant to N.J.S.A.18A:29-14 and N.J.A.C. 6A:3-4.1.

Respondent signed an acknowledgement of receipt of the Memorandum and wrote: "I am not in agreement with the memorandum," and on the advice of her Union representative, did not orally respond to the memorandum.

At the April 8 meeting, Brower then handed Respondent a letter notifying the teacher of her immediate suspension with pay. The letter provides, in relevant part:

> This is to advise you that, as a result of your unprofessional, inappropriate, contemptuous and vituperative email correspondence with another staff member on the District's server during school hours, you are being suspended with pay pending further action by the Englewood Cliffs Board of Education. More information regarding the administration's concern with your email correspondence is set forth in the Evaluative Memorandum provided to you on April 8, 2019.
>
> Please be advised that this action is being taken with the approval of the Board President pursuant to the provisions of N.J.S.A.18A:25-6. During the period of your suspension, you are not to be present on the District's campus for any reason without prior written authorization from me. Your suspension shall be reported to the Board forthwith and the Board shall determine what further action is appropriate.

Brower testified that at the time she served the April 8, 2019 Evaluative Memorandum upon Respondent, Brower had no intention to work with Respondent on the PIP or give Respondent the opportunity to comply with the PIP. Brower wrote the Evaluative Memorandum and PIP "as part of progressive discipline" and gave

Respondent the suspension to give herself "more time to think about the process due to the seriousness pending further action."

Respondent has not worked in the District since the April 8, 2019 meeting. In her July 23, 2018 to July 1, 2019 Annual Evaluation Respondent received a composite score of 3.42. Her Domain 4, components 4a, 4b, 4c, and 4d reflected ratings of "Effective." However, in each of those four components Brower noted: "Although the score in this area is warranted for 'effective', it was noted that Ms. Chakmakian demonstrated profound lack of judgement and professionalism this year as noted in 4f." In Component 4f Respondent received an "Ineffective" rating. In the "Notes and Evidence" section of the component, Brower wrote:

> During this school year, certain emails developed that demonstrated profound lack of judgement and professionalism.
> Due to lack of professionalism toward students, staff, and community, Ms. Chakmakian is being recommended for non-renewal/dismissal as indicated in the composite score report.

In the "recommendation" portion of the composite score report, the Evaluation states:

> Recommended for Dismissal/Non-renewal. (This teacher has failed to make progress on a Corrective Action Plan, or the educator consistently performs below the established standards, or in a manner inconsistent with the school's mission and goals.

By letter dated August 1, 2019, Brower notified Respondent that the Superintendent was recommending that the school board withhold Respondent's employment and adjustment increments for the 2019-2020 school year. By letter dated August 7, 2019 Respondent was notified that the Superintendent had filed tenure charges against Respondent. By letter dated August 13, 2019 the District notified Respondent that

the school board had approved the withholding of Respondent's employment and adjustment increments for the 2019-2020 school year. By letter dated September 5, 2019 the District notified Respondent that the school board had certified tenure charges against Respondent on September 4, 2019.

Brower testified that even if she saw only one violation of FERPA by Respondent, she would have filed tenure charges against Respondent.

The Intentions of Respondent and Delcalzo

Both Respondent and Delcalzo were familiar with the District's acceptable use policy. However, both teachers had the impression that their emails to one another using their private email accounts were private notwithstanding that the sender or recipient may have used their District-issued computer. Respondent was told by the District's then superintendent Kravitz when she first received a computer that she was permitted to put her private email account on the computer. Prior to the March/April 2019 events relevant here, Respondent knew of no other teacher who had his or her emails reviewed by the District administration. Both Respondent and Delcalzo expected their emails to remain private and neither intended that anyone else would ever view the emails.

Prior Email Monitoring by the District's Superintendents

The record discloses prior monitoring of computer use by the District's superintendent limited to Brower's review of emails of two teaching staff members and one secretarial staff member. Each of the three staff members received a written memorandum with one also suffering a loss of pay for falsifying sick days. None of the

three faced tenure charges because, according to Brower, the staff members had not made outrageous comments about students.

The Dissemination of the Emails

In addition to Respondent; Delcalzo; counsel, the arbitrator and the court reporters involved in this Tenure matter, the emails at issue have been seen by Brower, Tauchert the nine members of the District's School Board and possible Supervisor of Curriculum Dawn Smith.

Admissions of Respondent

Respondent admitted to having knowledge that the Superintendent had authority to access the District's network to monitor compliance with District Policy, but that she was not aware of such occurring before. Respondent admitted that in some of the emails at issue she made inappropriate comments about colleague and staff in violation of the District's Policy; that she engaged in the use of inappropriate language and made malicious statements about staff members in violation of the District's Code of Ethics; and that her forwarding student records to Delcalzo at his private email address violated FERPA. Much of what she wrote were expressions of her frustration; she knows she was wrong, "100 percent wrong" in expressing herself as she did.

Respondent wrote Brower an apology dated May 2, 2019.

Delcalzo's Discipline History

Delcalzo was also disciplined for his email conduct, conduct that included the demeaning and mocking of staff, inappropriate use of the District's computer netweork, inappropriate language - conduct described by Brower as "outrageous" - and FERPA violations. Delcalzo received an April 3, 2019 Evaluative Memorandum from principal

Tauchert withholding the teachers' annual increment and placing Delcalzo on a PIP. The April 3, 2019 discipline was based upon: (1) Delcalzo's FERPA violations; (2) critical emails directed toward district personnel, (3) failure to attend mandatory professional development meetings, (4) his absence from almost 50 percent of "extended faculty meetings" and (5) raising his voice to a colleague in front of a student. Prior to his April 2019 discipline, Delcalzo had received two warnings; a February 4, 2016 Evaluative Memorandum concerning his shouting at a student, and a May 21, 2018 Warning relating to his cell phone use.

Arguments of the Parties

The parties submitted lengthy and detailed post hearing briefs presenting factual and legal arguments on the Tenure Charges; briefs that have been fully and carefully considered by the undersigned and will only be summarized herein.

Position of the School District

The District asserts that the evidence supports its tenure charges. The District has shown, and to a large degree Respondent admits, that Respondent sent the emails in question and that her emails violated Board policies. Respondent showed little or no remorse for her conduct at the time she was presented her evaluative memorandum on April 8 or thereafter. The District has shown that: (1) the five emails alleged to have violated federal and state privacy law and related Board policy were confidential pupil records; (2) that Delcalzo did not have a "legitimate educational interest" in the records such that he needed to review the records to fulfil his professional responsibility; (3) that Respondent emailed the records to Delcalzo's private email address thereby exposing the

student records to public dissemination and (4) Respondent disclosed confidential information without the appropriate parental written consent for disclosure.

Respondent was trained on the Board's privacy policies and FERPA and admitted at the hearing that she had an understanding of the law during the relevant period. Although Respondent asserted in regard to most of the FERPA related emails that Delcalzo had previously, or at the time of the emails had the child as his student, or that the two teachers were attempting to coordinate their schedules, such is insufficient to establish a legitimate educational interest within the meaning of the law, regulations and policy. If Respondent had honestly believed that it was necessary to share student information with Delcalzo, she should have sought guidance and permission from the administrator with the authority to grant permission for disclosure. Respondent did not do so.

The evidence establishes that in her emails to Delcalzo Respondent violated Board Policy 3281 related to Inappropriate Staff Conduct, Board Policy 3211 Code of Ethics and New Jersey Professional Teacher Standards by making malicious statements and using inappropriate language. Respondent's email language was antithetical to the collaborative, professional development, ethical and professional-relationship requirements of the Teacher Standards.

In certain of her emails Respondent made inappropriate comments about District pupils that undercuts the public's trust to protect the well-being of students. Some of Respondent's emails contained inappropriate statements about colleagues in violation of Board Policy 3211. All of the emails at issue were in violation of the Board's Acceptable Use of Computer Networks(s)/Computers and Resources Policy 3321 as Respondent used

District computers and the District's network to either send or receive the emails and the emails either violated disclosure law or –considering their content- were for shameful, inappropriate and obscene purposes.

Contrary to the argument of Respondent, she did not have an expectation of privacy in her email communications with Delcalzo. Both teachers were subject to the Board's Policy 3321 which provides, in pertinent part that:

> The Board provides access to computer network(s)/computers for administrative and educational purposes only. The Board retains the right to restrict or terminate teaching staff members access to the computer network(s)/computers at any time, for any reason. The Board retains the right to have the Superintendent or designee, monitor network activity, in any form necessary, to maintain the integrity of the network(s) and insure its proper use…

The District's Policy clearly put Respondent on notice that the District Superintendent could monitor Respondent's network activity at any time. Thus, Respondent was clearly put on notice that her use of the District's network was not private. Respondent used the network either to send or receive her emails. As consequence, the District Superintendent had authority to review emails sent from, or received by, Respondents' District email account. Considering her emails were not otherwise confidential or privileged, Respondent did not have an expectation of privacy using her District email account.

Respondent did not exhibit contrition about her conduct. When first presented with the results of the district's investigation, Respondent chose to write that she did not agree with the Superintendent's evaluative memorandum and said nothing; made no apology. In fact, the only written apology made by Respondent was a narrow one, addressing only her harm to the Superintendent and making no apology to the other staff members, students or parents who were subjects of her emails. As further evidence of

Respondent's insincerity, her written apology was sent a full month after her suspension and only at a time when the employee realized her continued employment was in jeopardy.

Termination is appropriate here. It is well settled that a teacher's unfitness for employment may be demonstrated by a single incident, if such is sufficiently flagrant. Here, each of the several emails involved are sufficient to warrant termination. Prior cases have established that even when the teaching ability of an involved teacher is well regarded, where the teacher's statements engender a lack of faith on the part of parents, teachers or administrators results in the loss of trust and that trust cannot be rehabilitated, dismissal is warranted. Additionally, it is also well established that where a respondent initially denies wrongdoing – such a theft - a later admission and willingness to cooperate in a district's investigation does not mitigate an employee's misconduct.

As for the *Fulcomer* test for determining whether termination is appropriate when a staff member is determined to be guilty in a tenure charge matter, the facts here support the termination of Respondent. Respondent's acts – the language she wrote - were "premeditated, cruel and vicious." Respondent used a written medium and such establishes that there was always some degree of premeditation in her conduct of writing, and there is no evidence that she was ever compelled to say anything. Respondent would be able to find employment elsewhere. The District has not sought to revoke Respondent's teaching certificates. The District admits that Respondent has a generally good history of performance; has demonstrated that she is a capable teacher who has achieved positive results for her students and has no notable disciplinary history. But, the

District here asserts only that she can no longer be effective in this district considering the gravity of the damage she has done to the trust previously placed in her.

Finally, it is well settled in labor arbitration that there are circumstances where an employee's offense is so serious that progressive discipline is not required and the employee may be terminated based solely upon a single serious offense. Respondent's actions here fall within such a category. This is particularly so where, as here, Respondent is held to a very high standard of conduct; a standard that reflects the high level of public trust and confidence afforded public school teachers.

Respondent cannot be permitted to continue to teach in a district she has so often maligned, teach students she has denigrated and work alongside staff and administrators she has ruthlessly mocked and criticized. Respondent is beyond rehabilitation and should be dismissed. Dismissal is a reasonable and proportionate response by the District. The tenure charges should be sustained.

Position of Respondent

Respondent maintains that the District has failed to support its tenure charges. Applying the well-recognized test for determining the appropriateness of termination of a tenured teacher's employment for unbecoming conduct articulated in *In re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967), and cases citing *Fulcomer*, the arbitrator should consider a number of factors, including: the potential impact on Respondent's teaching career; the longevity of Respondent's teaching career; Respondents overall teaching record; Respondent's teaching ability; Respondent's attitude and whether the acts at issue were premeditated, cruel or done with an intent to punish; Respondent's disciplinary

record; the nature and gravity of the offenses under all of the circumstances; evidence of provocation, extenuation or aggravation; any harm or injuries Respondent's conduct may have had on maintenance of discipline and the proper administration of the school system; the likelihood of such behavior recurring and whether the discipline is generally fair and proportional to discipline imposed for similar offenses by other public employees. It is also well established that where an incident of conduct unbecoming is found to have occurred, in most cases progressive discipline should be used.

Applying the *Fulcomer* standards, there is no reasonable basis for the District to take any disciplinary action against Respondent aside from the Professional Improvement Plan issued to her on April 8, 2019. If Respondent is terminated, pursuant to N.J.A.C. 6A:9B-4.5 the District would be required to report such to the New Jersey State Board of Examiners for possible revocation of her teaching certificates. Such could potentially end her eighteen year, unblemished teaching career. Respondent has an outstanding teaching record with no prior discipline and has unquestioned ability. Her 13 emails were sent over a seven-year period and were intended to be private. The five emails identified by the District as FERPA violations all related to students about whom Respondent and Delcalzo had legitimate educational interests. As none of the emails have been disseminated beyond a very few – members of the Board and three administrators – Respondent's conduct did not harm nor have injurious effect on the maintenance of discipline and proper administration of the District.

Of the hundreds of emails over a seven-year period reviewed by Brower, the emails raised in the Tenure Charges are thirteen, all of which were between Respondent and her fiancé Delcalzo. Five of the emails identified by the district as FERPA violations

actually related to legitimate educational interests of the two teachers in the students involved. The remaining eight emails that contained certain unprofessional and obscene comments were private communications and do not justify the termination or a long-term suspension. Numerous Commissioner decisions and arbitration awards have found termination inappropriate in circumstances involving significantly worse conduct and disciplinary histories than involved here.

Respondent's performance as a teacher in the District has been exceptional. She received "highly effective" observations and evaluations for almost two decades, during which she performed as a 4th grade teacher, a Kindergarten teacher, a Basic Skills teacher and a Special Education teacher. She performed work with other teaching staff (including then-teacher Dr. Brower) on various areas of curriculum and individually developed the District's first Basic Skill curriculum, a curriculum still used by the District. Respondent went above and beyond in the 2017-2018 school year when she voluntarily added the regular education duties to her special education duties for her classroom following the resignation of her classroom's regular education teacher. As a consequence of her work and in the words of Brower, for being the ultimate team player, Respondent was awarded the Teacher of the Year Award.

Respondent is an outstanding teacher with 18 years of experience in the District with a heretofore unblemished record. She sent five emails to her fellow teacher and fiancé concerning the education of students. Both teachers had legitimate educational interests in the students involved. She sent eight other emails to her fiancé during a seven-year period - emails that she believed were private – using the District's server. Respondent's conduct does not warrant termination, particularly where, as here, Dr.

Delcalzo was accused by the District of FERPA related emails to Respondent and multiple violations of the District's Acceptable Use policy that included criticism of District staff that Brower characterized as "outrageous," but despite the fact that Delcalzo had been disciplined twice before, the District issued only an increment withholding to Delcalzo. The District has treated Respondent disparately.

The District has also failed to apply progressive discipline to Respondent and has inappropriately subjected her to double jeopardy. The District has made an effort to apply different levels and incidents of discipline for the very same acts by Respondent. Such is not progressive discipline and has resulted in Respondent being disciplined multiple times for the same conduct; having first received an Evaluative Memorandum, then a PIP, then a suspension and then a termination. There is nothing "corrective" about the District's disciplining Respondent a number of time for the same conduct.

Finally, contrary to the District's assertion, Respondent did have remorse for her conduct. She followed the advice of her Union representative on April 8, 2019 when she was subjected to an unexpected meeting with the Superintendent and did not say anything. She later wrote a letter of apology to the Superintendent who had personally read Respondent's emails and she truthfully expressed remorse during the hearing. Termination of the outstanding teacher that is Respondent is grossly disproportional to the conduct in which Respondent engaged. What would be fair is to give Respondent the opportunity to comply with the PIP provided her on April 8, 2019 and thereby allow the District to positively address its concerns while maintain the employment of a wonderful teacher.

Discussion

A. Summary

The parties present differing narratives about the nature and impact of the Superintendent's discovery of the emails involved herein on the District's important interests, and the degree, if any, to which they should be considered violations of law and District policy. The allegations of the Tenure Charges themselves presented by the District are sweeping and severe in nature; they allege conduct throughout many years that amounted to willful and intentional violations of Board policy and conduct that was abhorrent and deplorable that will have a continuing impact upon the District's important mission. In contrast, Respondent asserts that the content of the emails should not be subject to judgment by the District as they were intended to be private between Respondent and her fiancé and were few in number and written over the course of many years; that to the extent they addressed specific students, Respondent and Delcalzo had legitimate educational interests in the students; and because the emails have not been disseminated, they represent no harm. Neither party is entirely correct in its narrative. However, it is the District that bears the burden of supporting its Tenure Charges and here I find that it has established the truth of only some of its allegations.

Based upon careful consideration of the record as a whole, including all testimony and other admitted evidence and the arguments of the parties, as well as my observation of the demeanor of all witnesses, I find that Respondent engaged in conduct that warrants significant discipline, but does not warrant termination. I find that Respondent violated the District's Policies by: (1) using her private email to send information about students to her fiancé and doing so without parental permission; (2) using the District's email

account for private emailing, (3) using inappropriate and unprofessional language on emails sent from her District account and (4) making demeaning and at times vile statements in emails about her administrators, coworkers and students. I find that the District has failed to establish the truth of its assertions that Respondent willfully violated law and policy, did so on an ongoing basis, cannot be rehabilitated, or is a risk to students. I also conclude that the District has failed to establish that termination is an appropriate level of discipline.

B. Notwithstanding that Respondent was on Notice that her Computer Use Could be Reviewed, Respondent's Expectation of Privacy was not Unreasonable Under the Circumstances

Although I find that Brower's review of Respondent's emails was permitted by published District policy, I am not persuaded that Respondent had no basis upon which to expect that her emails to her fiancé would remain private. The District's Acceptable Use Policy Number 3321, establishing the right of the Superintendent to monitor network activity was adopted by the District in March 2004. The record establishes that although the right was so given to the District's Superintendent, monitoring has not been a consistent practice of the District and there is no evidence in the record that it was done during the approximately eleven years of the Policy's existence prior to Dr. Brower becoming superintendent in 2015. Additionally, the evidence of any monitoring of network activity since 2015 is limited to reviews by Brower involving two teaching staff and one non-teaching staff and the reviews of Respondent and Delcalzo.

A close examination of the language of the Policy itself establishes that rather than focusing upon staff email use, the Policy is primarily focused upon use of the

internet generally, including inappropriate internet searches, misappropriation of accounts, violations of law, etc. The policy is also confusing as it uses ambiguous language such as "inappropriate activities" and then offers a circular definition of the phrase as activities that violate the Policy. The Policy references email only within the context of forging electronic mail messages or using an account owned by others. The catch-all example of unauthorized use provides; "k. Engages in other activities that do not advance the educational purposes for which computer networks/computers are provided," but does not clearly prohibit employees from using the District network for their personal email accounts.

Additionally, Respondent testified without contradiction that when she was first issued her computer, then-Superintendent Kravitz told her she could use the computer for her personal email account. Respondent also offered un-contradicted testimony, testimony I credit, that she was never told that she could not use her District-issued computer for personal emails. Other than directing staff to read the Board's Policies, there is little evidence of any education of staff on the question of privacy of their personal email accounts on the District server.

Although the Policy does plainly provide that the Superintendent may monitor the network at any time, considering the language of the Policy itself focusing on non-email use of the network, the infrequency of prior monitoring of the network, the statements by the District's former superintendent, the content of the emails themselves – content that on their face suggest that they were not intended to be seen by anyone besides the addressee - I find that Respondent intended her emails to be private and that her belief that her email communications to her fiancé were, and would remain, private was not

unreasonable. As a result of such considerations, to the extent that the Tenure Charges suggest that Respondent willfully, intentionally or carelessly violated District policy and that she should have known or assumed her emails would be susceptible to dissemination either within the District or to the public, I find such is not supported by the evidence.

C. In Context, the Emails Were Isolated

I find the emails at issue cannot fairly be described, as the Tenure Charges assert, as statements made "throughout" the school years involved. Respondent did not constantly send emails over a seven-year period expressing disgruntlement at her administrators, coworkers, students and parents. Instead, given the time span involved, the emails at issue were rare. They became known to the District's Superintendent when the Superintendent was reviewing the internet use of another teacher. As such, Respondent's emails were revealed only as the result of a chance discovery by the Superintendent of isolated artifacts of Respondent's communications to a single, intimate colleague, the majority containing Respondent's private feelings and opinions, some as old as seven years. They were few and far between and there is no dispute that if Respondent had such thoughts and kept them to herself, and/or orally communicated with Delcalzo the subject information about students in private, there would be no basis for the Tenure Charges.

D. The Nature of Violations Found

The content of Respondent's expressions, some made long ago, caused hurt and concern and two or three of them could rightly be considered statements of betrayal to the Superintendent who spent many years working closely with Respondent. But,

notwithstanding these scattered, yet disturbing glimpses of Respondent's frustrations, expressed at times with vulgar and at times with vitriolic words, the evidence fails wholly to show that such feelings of Respondent were made manifest in any conduct by Respondent toward her students, her coworkers, her administrators or the parents of children in the District. In fact, the evidence establishes just the opposite. Respondent has a long history of high performance in her professional responsibilities and good relations with all.

I find the content of some of Respondent's emails did disparage and were in instances vile. As such, Respondent violated the District's Policies relating to professionalism and Code of Ethics. However, as a result of considerations described above, I find that there is insufficient evidence to establish that Respondent intentionally violated any policy or law or had any intent to do harm to anyone. Instead, I credit her testimony that she was frustrated and find that her motivation in sending many of the emails was to vent. In her doing so, her choice of words reflected poor judgment and at times a poor attitude. But, her venting did not result in any contemporaneous harm whatsoever to the District or its students.

On the witness stand, Respondent admitted that her five emails relating to students copied to Delcalzo amounted to violations of District privacy policies, and I find that considering the emails were either sent from or to private email accounts, Respondent did not comply with District policy requirements on confidentiality.

E. Is Discharge is not an Appropriate Level of Discipline Under the Circumstances.

Having found merit to a portion of the allegations contained in the tenure Charges, I make the following conclusions based upon the *Fulcomer* and Just Cause standards:

1. Applying the *Fulcomer* Test

I find that Respondent has a significantly long teaching career of eighteen years, that she has a very good overall teaching record, she has no prior record of discipline and the record well establishes that Respondent has very good teaching ability. The potential impact of termination on Respondent's teaching career would be substantial. Some of Respondent's language in her emails reflected a poor attitude, but the record is insufficient to establish any intent on her part to punish anyone. In such regard, as found above, the evidence fails to show that any poor attitude evidenced in her emails was reflected or otherwise made manifest in any conduct by Respondent toward her students, her coworkers, her administrators or the parents of children in the District. As for the nature and gravity of the Respondent's offenses under all of the circumstances, I find they are significantly mitigated by the fact herein found that Respondent intended the emails to be private and expected that they would remain so. The emails have been disseminated only to District Board members and administrators. Although both Superintendent Brower and Principal Tauchert have read the emails, both administrators exhibited a high degree of professionalism on the witness stand and both are aware of their own requirements to comply with Board policies governing their conduct to treat staff, including Respondent, appropriately in the future. I find there is no significant likelihood of harm or injury that Respondent's conduct may have on maintenance of

discipline and the proper administration of the school system. Finally, I am persuaded that, considering the very significant disciplined of Respondent ordered herein, it is unlikely that Respondent will repeat her problematic behavior.

Although the District asserted that her lack of contrition upon being served with the April 8, 2019 Evaluative Memorandum is evidence of Respondent's lack of remorse, I find such is not the case. During her eighteen years of employment with the District, Respondent had never been disciplined and she had no prior warning that she was going to be suddenly subject to an Evaluative Memorandum, a notice of withholding of increment, a PIP and a notice of suspension. It is beyond reasonable expectations to assume that anyone in such circumstances would take everything in, analyze the claims made - some of them relating to events many years old - and simply accept her punishment and offer remorse. She was subjected to an unanticipated and significant event in her life and career and it is reasonable under the circumstance that she would follow the advice of her representative at the meeting and say nothing. Respondent has since expressed her remorse.

Applying the *Fulcomer* considerations, I find that termination is unwarranted in this matter.

2. **Just Cause**

The TEACHNJ Act incorporates the just cause standard wherein it provides that a school district shall not dismiss or reduce the compensation of a tenured teachers except for "inefficiency, incapacity, or conduct unbecoming *...or other just cause,*" (emphasis added). An analysis of whether or not Respondent's discharge was for just cause under generally recognized standards requires consideration of all of the circumstances in

determining whether the issuance of discipline was "fair." Some of the several factors often considered when applying the just cause standard include whether or not: (1) the rule or policy being enforced is reasonable; (2) there was prior notice to the employee of the rule and the consequences for its violation; (3) the disciplinary investigation was adequately and fairly conducted and the employee was afforded an appropriate level of due process under the circumstances; (4) the employer was justified in concluding that the employee engaged in the conduct as charged; (5) the rule has been consistently and fairly enforced and (6) whether or not the discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline and due process.

In the instant matter, I find the District failed to show that the Policies it relies upon were consistently and fairly enforced and that the discipline of discharge was appropriate given the relative gravity of the offense, Respondent's disciplinary record and considerations of progressive discipline and due process.

a. Consistent Application of the Rule

I am persuaded by the argument of Respondent that the District has applied a different standard of discipline to Respondent than it did to Delcalzo. Although it is true that some of Respondent's emails were derogatory, vile and unprofessional, some of Delcalzo's emails were – albeit in some instances to a lesser degree – derogatory, outrageous and unprofessional. But, importantly, Delcalzo's April 2019 discipline was not only for his unprofessional email comments and personal use of the District's network. Delcalzo was additionally disciplined for failing to attend professional development meetings, failing to attend extended staff meetings and inappropriate

conduct toward a fellow staff member in front of a student. Yet, notwithstanding that he had a record of two prior disciplines and was found to have violated many and various District policies, Delcalzo was subject to discipline limited to an increment withholding and PIP. Delcalzo was not subject to tenure charges seeking termination.

The primary reason offered by the superintendent at the hearing for her different discipline-related treatment of Respondent and Delcalzo was the allegedly violent character of Respondent's emails; a violent character I have found was not communicated by Respondent's emails. Additionally, the superintendent further testified that had she discover only a single violation of FERPA by Respondent, she would have recommended tenure charges; a position at odds with the District's lesser discipline of Delcalzo who was also disciplined for violating FERPA. Relying upon the above considerations, I find that the District applied a different standard to Respondent than it did to Delcalzo.

b. **The Corrective Nature of Progressive Discipline**

In is widely recognized that in all but the most egregious cases, discipline in the employment context is primarily intended to be corrective in nature; discipline is an effort by an employer to correct questionable conduct or poor performance by employees. Under the just cause standard, discipline is not a means to punish an employee or gain retribution for an employee's conduct. Only when efforts to correct have failed through reasonable efforts under the circumstances, is discipline justly used to terminate the employment relationship. Consistent with the principle of progressive discipline, the District's own Policy 3321 relating to appropriate use of computers provides a list of progressively more sever discipline for violations of the Policy; a list that includes seven steps of discipline before discharge for violation of the Policy.

Necessary to any effort to correct conduct is the understanding that once the employee has received corrective discipline, the employee actually be given the opportunity to correct his or her conduct. It is fundamentally contrary to any concept of justice in the workplace for an employee to receive further discipline for conduct before the employee has had a fair opportunity to reform his or her conduct.

I find that Respondent's conduct was not of such an egregious character as to warrant immediate termination of the long tenured teacher. In her eighteen years of employment with the District, Respondent was never previously disciplined, her conduct the subject of her tenure charges was sporadic and her communications were intended to be private.

Nor has Respondent been given the opportunity to correct her conduct relating to her emails. Instead, I find that the District's decision to terminate Respondent was primarily punitive in character. In this regard, the evidence establishes that on the same day, within a matter of 20 minutes, the District's Superintendent; (1) issued Respondent first an Evaluative Memorandum that concluded by informing Respondent that the District would be considering withholding her 2019-2020 increment, (2) then served Respondent with a contemporaneous PIP and (3) then served Respondent with a contemporaneous suspension. In regard to these multiple levels of discipline, the superintendent testified that; (1) she never intended that Respondent have the opportunity to complete her PIP, and that (2) in addition to notifying the teacher that she was suspended and that the superintendent intended to seek the withholding of the teacher's increment, she was also keeping-her-options-open for further discipline by notifying Respondent that the matter was being forwarded to the Board for possible further action.

I find the superintendent's witness stand explanation for her multi-discipline approach – that she did so because she wanted to "follow progressive discipline," - confusing. There was nothing "progressive" about such a contemporaneous four-pronged discipline. I find the District's piling on of multiple levels of discipline on Respondent for the same conduct akin to "a death by a thousand cuts."

Respondent was given no opportunity to correct her conduct and I find insufficient evidence to support the District's claim that Respondent will not reform her conduct in the future. Respondent's record of good performance and expressed interest in continuing her position and reforming her conduct establishes just the contrary. The District's discipline of Respondent was punitive in nature rather than corrective and I find in such regard that the District failed to satisfy the standard of just cause.

c. **Due Process / Double Jeopardy**

The statement contained in the April 8, 2019 letter of suspension given Respondent - that notice of the suspension would be forwarded to the School Board for potential further action - was inconsistent with the notice already given Respondent that the discipline for her conduct would be a withholding of her increment. Not only is the statement inconsistent with the principles and corrective goals of progressive discipline, by later exposing Respondent to further discipline in her annual summative evaluation for conduct for which she was already disciplined amounts to double jeopardy. Respondent here received five different disciplines for the same conduct; an Evaluative Memorandum, a PIP, a suspension, a withholding of increments and the instant effort to terminate. I find the District's multiplicitous discipline of Respondent amounted to double jeopardy and was contrary to basic concepts of due process.

d. **Appropriate Discipline**

Having found that termination of Respondent is disproportionate to the conduct found, I nevertheless find that Respondent's conduct was serious and warrants a comparative level of discipline, while giving her an opportunity to correct her conduct. Considering the entire record in this matter, I consequently will order that Respondent be promptly reinstated, that Respondent's increment be withheld for the 2019-2020 school year, that Respondent be given adequate time and support to successfully complete her PIP, and that Respondent serve a suspension of time served, said suspension to include any period when she was suspended without pay of no more that 120 days.

Conclusion

The Tenure Charges are sustained in part and dismissed in part.

Award - IMO Tenure Charges of Rene Chakmakian
Agency Docket Case No. 238-9/19

The subject tenure charges against Respondent are sustained in part and dismissed in part.

The District is ordered to:

1. Promptly offer Respondent reinstatement to her former position;

2. Reduce Respondents termination to a suspension from the date of her suspension to the date of this Award, said suspension to include the period of suspension already served without pay of no more than 120 days;

3. Withhold Respondent's increments for the 2019-2020 school year; and

4. Provide Respondent adequate support and time to successfully complete her Professional Improvement Plan.

Dated: February 19, 2020

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket Case No. 238-9/19 relating to tenure charges against Rene Chakmakian on Friday, February 19, 2020.

Timothy J Brown

New Jersey Commissioner of Education

Final Decision

Mindy Prosperi,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that she had not met the requirements for issuance of a Teacher of Computer Science Technology Certificate (CTE). The SBE filed a motion to dismiss in lieu of a response.

The ALJ found that: prior to the hearing date, a status conference was scheduled; during the conference, petitioner advised that after her review of new Department guidelines for issuance of the CTE, she was withdrawing her appeal. Accordingly, the ALJ concluded that this matter is no longer a contested case and ordered the case dismissed.

The Commissioner concurred with the determination of the ALJ herein; accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The petition was dismissed.

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

February 25, 2020

75-20

OAL Dkt. No. EDU 12060-19
Agency Dkt. No. 151-6/19

New Jersey Commissioner of Education

Final Decision

Mindy Prosperi,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petitioner has voluntarily agreed to dismiss the petition of appeal. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/20
Date of Mailing: 2/26/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 12060-19
AGENCY DKT. NO. 151-6/19

MINDY PROSPERI.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION STATE BOARD OF EXAMINERS,
Respondent.

Mindy Prosperi, petitioner, pro se

Michal Czarnecki, Deputy Attorney General for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 28, 2020 Decided: January 28, 2020

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Petitioner, Mindy Propseri, challenges respondent's denial of her application for issuance of a Teacher of Computer Science Technology Certificate. In lieu of an

answer respondent filed a Motion to Dismiss on August 16, 2019. Shortly thereafter the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. On September 6, 2019, the undersigned sent correspondence to petitioner requesting that she submit a response to respondent's motion by September 16, 2019. A telephone prehearing was conducted on September 17, 2019, wherein the parties agreed on a hearing date of November 15, 2019.

Prior to the hearing date, respondent's counsel requesting an adjournment to allow petitioner to review the new guidelines regarding the Computer Science Technology Certificate. The November hearing date was cancelled and a status conference was December 12, 2019. During the pendency of the conference, petitioner advised that she would be withdrawing her appeal. A letter was submitted from petitioner stating:

> "I am writing to request that we cancel the hearing about the above-referenced matter. I am pleased that the Department of Education released new guidelines regarding the CTE certificate I was previously denied." . . . .
>
> Said correspondence is attached hereto for reference.

Based on the foregoing, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

January 27, 2020
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: Jan. 28, 2020

Date Mailed to Parties:

ljb

103 Chestnut Street
Apt 111
Cranford, NJ 07016
December 14, 2019

Hon. Joann LaSala Candido
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Mindy Prosperi v. NJ Dept. of Education, State Board of Examiners
Agency Ref. No. 151-6/19
OAL Docket No. EDU 12060-2019N

Dear Judge LaSala Candido:

I am writing to request that we cancel the hearing about the above-referenced matter. I am pleased that the Department of Education released new guidelines regarding the CTE certificate I was previously denied. I can only hope by my persistence and your willingness to participate in this process has caused the Department of Education to review their guidelines.

Thank you for your help in this regard.

Mindy S. Prosperi
Technology Teacher
JFK-STEM High School

OAL Dkt. No. EDU 16272-18
Agency Dkt. No. 243-9/18

New Jersey Commissioner of Education

Final Decision

D.M.B., on behalf of minor child, K.B.,

Petitioner,

v.

Board of Education of the Township of Bernards, Somerset County,

Respondent.

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

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 2/25/20

Date of Mailing: 2/26/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16272-18 AGENCY DKT. NO. 243-9/18

D.M.B., ON BEHALF OF MINOR CHILD, K.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,

Respondent.

D.M.B., on behalf of minor child, **K.B.**, petitioner, pro se

John Croot, Esquire, for respondent (Adams, Gutierrez and Lattiboudere, LLC, attorneys)

Record Closed: January 21, 2020 Decided: January 23, 2020

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 13, 2018, 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 (C-1) indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes and does not require Board approval.

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

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

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

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

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

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

January 23, 2020
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/28/2020

Date Mailed to Parties: 1/24/2020

lam

APPENDIX

EXHIBITS

For the Court

C-1 Settlement Agreement

DMB. o/b/o K.B.
v.
BERNARDS TOWNSHIP BOARD OF EDUCATION

COMMISSIONER OF EDUCATION

AGENCY REF. NO. 243-9/18
OAL DOCKET NO. EDU 16272-2018

SETTLEMENT AGREEMENT

The parties, having conferenced the case with Judge Buono, and desiring to resolve this matter amicably, hereby agree as follows:

1) The respondent will provide the petitioner with copies of the four templates of the April 12, 2018 POL assessment for Honors Chemistry;

2) The petitioner agrees not to disclose the test templates or their contents to any third party;

3) Neither party admits any wrongdoing in this matter;

4) The petitioner releases the respondent for anything that has happened up to now, including any claims raised in this matter or the pending case before the governor record council and any claims related to Honors Chemistry or the POL test;

5) This matter is hereby dismissed;

6) The petitioner will immediately withdraw the matter pending before the NJ Goverment Records Council, GRC Complaint No. 2016-212.

Deborah Murray-Breston

Deborah Murray-Breston
Petitioner, Pro Se

1-21-20

Dated

John E. Croat Jr.
Attorney for Respondent

1/21/20

Dated

IN THE MATTER OF THE TENURE HEARING OF BLANCA GODINEZ, SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

BEFORE THE COMMISSIONER OF EDUCATION

STATE OF NEW JERSEY
Agency Docket No. 239-9/19

OPINION AND AWARD

(Issued: March 9, 2020)

ARBITRATOR
Joseph Licata, Esq.

HEARING DATES
December 3, 12, and 13, 2019

HEARING LOCATION
Paterson School District
Board of Education Offices
90 Delaware Avenue, Paterson, New Jersey

FOR THE SCHOOL DISTRICT
Deborah J. Bracaglia, Esq.
Ryan S. Carey, Esq.
APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.

FOR BLANCA GODINEZ
Ronald J. Ricci, Esq.
RICCI & FAVA, LLC

INTRODUCTION

The Petitioner, Paterson Board of Education ("Board" or "District") brought tenure charges against Respondent, Blanca Godinez, an elementary physical education teacher, for unbecoming conduct, incompetency, failure to perform duties, and other just cause within the meaning of N.J.S.A. 18A:6-10 et seq. In accordance with Public Law 2012, Ch. 26, known as "Teacher Effectiveness and Accountability for the Children of New Jersey Act" ("TEACHNJ")", once the Tenure Charges have been certified, the Commissioner of Education then determines if the Charges are sufficient to warrant dismissal or reduction in salary of the person charged and, if so, refers the case to an Arbitrator for further proceedings. N.J.S.A. 18A:6-16. Pursuant to such a referral in this case, the undersigned was designated as arbitrator to hear and decide this dispute.

THE SWORN TENURE CHARGES

1. Blanca C. Godinez ("Godinez" or "Respondent"), is employed by the Paterson Board of Education ("District" or "Petitioner") as a teacher holding tenure in that position.

2. During the 2018-19 school year, Godinez was assigned to work as a physical education teacher at two elementary schools, School Number 28 and Edward W. Kilpatrick School. Both schools house kindergarten through eighth (8^{th}) grade students.

3. As a Teacher in the District, Godinez's job functions and responsibilities include, but are not limited to: (1) "[d]isplay[ing] the highest ethical and professional behavior and standards when working with students . . . associated with the school[;]" (2) "[a]ssum[ing] responsibility for all students within the school, beyond those specifically assigned, [and] supervising in a fair and constructive manner to ensure the safety and well-being of all students[;]" (3) "[e]nsuring the safety and health of all students, notifying the administration of any unsafe conditions, following established procedures[;]" (4) "[s]erv[ing] as a role model for students[;]" and (5) "[a]dher[ing] to New Jersey school law, State Board of Education rules and regulations, Board of Education policies and regulations, school regulations and procedures, and contractual obligations."

SPECIFICATION OF CHARGES

CHARGE I

UNBECOMING CONDUCT AND/OR OTHER JUST CAUSE, INCLUDING WITHOUT LIMITATION INAPPROPRIATE USE OF PHYSICAL FORCE AND PHYSICAL CONTACT WITH A STUDENT, IMPROPER CORPORAL PUNISHMENT, INAPPROPRIATE LANGUAGE, PUTTING STUDENTS AT RISK OF HARM, AND VIOLATION OF RELATED STATE LAW AND BOARD POLICIES/REGULATIONS INCLUDING, BUT NOT LIMITED TO, N.J.S.A. 18A:6-1 AND BOARD POLICIES/REGULATIONS 3150, 3217, 3280, AND 3281.

4. All of the foregoing facts and allegations are incorporated by reference as if fully set forth herein.

5. On or about Wednesday, February 20, 2019, Godinez was teaching a third-grade physical education class at School No. 28 during 7th period. A substitute teacher and an aide were also in the gym during this class. When the class was ending and students were lining up to leave, at approximately 12:20 p.m., Respondent got into an altercation with J.W., a male special education student in the class. The altercation occurred in the presence of the remaining students in the class, all of whom witnessed the incident.

6. The video of the incident shows Godinez lying down on top of the student with her back facing the floor and the student on his stomach. Godinez had her arms on the child's legs and head area. The video further shows Godinez rolling on the floor to stay on top of the young man. Godinez was on top of the student for approximately one to two minutes.

7. The student was crying and yelling "you hurt me." In response, Godinez yelled "I did not touch you." She then asked the student to show her a red mark or a scratch.

8. The student continued to cry while on line and until he got to his next class.

9. Godinez had previously told the substitute teacher that when students are fighting or misbehaving, she tells them that if they do not stop, she will lay on them or tackle them. If the students continue, she lays on them.

WHEREFORE, the foregoing unbecoming conduct and other just cause warrant Respondent's dismissal in accordance with N.J.S.A. 18A:6-10.

CHARGE II

INCOMPETENCY, FAILURE TO PERFORM DUTIES, UNBECOMING CONDUCT AND OTHER JUST CAUSE INCLUDING, WITHOUT LMITATION, FAILING TO INTERVENE IN A STUDENT FIGHT,THUS PUTTING STUDENTS AT RISK OF HARM AND VIOLATION OF RELATED STATE LAW AND BOARD POLICIES/REGULATIONS INCLUDING, BUT NOT LIMITED TO, N.J.S.A. 18A:6-1 AND BOARD POLICIES/REGULATIONS 3150, 3217, 3280, AND 3281.

10. All of the foregoing facts and allegations are incorporated by reference as if fully set forth herein.

11. On or about Monday, February 25, 2019, a fight among two (2) male third-grade students occurred in the gym locker room at the Edward W. Kilpatrick School in Godinez's presence.

12. Reports were filed and the students were suspended.

13. Godinez failed and refused to intercede and/or attempt to break up the fight.

14. When Godinez was spoken to by Derrick Hoff, the principal of the Edward W. Kilpatrick School, she asserted that she was approximately five (5) feet from the altercation and that she was yelling at the students. She further stated that she did not attempt to intervene due to spinal issues that prevent her from breaking up a fight.

15. Godinez further asserted her belief that breaking up fights is not a teacher's responsibility.

WHEREFORE, the foregoing unbecoming conduct and other just cause warrant Respondent's dismissal in accordance with N.J.S.A. 18A:6-10.

THE ARBITRATION HEARING

A hearing was held at the Paterson Board of Education's Office on December 3, 2019, December 12, 2019, and December 13, 2019. The following witnesses appeared and gave testimony:

Board Witnesses

Nicholas Vanderlofske

Mr. Vanderlofske is employed as an elementary physical education teacher at Paterson School No. 28. This is his second year at School No. 28 and only his second year as a teacher. As of February 20, 2019, he had only been employed at School No. 28 for a few weeks. Mr. Vanderlofske testified to the February 20, 2019 incident (Tenure Charge I).

Nancy Castro

Principal Castro is the principal of School No. 28, a pre-K to 8th grade school. This is her eighth year as a principal, all at School No. 28. Principal Castro is tenured in the position. Since 1992, she has been employed by the Paterson School District in various capacities, including principal, vice principal and substance awareness coordinator. Principal Castro testified as to her involvement in the February 20, 2019 incident (Tenure Charge I).

Joaquin Perez

Mr. Perez is employed as a District Security Supervisor. He has been employed in Paterson for twenty-four (24) years and he has been in the role of supervisor for three years. Mr. Perez testified that he is in charge of the surveillance for the District. In that role, he is responsible for all of the video cameras throughout the district, including those in the gym at School No. 28. Mr. Perez produced a video recording capturing most of the February 20, 2019 incident (Tenure Charge I).

Anita Fulmore

Ms. Fulmore has been teaching in Paterson for twenty (20) years. She is a special education resource teacher at Edward W. Kilpatrick ("EWK") School. She services students from kindergarten through third grade through both in-class support and pullout support. She is also the HIB ("harassment, intimidation and bullying") specialist for the building. Ms. Fulmore testified as to the February 25, 2019 incident (Tenure Charge II).

Derrick Hoff

Principal Hoff is the principal of EWK Elementary School. He has served as principal of EWK since 2009/2010. He is tenured as a principal. He was first hired by the District in 2011. Principal Hoff testified regarding the February 25, 2019 incident (Tenure Charge II).

Luis Rojas

Mr. Rojas is the Assistant Superintendent for Human Resources, Labor Relations and Affirmative Action for the Paterson School District. Assistant Superintendent Rojas has been employed in Paterson since 2005. He has been in his current role as Assistant Superintendent since the fall of 2017. Assistant Superintendent Rojas testified to his investigation and other input regarding both the February 20 and 25, 2019 incidents (Tenure Charges I and II).

Respondent Witness

Blanca Godinez

Ms. Godinez is the Respondent in this matter. She is a physical education teacher in the Paterson School District. She has been employed in Paterson since 1999. She was assigned to teach fifty percent (50%) of her time at School No. 28 and fifty percent (50%) of her time at EWK School. She worked every other day at each school. Ms. Godinez testified as to both incidents and her overall employment record.

EXHIBITS

Exhibit No.	Date/Description of Document
	JOINT EXHIBITS
J1	Tenure Charges
J2	Answer
J3	Appt. Letter 10/3/19
J4	Stipulation Regarding Vide Evidence (B1)
	BOARD EXHIBITS
B1	DVD of 2/20/19 altercation at School No. 28
B2	Policy 3217 – Corporal Punishment
B3	Policy 3280 – Liability for Pupil Welfare
B4	Policy 3281 – Inappropriate Staff Conduct
B5	Regulation R 3281 – Inappropriate Staff Conduct
B6	Policy 5561 – Physical Restraint
B7	Regulation R 5561 – Physical Restraint
B8	Policy 3150 – Discipline
B9	Policy 3144 – Tenure Charges
B10	Regulation R 3144 – Tenure Charges
B11	2/21/19 email from Nick to Castro
B12	Handwritten Statement of Nick Vanderlofske
B13	Statements of J.W. and JL
B14	B. Thomas 1st Statement
B15	B. Thomas 2nd Statement
B16	School Incident Report

B17	Regulation R 3280 – Liability for Pupil Welfare
B18	Handwritten notes of Principal Derrick Hoff
B19	Behavior Detail Report regarding 2/25/19 incident at EWK
B20	2/27/19 email from Principal Hoff to Luis Rojas re: EWK incident
B21	Job Description 2001 – Elementary Teacher
B22	6/30/05 Increment Withholding
B23	6/25/10 Increment Withholding
B24	2/28/19 Email to Luis Rojas with Statement of Blanca Godinez.
BLANCA GODINEZ'S EXHIBITS	
R1	Job Description 3009 – Health and Physical Teacher
R2	2000/2001 observation and evaluations
R3	2003/2004 observations and evaluations
R4	2006/2007 observations and evaluations
R5	2008/2009 observations and evaluations
R6	2011/2012 observations and evaluations
R7	2012/2013 observations and evaluations
R8	2013/2014 observations and evaluations
R9	2014/2015 observations and evaluations
R10	2015/2016 observations and evaluations
R11	2016/2017 observations and evaluations
R12	2017/2018 observations and evaluations

The parties' representatives each submitted a post-hearing brief and a reply brief. Both parties were expertly represented by skilled legal counsel. The instant Opinion and Award is timely filed based on the March 10, 2020 extended deadline established by the Director of the Bureau of Controversies and Disputes.

STATEMENT OF THE ISSUES IN DISPUTE

Has the Paterson Board of Education established, by a preponderance of the credible evidence, that it has reason to terminate Blanca Godinez's employment pursuant to N.J.S.A. 18A:6-10? If not, what, if anything, shall be the remedy?

SUMMARY OF THE PARTIES' POSITIONS

The Position of the Board

The Paterson School District has proven that they have good reason and/or "just cause" to terminate Blanca Godinez's employment in the District. As the Arbitrator knows, a "just cause analysis" for purposes of determining whether an employee should be terminated from his/her employment has two components: is the employee "guilty as charged" of the charges instituted against the employee by the employer, and, if so, is

termination the appropriate remedy for the employee's actions? In this case, the answer to both questions is a resounding yes, and the Arbitrator must terminate Blanca Godinez's employment in the Paterson School District.

Tenure Charge I. The February 20, 2019 Incident Involving Student J.W.

In terms of whether Ms. Godinez is guilty as charged with regard to the February 20, 2019 incident in the gym at School No. 28, the video evidence is more than persuasive. Regardless of the excuses and finger pointing offered by Ms. Godinez, the fact remains that she was rolling around on the floor on top of a slightly built second grade special education boy for approximately two minutes. She continued to restrain and stay on top of the boy despite the young boy struggling to get out from under her and despite the young boy repeatedly saying she was hurting him. She can be seen at one point laying back side down on top of the boy, who was in a prone position, with her legs crossed as if she was relaxing on the beach. Her full weight appears to be on the young boy at that point, as well as at other points during the incident. Given her size, which is admittedly at least three times that of the young boy, she is lucky she did not seriously injure him. The video evidence is indisputable.

Quite frankly, absent any additional evidence or testimony, there can be no question that Ms. Godinez is guilty as charged with regard to Count I of the Tenure Charges. There is no universe where her conduct could possibly be deemed appropriate. As an experienced educator, Principal Castro testified that she has never seen anything like this during her lengthy career. She testified "honestly, I've dealt with every disability for special ed. including behavior disability and I've never witnessed an incident like this before. Assistant Superintendent Rojas also testified that in his years of experience, he has never seen a teacher engaging in such egregious conduct. Thus, two seasoned and experienced educators with over thirty years of experience both found this conduct beyond egregious and something they had never before seen.

On cross-examination, counsel for Ms. Godinez attempted to place blame on Mr. Vanderlofske and/or Ms. Thomas for failing to intercede. However, regardless of the actions or inaction of Mr. Vanderlofske and Ms. Thomas, the fact remains that Ms. Godinez was rolling round on the floor on top of the young, slightly built special education boy for approximately two minutes. There is no justification for her launching herself on top of the boy in the first place and there is certainly no reason why she remained on top of him for such a lengthy period. Similarly, Ms. Godinez's attempts to justify her actions by alleging that J.W. was swinging his backpack, that he threw his backpack and/or that he threw something else are unpersuasive. As both Assistant Superintendent Rojas and Principal Castro testified, there are no circumstances that would justify Ms. Godinez's actions as depicted in the video.

Ms. Godinez also faulted the District for not providing adequate training. Again, regardless of training, Ms. Godinez's actions were egregious and inappropriate. No training should be necessary to know that it is inappropriate for a teacher to throw herself on top of young slightly built special education second grader.

Finally, while it is the District's position that the video evidence, alone, is sufficient to find Ms. Godinez guilty of conduct unbecoming a public employee, her conduct clearly violated several State statutes, District job descriptions, policies and regulations and her removal is consistent with existing case law (citations omitted). Accordingly, the District asks the Arbitrator to sustain the allegations of Tenure Charge I.

Tenure Charge II. The February 25, 2019 Incident at EWK

It is the District's contention that they have proven that Ms. Godinez failed and refused to intervene in a fight in the gym at EWK School on February 25, 2019, less than a week after she is seen on a video rolling around on top of a young student at School No. 28. A preponderance of the credible evidence demonstrates that Ms. Godinez failed to intervene in a fight between two third-grade boys on February 25, 2019. Despite her assertion that she was yelling at the students to stop and that she was not seated in a chair when teachers Dana LeGarde and Anita Fulmore entered the gym, it is respectfully submitted that her testimony is wholly lacking in credibility. The fact that Ms. Fulmore and Ms. LeGarde had to enter the gym to break up the fight in the first place discredits Ms. Godinez's testimony that the fight lasted only a couple of seconds. While common sense would dictate that a teacher is responsible to intercede when students are engaged in a fight, multiple district policies, regulations and job descriptions explicitly require a teacher to intervene to stop or break up a fight among students.

As Assistant Superintendent testified, the following policies/regulations were violated by Ms. Godinez when she failed to intercede in the fight at EWK: Policy and Regulation 3280, B-3 and B-17 in evidence; Policy and Regulation 3281, B-4 and B-5 in evidence; and, Policy 3217, B-2 in evidence. District Policy 3217, Corporal Punishment, B-2 in evidence, provides in pertinent part as follows:

> A teaching staff member who:
>
> . . . .
>
> - Permits pupils to harm one another by fighting . . .
>
> Will be subject to discipline by this Board and may be dismissed. (Emphasis provided).

Similarly, District Regulation R3280, Liability for Pupil Welfare, B-17 in evidence, provides in pertinent part that "Teaching staff members are responsible for preventing and stopping pupil fights and assaults, whatever the cause or intent; if necessary, responsible assistance must be quickly summoned." (Emphasis provided).

Aside from the documentary evidence, both Principal Derrick Hoff and Assistant Superintendent Luis Rojas testified that it is a teacher's responsibility to break up or intercede in student altercations. When asked if based on his education and 20 years of experience, a teacher is responsible to intercede if students are fighting, Principal Hoff responded "absolutely." He testified that:

> There are a number of things that they can do. They can call for security. They can physically intervene and try to restrain the students. They also can summon another teacher who's in the gym to help them break up a fight.

He went on to note that he was concerned with Ms. Godinez's failure to intercede,

> Well, when you're talking about children fighting and you're talking about children's welfare, when you have an alteration, something – I mean building protocol calls for, you know, either intervene, call security, somehow some way – what we didn't want was a situation where based on what the kids described and the staff member described that the kids were in a circle observing this fight. Someone could have got very seriously hurt.

Similarly, Assistant Superintendent Rojas testified that he was absolutely concerned about the incident at EWK School on February 25, 2019:

> Because it's the responsibility of all adults no matter who you are, whether it's me all the way down to the cafeteria, if I'm in a building and see two students or I see a group of students fighting, it is my duty and my responsibility as an adult in district, as an employee of the Paterson Public School District to intervene and break up the fight to the best of my abilities.

The fact that this incident occurred less than a week after the altercation at School No. 28 makes it all the more troubling. On February 20, 2019, Ms. Godinez had no difficulty launching herself on top of a young special education second grader and rolling around on the floor on top of him for two minutes, purportedly because he posed a threat. Five days later, she asserts that it is not her responsibility and she is not capable of interceding to break up a fight between two third-grade boys. The incongruity of these two situations raises serious concerns about Ms. Godinez's ability to deal with difficult situations, not to mention her judgment.

For all of the foregoing reasons, the District maintains that it has proven that Ms. Godinez is guilty of the allegations set forth under Tenure Charge II.

The Appropriateness of the Removal Penalty

The District notes that whether or not termination is appropriate must be decided on the facts and circumstances of each case. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record, the effect of such conduct on the maintenance of discipline among students and staff and the likelihood of such behavior recurring. Arbitrators widely apply the following standard of review when asked to judge the appropriateness of a disciplinary penalty: If a preponderance of the evidence supports the disciplinary

allegations, an employer must also show that the penalty imposed is just in light of factors, such as: [1] the gravity of the offense; [2] the employee's overall record and length of service; [3] the provision of proper notice of rules and penalties; [4] an employer's adherence to progressive discipline, if applicable; [5] whether there has been lax enforcement of rules; and [6] whether the employer's actions or failure to act contributed to the disciplinary offense(s). Elkouri and Elkouri, How Arbitration Works, 5th Edition, pages 930, et. seq.

Applying the criteria to the current case must result in Ms. Godinez's termination. The first criteria, the gravity of the offense, is particularly relevant here. The egregious nature of Ms. Godinez's conduct on February 20, 2019 cannot be understated. It is difficult to comprehend any teaching professional acting in such a manner. In fact, two experienced and seasoned educators, Principal Castro and Assistant Superintendent Rojas, both testified that they were beyond appalled by her actions and that they had never encountered anything at all like this over the course of their lengthy careers. Ms. Godinez's failure to take responsibility for her actions, instead trying to place the blame on her colleagues, as well as her lack of remorse for her actions, only serves to underscore the fact that she is not fit to continue teaching. The discrepancies in her testimony were frequent and significant, casting serious doubt on her overall credibility.

Compounding matters, Ms. Godinez's failure to take any action to quell a fight between two of her students on February 25, 2019 was also an egregious act of misconduct. Similar to the February 20, 2019 incident, Ms. Godinez, this time through inaction, created a similar risk of harm to her students.

With regard to the remaining factors, the District does not dispute that Ms. Godinez's overall record of observations is good; however, it should be pointed out that she did have three prior increment withholdings based on attendance.

Applying factor 3, even absent any policies or regulations, common sense should dictate that the type of conduct exhibited by Ms. Godinez on February 20 and 25, 2019 here is inappropriate and unprofessional. Nonetheless, in this case, there are relevant and applicable policies and regulations, as well as State law which Ms. Godinez violated. Similarly, there is no question that Ms. Godinez was aware of the District's policies and regulations. In fact, she acknowledged on both direct and cross-examination that it was and is her responsibility to be familiar with and to abide any such policies and regulations.

Applying factor 4, it is the District's contention that given the egregious nature of Ms. Godinez's collective actions and inactions, progressive discipline is not necessary. Board Policy 3217, Use of Corporal Punishment, B-2 in evidence, explicitly provides that a teacher who "uses force or fear to discipline a pupil" and/or "touches a pupil in an offensive way even though no physical harm is intended" "may be dismissed." B-2. The policy clearly contemplates dismissal without regard to progressive discipline in a case involving corporal punishment. Regulation 3280 prohibits a teaching staff member from allowing students to fight without interceding. Ms. Godinez violated these important

policies on both February 20 and 25, 2019 thereby justifying the District's removal action.

As to factors 5 and 6, there has been no lax enforcement of the rules. Despite Ms. Godinez's belated attempt to attribute her actions to a lack of training, the District's actions in no way contributed to the conduct at issue. One should not need training to know that it is inappropriate and gross misconduct to launch oneself on top of a second-grade boy with special needs or to sit idly by while two students are fighting.

Ms. Godinez's February 20, 2019 conduct at School No. 28 was harmful not only to J.W., the student she launched herself on top of, but to the remaining students in that class, all of whom had to witness the altercation. These are young special needs students. As such, they are particularly vulnerable. No student should have to be subjected to such conduct by a teacher and no student should have to witness his or her friends being subject to such conduct. It would be difficult for any of those students to have any respect for Ms. Godinez after witnessing that altercation. In fact, they would likely be afraid of her. A similar concern exists with respect to the February 25, 2019 incident whereby Ms. Godinez inexplicably allowed two of her students to fight.

Finally, Ms. Godinez's actions in both instances were harmful to the reputation of the Paterson School District as well as to the morale of the remaining staff.

The District concludes: "Given the seriousness of the behavior, however, and the very real risk of injury to a student, as well as the risk of ridicule and embarrassment for the Paterson School District and its employees, there is simply no other sanction that can be imposed in this matter other than termination."

The Position of Blanca Godinez

Tenure Charge I. The February 20, 2019 Incident Involving Student J.W.

A teacher may not inflict corporal punishment on a student. N.J.S.A. 18A:6-1. However, a teacher may use such force as is reasonably necessary (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property. Similarly, Policy 3217, Use of Corporal Punishment, states that a teacher who uses force in violation of the policy will be subject to discipline and may be dismissed, "**except as such force or fear may be necessary to quell a disturbance threatening physical injury to others** . . ." [emphasis supplied].

In this case, Ms. Godinez is a long-term, 23-year employee with years of positive evaluations and discipline only for attendance. She testified that on February 20, 2019, she observed J.W.'s erratic behavior. He was screaming and yelling and proceeded to flip up a ride-on tiny tyke car and throw it at a group of toddlers. She told him no, and he

screamed and yelled and ran out of the doors. Upon exiting the locker room/storage area, Ms. Godinez saw a boy up against the bleachers screaming as J.W. was pushing and beating him with the backpack.

In the seconds that it took Ms. Godinez to approach, J.W. saw her, turned, screamed and flung the book bag at the bleachers, right past the face of the classroom aide seated and in the direction of other children. At that point, Ms. Godinez was afraid that one of the children was going to be knocked in between the benches and snap their necks, so when J.W. flung the book bag, she took him by the wrist. He took two big steps away from her, flung himself on the ground and took her down to the ground with him.

Despite the emphasis on cross-examination on the skip of the tape prior to Ms. Godinez on the ground with J.W., Ms. Godinez stated that it was a matter of seconds. She intimated that a lot had occurred, not in the sense of time – but rather a lot happened that she witnessed in those seconds.

On the ground, Ms. Godinez did not want him to get up and throw anything else and his behavior was escalating, so she turned and took hold of his lower body and his upper body on the ground. She reacted immediately to prevent any other danger to the students. When challenged about how she got to the floor, Ms. Godinez clarified that J.W. pulled me down with him. She further explained that what the report says about being on floor with back toward him described her position, not the act of getting to the floor. She reiterated that she "fell and then sat with her back towards him." Not one witness could identify any evidence to contradict Ms. Godinez's account of how she ended up on the floor.

These facts demonstrate that Ms. Godinez's behavior does not constitute corporal punishment. She acted in a manner necessary to quell a disturbance threatening physical injury to others in accordance with the policies. Corroborating the intention of Ms. Godinez's conduct is Ms. Thomas's statement. She observed Ms. Godinez "trying to restrain J.W. to hopefully calm him down" because "Ms. Godinez noticed how J.W. was acting and quickly tried to restrain him to avoid any other student to be potentially hurt." It was admitted by Principal Castro that she has no information to contradict Ms. Thomas' statement. Arguably the length of time Ms. Godinez restrained J.W. was too long, however, had the other teachers in the room intervened, it would not have been.

While on the ground, Ms. Godinez tried to hold her body in a way so that her weight was not resting on him. She did admit that there were times her weight may have been on him, but she did not intentionally or purposely rest her weight on him and made efforts to move around to redistribute her weight as he was moving on the ground.

When Principal Castro was asked what Ms. Godinez could have done differently, she stated that Ms. Godinez should have reached out to another adult or got security, or got an administrator. Ms. Godinez reacted immediately to an escalating dangerous situation. Was it the fault of Ms. Godinez that the two other adults kept their head down

and did not come to her aid? Rather, Mr. Vanderlofske stared at his watch for the entirety of the incident, never actually moving from his spot against the wall. His and Ms. Thomas' inaction allowed the incident to continue.

Moreover, when shown Policy 3217 during her testimony, Principal Castro stated that physical restraint is appropriate only in an "emergency," but that she did not qualify the February 20 event as an emergency. The language of the policy, however, does not use the word emergency. Rather, force is appropriate in a threat of physical injury to others. With respect to Principal Castro's testimony, generally, she was often evasive and unresponsive. In response to the question of "so your opinion is that if a teacher sees a fight and they yell stop or don't do that, that's appropriate, correct?" Principal Castro did not respond. Rather, she claimed that this was not a fight, that a child swinging a throwing a backpack at a group of students was not a fight. However, she finally admitted that a child could be injured being hit with a backpack, that it is not okay for kids to throw backpacks at each other, and that if a child was hit with a backpack and fell through the bleachers they could be injured. Nonetheless, her evasiveness, failure to concede that the policy does actually provide for instances where restraint or force is appropriate, and her overall failures relative to the investigation including not speaking with Ms. Godinez or Ms. Thomas demonstrate her lack of credibility.

The testimony of all witnesses is clear that Ms. Godinez never intended to inflict any harm on J.W. Ms. Godinez testified multiple times that she had absolutely no intent to injure J.W. In answering the question as to whether the conduct rises to the level of corporal punishment or what is the appropriate penalty, corporal punishment cases look to the intent of the teacher. And, unlike many of the cases which involve unjustified physical responses from teachers, here, the evidence shows that a response to the situation with J.W. was required and justified. At worst, this is a case of a "mistaken and misguided notion that restraint was called for." There is no evidence presented that the actions of Ms. Godinez constitute unbecoming conduct.

Rather, the actions of Ms. Godinez demonstrate a lack of training. Ms. Godinez has no prior instances of improper contact with a child in approximately twenty years. Ms. Godinez had returned to her teaching position for several days prior to being suspended, so there does not exist any issue with her being in the classroom or around children. Thus, neither Ms. Godinez's actions nor her reinstatement has any tendency to destroy public respect for government employees' confidence in the operation of public services. Accordingly, Ms. Godinez should be returned to her position of employment and provided with necessary training.

Tenure Charge II. The February 25, 2019 Incident at EWK

Principal Hoff admitted that Ms. Godinez said she did intervene in the fight – she yelled, which constitutes a verbal intervention. He agreed that one of the appropriate methods to stop a fight would be to yell. Surprisingly, when asked whether the policy requires that a teacher has to get "physically involved," Principal Hoff could not even recall what the policy said, though he apparently expects his teachers to know. He then

said he believed that a physical response was implied. It was asked, "so your position is that teachers are required to physically intervene in fights, not call security, not tell them to stop fighting; is that correct" – to which he answered "when children are at risk, teachers have a responsibility to intervene." However, he admitted that he was not aware whether the fight was serious or whether there were injuries. In fact, he stated he was not aware of the details of the fight at all. Therefore, it is obvious that Principal Hoff does not believe that teachers have to physically intervene in every student altercation. And he clearly did not have enough information to know one way or the other if physical intervention in this particular fight was required on February 25, 2019.

Principal Hoff further acknowledged that nowhere in the job description of a physical education teacher does it say that you have to have the strength to break up a fight. He admitted that Ms. Godinez told him that she did intervene by yelling. He admitted that Ms. Godinez did not say, nor imply, that she did not have a responsibility to intervene, but rather was referring to physically intervening a fight; and that getting physically involved was not in her job description, which he conceded the job description does not state. In fact, Principal Hoff conceded on numerous occasions that even though he wrote that she refused to intervene in fights between students, he meant that it was that Ms. Godinez may not physically intervene. The testimony concedes that she did intervene in some fashion on February 25.

Ms. Fulmore's testimony about maybe seeing Ms. Godinez sitting or that she was not able to recall if Ms. Godinez was standing (whichever may be the truth) does not contradict Ms. Godinez's account that she verbally intervened. As the record demonstrates, Ms. Godinez did intervene. Ms. Godinez observed the boys in a "scuffle." She was seated about five feet away from the boys when the fight started and Ms. Grundman was about ten to twelve feet away from the boys, both about the take attendance. Ms. Godinez got up, went to where the boys were, stood there and yelled at them to stop. In a matter of seconds, two other teachers, Ms. Fulmore and Ms. LeGarde came in from outside of the gym, and the boys stopped without physical intervention.

Ms. Godinez credibly explained that she did not feel that a physical intervention was warranted. She explained that in her opinion, it warranted no more than a verbal intervention as the fight had not escalated to a point where there was a danger in that room for any child. Moreover, the entirety of the fight lasted only a few seconds before it was easily ended by the presence of multiple teachers. With regard to the actions of the boys, Ms. Godinez did not observe the boys make real contact, they swung at each other but there was no punch. Ms. Godinez acknowledges, however, that she did tell Principal Hoff that she did not think *she* should take punches as "that situation didn't merit it."

Ms. Fulmore testified that she walked into the gym, said "what are you guys doing" and they all separated. Ms. Fulmore believes that when the boys saw her coming, they stopped fighting as she serves as a disciplinarian in the building. She said that no physical intervention was required to stop the fight, they easily separated. But she did recall that she put her hand on one of the boys fighting and Ms. LeGarde put her hand on the other and walked them to the office. To emphasize, it was not a physical intervention

that was required to, or that did, end the fight. With three adults standing around the two boys, they stopped. Ms. Fulmore and Ms. LeGarde and Ms. Godinez screamed at the students to stop. Right away, they stopped. No physical intervention ever occurred to break up the fight. Furthermore, nothing from Ms. Fulmore's testimony indicates that Ms. Godinez did not yell at the boys to stop. Verbal responses are considered interventions and the report prepared on the incident does not contradict that. The Report prepared indicates that "the fight broke up only when three teachers intervened, A.F., D.L. and B.G.

Whether the report submitted was in fact authored by her or not is not significant. Ms. Godinez agreed with the report's description of the incident. She does not recall submitting the report. Moreover, Ms. Grundman had told her that she could access Ms. Godinez's login to the system. Ms. Godinez believes that Ms. Grundman filled out the report. However, no one ever spoke to Ms. Grundman. In fact, the administrators did not even know that Ms. Grundman was in the room. That fact should so emphasize the inadequacy of the investigation – and thus, inadequacy of the tenure charges. And despite no mention of Ms. Grundman in the report, no witness testimony that Ms. Grundman did anything to intervene at all, when it was learned that she was in the room, *she* was never disciplined for failing to intervene.

For these reasons, Ms. Godinez submits that Tenure Charge II should be dismissed.

The Board's Decision-Making Process is Internally Inconsistent

The Board's position is inconsistent and they are singling out Ms. Godinez yet failing to discipline others involved in these matters. The Board's positions do not make sense and are inconsistent with the very policies it claims apply to this case. It is:

1. Admitted that physical intervention is appropriate if a child is beating another with a backpack and then throws a backpack at a group of children on the bleachers, but that Ms. Godinez's restraint to calm J.W. constitutes corporal punishment even though she was not disciplining him, had no intent to injure him, and he was not injured.

2. Claimed that Ms. Godinez's presence on the ground for one to two minutes with J.W. was too long, however, had Mr. Vanderlofske or Ms. Thomas not failed to intervene, it would not have been.

3. Admitted that Ms. Godinez intervened in the February 25 incident, but her level of physical response was too little and she should have physically broken the boys apart from each other – even though that ended up not being necessary.

4. Claimed that Ms. Godinez said she outright refuses to physically get involved in a situation between students due to her back problem, when she had

restrained J.W. a few days prior to prevent serious injury because that situation, not the February 25 incident, warranted.

5. Implied that Mr. Vanderlofske and Ms. Thomas were excused in not intervening or assisting Ms. Godinez and J.W. since Ms. Godinez did not ask call out for help – though they have no proof that she didn't.

6. Asserted that it is justified that Mr. Vanderlofske was not disciplined because he had no training – but it is not justified that Ms. Godinez had no training.

7. Argued that the other teacher in the room on February 25 did not fail to intervene because "she was taking attendance."

None of these positions make sense. The conduct attributed to Ms. Godinez does not rise to the level of unbecoming conduct, corporal punishment or any violation of policy. Moreover, the lack of uniformity in how the Board has determined culpability of Ms. Godinez as compared to her peers that were also involved in these two incidents undermines the validity of the tenure charges. Thus, the charges should be dismissed.

The Board's Failure to Train Employees in the Use of Physical Restraints Must be Considered

Not one administrator could identify any training that was given to its employees on the policies it claims were violated by Ms. Godinez. Specifically, Principal Hoff could not identify any specific training provided to Ms. Godinez and stated that he was not aware if she was ever trained with regard to how to break up a fight. Assistant Superintendent Rojas testified that there are absolutely no records of any training – that the department of professional development was dismantled due to budget cuts. Therefore, there is no documentation of any training given to Ms. Godinez in her twenty years of teaching.

Moreover, Ms. Godinez testified that she was not given training relevant to these incidents: "I don't have the training I see now that would have helped with this situation with that child." Ms. Godinez testified that she had never received any training from the Board of Education with regard to proper way to restrain a student, had never received training from the principals, nor was she ever sent to any instructional training on restraining a student. Most shocking is the fact that Mr. Vanderlofske testified that he has not ever received any training by the district before or following the February 20, 2019 incident. The very reason stated by the administrators as to why Mr. Vanderlofske was not disciplined in this case is because he may not have known what to do. He apparently still does not. But we do know that had he intervened, this event would not have gone on so long.

Because the Board cannot prove that Ms. Godinez had the proper training on the Policies alleged to have been violated, the tenure charges must be dismissed.

The District Violated the Same Policies Alleged to Have Been Violated By Ms. Godinez

Policy 3281 was admittedly violated by the School District. The violation by the District to do a proper investigation as required by the law not only presents itself as a clear violation of the law, but also affects Ms. Godinez's rights. Policy 3281 requires a full and impartial investigation. It is evident that the investigation in this matter was cursory, partial and incomplete. Assistant Superintendent Rojas admits that security was not involved in any investigations. And though he claims to have been designated to conduct an investigation per this Policy, he admits to not interviewing all witnesses, not preparing an independent report, never speaking to witnesses who could – or actually do – provide corroboration of Ms. Godinez's account of what happened, and did not even know that there was another teacher in the room on February 25 who witnessed the entirety of the event along with Ms. Godinez. Moreover, Mr. Vanderlofske was not disciplined for failing to intervene, Ms. Thomas was not disciplined for failing to intervene and Ms. Grundman was not disciplined for failing to intervene.

Policy R-3281, Exhibit B-5, states "the Director of Security will begin a prompt and thorough investigation of every report." Assistant Superintendent Rojas testified that security was not involved in the investigation and that no witness statements were taken by security. On page six of the policy, it says that "the Director of Security or designee will begin a prompt thorough and impartial investigation." Page 8 of the Policy continues that "the Director of Security or designee finding that an inappropriate staff conflict may have occurred after the preliminary investigation, requires a full investigation," "A full investigation will include, but not limited to interviews with the staff members."

Assistant Superintendent Rojas acknowledged the requirements of these policies in his testimony. However, he denied that he had a responsibility to conduct interviews but instead just gathered the others' information. Assistant Superintendent Rojas failed to conduct interviews in accordance with the policy.

The Policy further states on page six that "upon the conclusion of the interviews and review of information, testimony, evidence, the Director of Security or designee will prepare a written report to the Superintendent of Schools. The following is his testimony.

> Q. Did you write a written report about your investigation of both incidents to the Superintendent of Schools.
>
> A. No..."
>
> Q. All right, so this would be a violation of the policy, correct?
>
> A. I don't know that it's a violation. I think its *de minimus*, but okay.

The very person appointed to ensure that an adequate and impartial investigation was conducted, and who failed to conduct that investigation, justified his admitted violation and failure by stating that it was *de minimus*. The District's violation of this policy is not *de minimus*. Its' violation led to tenure charges which seek the removal of Ms. Godinez's employment and impacts Ms. Godinez future.

The District's violation has tainted the investigation and the process through which the instant tenure charges have issued. For that reason, the tenure charges must be dismissed.

In the Alternative, the Penalty Should Be Reduced Substantially

Whether an incident is sufficient to warrant removal requires application of the following factors: whether the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment, the nature and gravity of the offenses under all of the circumstances involved, any evidence as to provocation, extenuation or aggravation, the teaching record and ability, the disciplinary record, and any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system (citations omitted).

The evidence in this case shows that there was no premeditation or prior animus between Ms. Godinez and J.W. While the allegation is that Ms. Godinez's actions may have gone too far, there is no charge that she acted in a cruel or vicious manner. Further, as set forth above, the testimony was consistent that Ms. Godinez did not act with the intent to punish or to inflict corporal punishment.

There has been no proffer that the return of Ms. Godinez to her teaching position would have any negative impact on the maintenance of discipline or proper administration of the school. In fact, Ms. Godinez had returned to work after the February 20, 2019 incident and taught her classes for several days without issue.

Further mitigating circumstances are evident in Ms. Godinez's disciplinary history. In her many years of teaching, the only discipline consists of increment withholdings which solely resulted from attendance issues related to her recovery for injuries she suffered at work. Those injuries resulted in contested workers compensation cases which were ultimately resolved by way of monetary settlement to Ms. Godinez.

Ms. Godinez's teaching evaluations are nothing but positive with absolutely no reports that Ms. Godinez had ever acted in an inappropriate, improper or in a harsh manner to students in her twenty years of teaching.

In light of the foregoing, Ms. Godinez submits that the Board has failed to prove the tenure charges and, therefore, the tenure charges must be dismissed. In the alternative, should there be a finding against Ms. Godinez, she respectfully requests that only a minimal penalty be imposed.

SYNOPSIS OF FACTS

1. During the 2018/2019 school year, Blanca Godinez was employed as an elementary physical education teacher assigned to work fifty percent (50%) of her time at School No. 28 and fifty percent (50%) at EWK.

2. In February 2019, Nicholas Vanderlofske was a permanent physical education substitute assigned to School No. 28. He was hired in late January 2019.

3. School No. 28 serves approximately 450-500 students divided by a gifted and talented program (grades 2-8); a pre-K to K program for local residents; and a special education program for grades K-2.

4. On or about February 20, 2019, it is alleged that Mr. Vanderlofske and Ms. Godinez were teaching two groups of K-2 special education students in the gym at School No. 28. Combined, the two groups totaled anywhere from 25-30 students. Ms. Godinez was responsible for her class of Kindergarten students who started gym class before Mr. Vanderlofske arrived with his first and second graders. Mr. Vanderlofske testified that he and Beverly Thomas (paraprofessional) were responsible for his students, including J.W. February 20, 2019 was a half day in Paterson. The class at issue was the last period of the day prior to dismissal, so the children had their coats and backpacks with them.

5. The incident in question began with Ms. Godinez's concern about J.W.'s alleged aggression toward other students. First, it appears that J.W. pushed a Little Tykes car into the equipment/locker room where other students were potentially in harm's way. Ms. Godinez allegedly admonished him inside the room. Second, after almost one minute of no acting out by J.W., a different student swings his backpack at J.W., hitting him in the back and causing him to fall down on top of a bleacher bench. Ms. Godinez does not see this happen. Instead, Ms. Godinez only observes J.W. tossing his backpack at the student who is trying to run away up the bleachers. The backpack does not come close to hitting any other student or staff member.

6. In response to observing J.W.'s second act of misbehavior, Ms. Godinez, employing a technique she previously shared with Mr. Vanderlofske, physically restrains J.W. for about two minutes by laying on top of him with her back facing his back, her knees bent and, at times, holding his leg with one hand and his shoulder/arm area with the other as he was laid out on the gym floor. The incident also extends to Ms. Godinez verbally addressing J.W. in animated fashion for almost one minute after the physical restraint had ended. The incident also involves several students who approached Ms. Godinez and J.W., one or two of them trying to help him and two ostensibly attempting to calm him afterward. Most of the incident, with one important gap (i.e., how Ms. Godinez ended up on the floor with J.W.) is captured by video surveillance, a DVD of which was played at the hearing and introduced in evidence as Exhibit B1.

7. Mr. Vanderlofske spent most of his time during the incident looking at his apple watch - trying to pair it with a speaker for the first time. He was not actively supervising or co-supervising the combined class immediately before or during the incident. Prior to the incident, he was not supervising his students as they gathered in the bleachers ahead of student dismissal. And, he did not intervene at all in the incident between Ms. Godinez and J.W. However, Mr. Vanderlofske did hear J.W. say his stomach hurt and observed J.W. crying.

8. Ms. Thomas did not testify at the arbitration hearing. She is observed on the video recording exercising control over her students who were seated in the bleachers awaiting student dismissal; however, she did not intervene in the incident between Ms. Godinez and J.W.

9. After the class ended, Mr. Vanderlofske spoke to his mentor, physical education teacher, Brian Olsen, regarding the incident he had witnessed. Mr. Olsen advised Mr. Vanderlofske that he should report what he observed to Principal Castro. Mr. Olsen and Ms. Godinez were not on good terms with one another at that time.

10. On February 21, 2019, Mr. Vanderlofske reported two incidents to Principal Castro: (1) that Ms. Godinez had emailed him a video clip of his performance (for reasons unclear) and (2) the February 20, 2019 incident involving Ms. Godinez and J.W. On the same date, Vanderlofske submitted to Principal Castro, by email, a brief description of his observations (Ex. B11).

11. Shortly after February 21, 2019, Vanderlofske met with Assistant Superintendent/HR Luis Rojas regarding the incident. Pursuant to Rojas' request, Vanderlofske submitted a handwritten incident report to him (Ex. B12). In both reports, Vanderlofske states that J.W. was crying and saying "you hurt me" to Ms. Godinez after Godinez got off of him. No one took J.W. to the nurse on February 20, 2019. Ms. Godinez did not report the February 20, 2019 incident involving J.W. to anyone.

12. In both Vanderlofske's report to Rojas and in his testimony, Vanderlofske states that Ms. Godinez – prior to February 20, 2019 – informed him that she will threaten to lay on students if they do not stop acting out and if they don't stop, she will lay on them. On cross-examination, Vanderlofske acknowledged that he never witnessed Ms. Godinez take any such action prior to February 20, 2019.

13. After meeting with Vanderlofske and hearing his depiction of the incident, Principal Castro requested the video from the gym during the time at issue. She was "mortified" by what she saw. Immediately after viewing the video, Castro took J.W. to the nurse; reported the incident to her supervisor, Assistant Superintendent Cicely Warren; called J.W.'s aunt, who is his guardian because his mother passed away; and, called Child Protective Services. No action was taken by the Institutional Abuse Unit of Child Protective Services.

14. Principal Castro had her assistant principal interview J.W. and another student, J.L., who is seen on the video trying to assist J.W. get out from under Ms. Godinez. Both statements were entered into evidence as Exhibit B13.

15. Pursuant to Principal Castro's request, Security Supervisor Joaquin Perez downloaded the February 20, 2019 video of the gym at School No. 28. He did not alter the video in any manner. The jumps in the video are attributed to a bandwidth issue at School No. 28. A critical frame is missed due to a fifteen-second skip, i.e.; the video does not capture how Ms. Godinez and J.W. ended up on the gym floor.

16. On February 25, 2019, at EWK School, Ms. Godinez was supervising her gym class and sharing the gym with Katherine Grundman, who was supervising her class. The EWK gym in question was described as the "small gym"; i.e., about the size of a dance studio. Both classes involved general education third-grade students.

17. Two staff members in the hallway heard a commotion inside the gym. Anita Fulmore also heard the commotion as she was standing by a nearby elevator. Ms. Fulmore and teacher Dana LeGarde, who also heard the commotion, entered the gym and found two young students engaged in an awkward fight (pushing or wrestling and throwing errant punches). Many students were gathered around watching.

18. Ms. Grundman, who was supervising her class and sitting further away from the incident than Ms. Godinez, did nothing verbally or physically to quell the conflict. It is alleged that Ms. Godinez, who was sitting closer to the two students did nothing either. Ms. Fulmore testified that to no avail, she twice asked Ms. Godinez to get up and write an incident report. For a third time Ms. Godinez was requested to do so – this time by Ms. LeGarde. Ms. LeGarde allegedly informed Ms. Fulmore that Ms. Godinez replied to her that she "does not have a computer". It is alleged that the remaining students were chanting and yelling that Ms. Godinez did not do anything. One of the participating students being escorted to the main office by Ms. Fulmore informed her that Ms. Godinez "just let us fight".

19. Ms. Fulmore and Ms. LeGarde broke up the fight by way of verbal commands and slight physical contact, i.e., holding an arm of each student.

20. Ms. Godinez claims that she got up from her chair while taking attendance and verbally commanded them to stop. She further claims that due to an exacerbation of an injured back (stemming from the February 20, 2019 incident) she could not physically intervene. Ms. Godinez further testified that she worked with both teachers to quell the fight.

21. EWK Principal Derrick Hoff subsequently met with the parents of the students involved in connection with the School's student discipline procedures. The parent of that student complained, based on information from her son, that Ms. Godinez just sat there and watched them fight.

22. There is a phone in the gym at EWK. The phone is located in the gym office which was adjacent to the area where the students were fighting. Security was not called to the gym on February 25, 2019.

23. On February 27, 2019, Principal Hoff met with Ms. Godinez regarding this incident. At that time, Ms. Godinez asserted that she was five feet away from the fight and that she was yelling at the students to stop.

24. Ms. Godinez also told Principal Hoff that she did not physically break up the fight due to her ADA accommodations and her back issues. She told him that she did not believe that breaking up fights was part of her responsibility as a teacher. Principal Hoff took this to mean that Ms. Godinez did not believe she was responsible at all to take any action. Ms. Godinez insists that she was referring to taking physical action to break up fights. Principal Hoff testified as to his concerns over Ms. Godinez's alleged failure to intervene in the fight.

25. Board Policies, Board Regulations as well as the Job Descriptions for an elementary teacher and a physical education teacher all require adult staff to intervene in student altercations.

26. Principal Hoff was not aware of the February 20, 2019 incident when he reported the February 25, 2019 incident at his school to Assistant Superintendent Rojas.

27. After conducting his meetings, Principal Hoff prepared an email to Rojas "requesting guidance in creating a safety plan indicated for a teacher that would not break up an altercation" due to physical restrictions, i.e., he was asking for guidance on a corrective action plan.

28. Rojas investigated both the February 20, 2019 incident at School No. 28 and the February 25, 2019 incident at EWK School.

29. Rojas interviewed Ms. Godinez with regard to both incidents. When asked why she did not intervene in the fight at EWK School on February 25, 2019, she related that she did not want to get hurt, that she had an ADA accommodation and that she did not believe it was her responsibility to intervene. Ms. Godinez was then shown the video of February 20, 2019 for the first time to refute Ms. Godinez's claim of physical incapacity to break up a fight.

30. In explaining why she was on top of J.W. for so long, Ms. Godinez faults J.W. and the inactions of Mr. Vanderlofske and Ms. Thomas – both of whom were in charge of J.W. that day. Ms. Godinez's statement relates that J.W. threw himself on the ground and was flailing around, at which point she sat down with her back facing him and began to restrain him. Ms. Godinez further explained that J.W.'s continuing aggression toward her, kicking, hitting, etc. led her to believe that he would be a danger to other students if she had let him go sooner than she did. Once J.W. released tension,

Ms. Godinez explained, she let him up. Ms. Godinez added that she was aware of a technique whereby a teacher can calm a student by way of a reverse bear hug.

31. Both Principal Castro and Assistant Superintendent Rojas testified as to their jointly held belief that nothing justified Ms. Godinez's conduct toward J.W. on February 20, 2019.

32. Based on both the February 20 and 25, 2019 incidents, Assistant Superintendent Rojas made a recommendation that the Board certify tenure charges against Ms. Godinez. Rojas testified that 95% of his decision was based on the video of the February 20, 2019 incident.

33. Ms. Godinez has had three prior increment withholdings related to absenteeism.

34. Ms. Godinez has received satisfactory evaluations from 2001 through 2018 (Ex. R2-R12). The Board provided no evidence to suggest that Ms. Godinez committed any misconduct toward students in the past.

FINDINGS AND DISCUSSION

PART I

Tenure Charge I
The February 20, 2019 Incident Involving Student J.W.

The Board Has Demonstrated
That Ms. Godinez Engaged In
Conduct Unbecoming in Violation of
N.J.S.A. 18A:6-10 and Corresponding Board Policies.

In this case, the best evidence of what actually transpired between Ms. Godinez and J.W. on February 20, 2019 is captured by the video evidence and by the testimony and statements of witnesses deemed consistent with the video evidence. To begin with, divided into frames for ease of reference, the following findings of fact are set forth in the form of a summary of the relevant video evidence:

EXHIBIT B1 VIDEO 11:50 – 12:07[1]	
Frame No./Time	**Depiction**
1. 11:57:53	Prior to this timeframe, Ms. G. is observed supervising her own class of students believed to be of kindergarten age.[2] There are approximately nine such students riding tricycles and one student playing basketball. There are two other adults in the gymnasium. --- There is no sign of student conflict.
2. 11:57:54	A second class consisting of older students including J.W. enters the gymnasium. This is Mr. V's class.
3. 11:59:12	Ms. G.'s kindergarten class continues to ride tricycles. One student is observed riding in a "Little Tikes" Car. Mr. V's class are viewed sitting down peacefully on the side of the gym in front of the bleachers. Three adults (not Ms. G.) are observed supervising the larger students who are sitting on the sidelines. J.W. is dressed in dark clothing wearing dark/black sneakers. He is observed as a comparatively slight or small student within this grouping.
4. 11:59:24 – 11:59:57	J.W. gets up from being seated with the rest of his class and walks toward the teachers' table. One of the adults, believed to be a classroom teacher who ushered the larger class of students in, directs J.W. to be seated with the rest of his group and he complies.
5. 12:00:11	The classroom teacher walks into the gym equipment/locker room and Ms. G heads toward the teachers' table. The classroom teacher is no longer captured by the video. It is presumed she left the gym.
6. 12:01:15	Ms. G is observed sitting in a fold up chair next to the bleachers with the two other adults seated next to her on a bleacher bench. Ms. G. continues observing her class of younger students as they ride around on tricycles, one on a scooter, and another in a Little Tikes car. The student on a scooter is observed stopped and saying something to J.W. from approximately five feet away.
7. 12:01:55	Mr. V. and the classroom teacher enter the gymnasium. In addition, three other adults, including Ms. G. are seated at the sidelines. --- It appears a total of at least five adults are in the gymnasium at this point. Mr. V.'s class continues to sit on the sidelines in front of the bleachers and Ms. G.'s class continues riding tricycles.

[1] It may be necessary to look back and/or ahead by a few seconds in order to view the depiction in full.
[2] Mr. Vanderlofske is referred to as "Mr. V.", Ms. Godinez is referred to as "Ms. G." and Ms. Thomas is referred to as "Ms. T.".

8. 12:02:31	Mr. V. is instructing his class. Ms. G.'s student who is riding the scooter is once again observed saying something to J.W. and another student.
9. 12:02:17	Ms. G.'s students continue to ride around the gymnasium on tricycles, one student on a scooter and one in a Little Tikes car. Mr. V's class continues to sit on the sidelines of the gym supervised by two adults. Ms. G. is observed still seated next to the two adults while talking to a larger-sized student wearing a yellow shirt.
10. 12:03:15	Mr. V. begins walking toward the opposite end of the gym and his students get up from sitting on the sidelines.
11. 12:03:29 – 12:03:36	J.W. is observed running across the gymnasium by himself toward the direction of Mr. V. J.W. is viewed walking behind Mr. V on the opposite side of the gym from left to right until both are out of video range. Ms. G and two other adults are still seated.
12. 12:04:40	Mr. V.'s students are out of the video frame, presumably playing on the other side of the basketball court. Ms. G.'s students are observed continuing to ride the tricycles, one student riding a scooter and another student in a Little Tikes car. Ms. G. and the two other adults are still seated observing the class. Mr. V. is observed walking into what is believed to be an office and he is not supervising students.
13. 12:06	Mr. V. is observed sitting down on the court near the bleachers speaking to one student who is not participating in any of the activities. Ms. G. and the two adults continue to be seated by the bleachers observing the combined class. J.W. has not yet reappeared in view of the surveillance camera.
14. 12:06:55	Mr. V. is observed still talking to the student who is not participating in the activities. J.W. appears in the frame chasing a stray basketball from the other side of the court.
15. 12:07:17	Mr. V. appears to have convinced the student to begin to get up to participate in gym activities. **END OF FIRST VIDEO CLIP.**
VIDEO CLIP TWO **12:07 – 12:23**	
16. 12:08:24	Mr. V. is viewed at the teachers' table attempting to do something. His back is toward the student activities. Ms. G. and two other adults are still seated by the bleachers conversing with one another. The students are interacting without incident. J.W. is not captured by this camera. Presumably, he continues to play basketball with the other students on the opposite side of the gym.
17. 12:09:15	Ms. G. changes her positioning from sitting in a chair squared up with her back supported to a 45° angle, legs straight and feet crossed (a more relaxed position with no lumbar support). Mr. V. continues standing at the teachers' table with his back facing the student activities. The two other adults continue to be seated next to Ms. G. as the three continue to talk with one another.

18. 12:10:06	Mr. V. has now turned his body toward the class while still standing at the teachers' table. Ms. G. and the two other adults remain in the same position. Ms. G. is still seated in a slanted position in the chair with her legs straight, feet crossed.
19. 12:11:01	One of the adults seated at the bleachers is witnessed taking another student out of the gymnasium. Ms. G. stands up and begins to walk around the basketball court. Mr. V. is still standing at the teachers' table with his back now facing the student activities. J.W. is not depicted by this camera.
20. 12:11:10	Mr. V. is now facing the student activities. Ms. G. has been walking around stretching. Another adult walks toward the opposite end of the gym and then returns to the teachers' table where Mr. V and Ms. G are conversing with one another. J.W. is still not depicted in this video.
21. 12:13:12	Mr. V. is standing in front of the teachers' table looking at his watch and facing the class. Ms. G. and two other adults coordinate the lineup of her students sitting on tricycles by the equipment/locker room. J.W. does not appear in this video frame.
22. 12:14:18	Ms. G. is still in the equipment/locker room. Students are bringing their tricycles into that room. Another adult is viewed standing outside of that room. Mr. V. is viewed slightly before the half-court line pointing his finger toward the equipment/locker room.
23. 12:14:30- 12:14:39	Ms. T. enters the gymnasium and sits in the bleacher row immediately next to Ms. G's chair.
24. 12:14:41	After several seconds of Mr. V. directing students from the opposite end of the basketball court to head toward the locker room, J.W. is viewed running behind the Little Tikes car and jumping on top of it.
25. 12:14:43	J.W. is viewed with both feet on the Little Tikes car frame and gliding along the basketball court.
26. 12:14:46 – 12:14:57	J.W. is riding in the direction of a girl wearing white pants with an off-white shirt. She jumps out of the way from J.W.'s path in order to avoid a potential collision. J.W. circles back and starts quickly pushing the Little Tikes car toward the equipment/locker. He jumps on the back of it and heads toward the equipment/locker room at a fast clip. He almost hits a girl who is taking a drink from the water fountain. Ms. G. is still inside the same equipment/locker room.
27. 12:15:35	A student wearing a reflective yellow/green and grey shirt is witnessed knocking another student over as he runs out of the equipment/locker room and onto the basketball court. Ms. G. and J.W. are still inside the equipment/locker room with other students as well.

28. 12:15:49 – 12:16:12	A skip in the video.
29. 12:16:12- 12:16:15	J.W. is observed walking toward the bleachers and talking to other students. He is not running toward the bleachers. It appears that J.W. was inside the equipment/locker room from 12:14:57 to 12:16:05 or thereabout. Ms. G is still inside the equipment/locker room.
30. 12:16:15- 12:16:22	Ms. G. comes out the equipment/locker room. J.W. is beginning to sit on the bleachers. Mr. V. is facing the bleachers talking to one of the teachers in the direct vicinity of J.W.
31. 12:16:23- 12:16:32	Ms. G. walks out of the equipment/locker room and begins to look around the basketball court. Mr. V. is still facing the bleachers by the students. J.W. has just climbed up to the top of the bleachers. Other students begin lining up for dismissal. The student with the yellow shirt is observed putting his jacket on.
32. 12:16:33	Ms. G. is now standing next to the students who are lined up for dismissal (by the teachers' table). Mr. V. continues to talk to a student facing the bleachers. J.W. is out of sight. --- Ms. G. is clearly not looking for J.W. at this time.
33. 12:16:44	Ms. G. walks up to the teachers' table with her back facing the students and picks up a cup. Other students are getting ready to leave for dismissal. Mr. V. is standing on the basketball court talking to the student in the yellow shirt who is putting on his coat. Ms. T. remains in the view of the camera. J.W. is not captured by this camera.
34. 12:16:47	Ms. G. is observed putting on the coat which she picked up from the teachers' table. J.W. is now seated on the third bleacher row next to a student wearing a light-blue hooded jacket or sweatshirt. He is not causing any trouble. Mr. V. is facing Ms. G., Ms. T. is seated in the bleachers and students continue to prepare for dismissal.
35. 12:16:54	J.W. has just walked to the end of the bleacher row and stepped down toward the line for student dismissal. Ms. G. is observed talking to Ms. T. Mr. V. is observed walking away from the bleachers toward the office.
36. 12:17:03	J.W. comes back into the picture and is standing several feet in front of the teachers' table facing the students who are still sitting in the bleachers. Ms. G. is standing with her back facing J.W. speaking to Ms. T. Mr. V. is off by the equipment/locker room looking at his watch.
37. 12:17:17- 12:17:23 and 12:17:23.05 to 12:17:38	A larger student wearing a light-blue sweatshirt (described before) is viewed hitting J.W. with his backpack. J.W. falls on top of the bleachers as a result of the impact. It does not appear that Ms. T. or Ms. G. witnessed J.W. being hit. J.W. stands up with a grey backpack in his left hand. The student begins to scramble up the bleachers as

	J.W. stares at him (12:17:23:014). Ms. G's testimony that J.W. threw the backpack (most likely at this student) is supported by frame 12:18:21 which shows a female student wearing a green winter cap and green backpack picking up J.W.'s backpack in between the third and fourth rows of the bleachers. Notably, this is precisely where the boy who hit J.W. with his backpack is viewed sitting at the time Ms. G is first observed on top of J.W. (12:17:39). At the time J.W. likely threw his backpack at the student in the area described, there did not appear to be any other student sitting above the second row of the bleachers (12:17:23). Also, Ms. T. was standing in front of the bleachers at the time that J.W. likely threw his backpack. As to the weight of the backpack, at 12:19:44:15 and 12:21:14:09, a good view of J.W.'s backpack shows it is relatively empty after he removes a denim jacket and a lightweight jacket.
12:17:23- 12:17:39	There is a skip in video surveillance from the point where Ms. G. is first observed walking toward the site of the interaction between J.W. and the student who hit him with the backpack to the point where Ms. G is witnessed on top of J.W. The video does not show how Ms. G. or J.W. wound up on the floor together.
38. 12:17:39- 12:17:41	Ms. G. is depicted in a kneeling/leaning forward position covering J.W.'s entire body and holding onto him. J.W. appears to be initially lying on his stomach or side. J.W.'s backpack is not in the frame. (Note: It does not appear until after a break in footage at 12:18:43:15). Ms. T. is standing approximately seven feet away speaking to the class and paying no attention to Ms. G. and J.W. Mr. V. continues to look at his watch and is standing by the teachers' table facing the bleachers with his head down. J.W. has nothing in his hand or any object close to him for that matter while Ms. G. is laying on him.
39. 12:17:42- 12:17:44	Ms. G. is now covering J.W.'s bottom half as he attempts to squirm out on his stomach. Mr. V. is standing at the teachers' table with his head down looking at his watch. Ms. T. is speaking to the students who are seated in the bleachers. It appears that a couple of students are now glancing at the activity between Ms. G and J.W.
40. 12:17:45	In response to J.W. squirming out from under Ms. G., Ms. G. rolls over onto her back and pins J.W. face down so that she is now fully covering him back to back. While her left hand is holding J.W.'s leg, her right arm is still up in the air and the full weight of Ms. G.'s upper body is likely on top of the middle of J.W.'s back. J.W. has nothing in his hand while Ms. G. is laying on him.
41. 12:17:46-	Ms. G. is laying back on top of J.W. J.W. is still face down, but he's trying to push up with his arms. Ms. G. now has her legs straight and

12:17:54	feet crossed. Her left hand appears to be holding J.W.'s leg. Her right, upper arm appears to be holding down J.W.'s shoulder and her right hand is on the gym floor, palms facing downward. Ms. T. is not paying attention to Ms. G and J.W. She is addressing other students with her back facing Ms. G. and J.W. Mr. V is viewed looking up from the teachers' table and toward the area of Ms. G and J.W. Mr. V. is still holding his watch. One student, a young female, is captured viewing the incident from the nearby bleachers. J.W. has nothing in is hand or any object nearby while Ms. G. continues to lay on him.
42. 12:17:55-12:18:02	Ms. G. appears to be momentarily bracing herself up by her elbows so as not to put her full weight on J.W. Ms. T. is standing inattentive by the student dismissal area. Mr. V. remains by the teachers' table while still holding his watch. All of the students who were still seated in the bleachers are now looking at the interaction between Ms. G. and J.W. J.W. appears to be more on his side than his stomach at this point.
43. 12:18:03	Ms. G. is still in the same position on top of J.W. She does appear to be bracing her weight with her elbows. J.W. is still on his side. A young female student now walks over to Ms. G. and J.W. She is looking directly at them as if trying to decipher what is going on. Other students in the bleachers are observing the same thing. Ms. T. appears to be caught up with student dismissal and is standing next to Mr. V at the teachers' table. Mr. V. is not focused on Ms. G. Instead, he is looking down at his watch.
44. 12:18:10-12:18:11	J.W. weakly swats at Ms. G. with his right hand as Ms. G is observed in a more upright position while still bracing J.W. with some of her body weight. Two male students walk toward the bleachers and observe Ms. G and J.W. The aforementioned female student is still seated in the bleachers and still looking on. Ms. T. is at the opposite end of the bleachers near the teachers' table. It is not certain whether she is looking at the incident. Mr. V. has his head down and is looking at his watch.
45. 12:18:12-12:18-20	J.W. appears to almost make a brief escape by crawling out from under Ms. G. on his stomach. However, Ms. G. responds by rolling over J.W.'s lower half with her back to keep him pinned down. J.W.'s face is toward the bleachers. Two students are still observing the interaction of Ms. G. and J.W. Mr. V. is still at the teachers' table looking down at his watch and another device. Ms. T. is by the student dismissal line. She now appears to be directly observing the incident. There is no sign that Ms. G. asked for help or that help was offered.
46. 12:18:21-12:18:24	Ms. G., on her side, manages to slide up more on top of J.W. so as not to allow him to escape. At this time, three students, including the female student and the other student who have been observing the incident for quite some time are standing close to Ms. G. and J.W.

	Ms. T. is looking at Mr. V. Mr. V. has his head down by the teachers' table and is looking at his watch.
47. 12:18:24-12:18:36	At 12:18:24, a girl wearing a green winter hat and green backpack is observed bringing J.W.'s backpack to him. The student who was wearing the yellow shirt is now wearing a blue jacket with a backpack. He walks over and sits down in the chair that Ms. G. was sitting in earlier. Ms. G. is partially off and partially on J.W. J.W. is reaching his hand out towards the student wearing the blue jacket. Approximately six students in total are now standing in proximity to the interaction of Ms. G. and J.W. and observing them. Other students are observing from afar. Mr. V. is still standing by the teachers' table looking at his wristwatch while occasionally glancing at the incident. Ms. T. is observed standing by the teachers' table and dismissal line without showing much interest in the incident.
48. 12:18:36-12:18:46	For the first time since the incident began, after a six second skip from 12:18:36-12:18:42, J.W.'s backpack appears next to him. Approximately six students are observing Ms. G. and J.W. directly. J.W. almost squirms out from under Ms. G. who, in turn, rolls more to her right so as to pin down J.W.'s legs. At this point, Mr. V. looks up while still holding his wristwatch. Ms. T. is not looking at the scene of the incident. Just about all of the remaining students are observing the incident.
49. 12:18:52	Ms. G. is now sitting adjacent to J.W. while holding him down with her left arm. Ms. G.'s left leg is extended out straight. Her right leg is bent underneath her weight. It cannot be determined for certain whether Ms. G.'s body weight is still on J.W. Approximately five students continue to watch this incident. Ms. T. is still far removed from the incident by the teachers' table. She is not looking at the incident. Mr. V., although not looking down holding his watch, is looking away from the incident while still standing at the teachers' table.
50. 12:18:54	Ms. G. is observed moving into a full kneeling position while holding J.W.'s leg with her right hand and his upper torso with her left hand. J.W. is in a side position while Ms. G. holds him to the floor. She's observed admonishing/yelling at J.W. while he is still on the floor. Ms. T. is by the teachers' table no longer observing the incident. Mr. V. is looking away from the incident and doing nothing. The same students, give or take, are still standing in proximity to Ms. G. and J.W. while continuing to observe the incident.
51. 12:18:57 – 12:19:13	Skip in the video surveillance.
52. 12:19:13-12:19:19	Ms. G. is observed now in a standing position crouching over J.W. The student with the yellow shirt and backpack is still standing directly by J.W. and Ms. G. J.W. is looking up at the student.

53. 12:19:20 – 12:19:29	Skip in the video surveillance.
54. 12:19:29- 12:19:52	Ms. G. is observed walking away from J.W. with her back facing him. She does not confiscate, let alone show any concern over J.W.'s backpack which is now next to him. In fact, J.W. is holding his backpack in the immediate presence of three students. Ms. G. walks closer to the teachers' table and speaks briefly with Ms. T. Mr. V. is still looking down at the table. However, back by the scene of the incident, the student with the yellow shirt appears to be holding/consoling J.W. or keeping him from doing something else. Another student with a light blue sweatshirt and flannel shirt tied around his head is speaking with J.W. and the other student. After the student with the yellow shirt finishes speaking to J.W., J.W. leaves his backpack on the basketball court, puts on his coat and walks toward the student dismissal line. Ms. G. is at the head of the student dismissal line facing toward Ms. T. and Mr. V (who continues to look at his watch).
55. 12:19:52 – 12:20:04	Lapse in the video surveillance.
56. 12:20:05- 12:20:13	Ms. G. is observed demonstratively speaking to J.W. with her arms stretched outward. J.W. is viewed speaking back to her in an overt manner and the student with the yellow shirt is standing somewhat in between J.W. and closer to Ms. G. Mr. V. is now facing Ms. G. and J.W. while leaning against the teachers' table. Students who are in line for dismissal and Ms. T. are all looking at Ms. G as she verbally confronts J.W.
57. 12:20:13	Ms. G. now takes two or three steps toward J.W. and appears to still be yelling at him. At this point J.W. turns his head toward the teachers' table as if to shy away. Mr. V. and Ms. T. are both looking at J.W. at this point. All of the students are still looking at Ms. G. and J.W. at this point.
58. 12:20:14	J.W. is observed wiping his eyes and/or nose with the sleeve of his sweatshirt.
59. 12:20:18	J.W. takes a step back away from Ms. G. Ms. G. takes a step back away from J.W. but continues to yell at him.
60. 12:20:22- 12:20:49	As J.W. sits down on a bleacher seat, Ms. G. aggressively approaches him. Both of her hands are on the back of her hips and she's leaning in closely toward him and speaking to him in an animated fashion. J.W. is viewed putting his head down as Ms. G. continues to address him with her hands on her hips. It appears that J.W., still seated in the bleachers, is simply trying to put a shirt or jacket on as Ms. G continues to address him in an aggressive manner.
61.	J.W. gets out of the bleachers and walks away from Ms. G. towards

12:20:49- 12:21:02	the opposite end of the basketball court. Ms. G. starts to walk toward the student dismissal line and appears to be saying something to Ms. T. Mr. V is still standing by the teachers' table facing the student dismissal line. The students are still in line for dismissal. J.W. is still putting on his shirt or jacket. The student with the light blue sweatshirt and flannel wrapped around his head is still talking to J.W.
62. 12:21:02- 12:21:13	J.W. is viewed with his back toward the surveillance camera rubbing his eyes with his hands as Ms. G. approaches him once again. The student that was standing next to J.W. is now several feet away toward the foul line of the basketball court. As J.W. continues to rub his eyes with his fists, Ms. G. approaches him and makes a sweeping motion with her arms toward the student dismissal line.
63. 12:21:13- 12:21:16	After an exchange of words between Ms. G. and J.W., J.W. picks up his jacket and backpack and begins walking toward the student dismissal line.
64. 12:21:17	J.W. is observed walking out of the frame with the students.[3]

In my opinion, as will be discussed in greater detail below, the aforementioned summary of the video evidence, even with the fifteen second skip, is more reliable than any countervailing witness testimony. By the same token, testimony and documents which are consistent with the video evidence are deserving of significant weight. The totality of the evidence does support conclusions that Ms. Godinez's engaged in conduct unbecoming a public school teacher by unnecessarily restraining and verbally lashing out at J.W. in response to an incident which clearly did not warrant her responses. Common sense would dictate that the more prudent course would have been for Ms. Godinez to have either let the unarmed J.W. flail on the floor until he tired out and/or enlist the help of Mr. Vanderlofske and/or Ms. Thomas. As a result of the choice(s) made by Ms. Godinez, I find, J.W. unnecessarily suffered pain in his stomach as well as evident emotional harm, albeit temporarily, and, other students potentially could have been

[3] Although the video surveillance recording continues for a few more minutes, nothing of relevance to this matter is observed.

emotionally harmed. As will be discussed in more detail, I will sustain Tenure Charge I, to the extent Ms. Godinez exhibited Conduct Unbecoming a public school teacher in violation of N.J.S.A. 18A:6-10 and related Board Policies. Tenure Charge I will be dismissed in all other respects.

Ms. Godinez, as she acknowledges, works under Job Description 3001, Elementary Teacher (Ex. B21), which requires a teacher to, among other things:

> 2. Display the highest ethical and professional behavior and standards when working with students. . .
>
> 13. Establish a professional rapport with students that earns their respect.
>
> 15. Assess and diagnose the learning, social and emotional needs and styles of students . . .Plan and adjust the learning experiences accordingly . . .
>
> 18. Assume responsibility for all student within the school, beyond those specifically assigned, supervising in a fair and constructive manner to ensure the safety and well-being of all students.
>
> 21. Ensure the safety and health of all students . . .
>
> 23. Complete in a timely fashion all records and reports as required by law and regulation or requested by the Principal . . .
>
> 26. Maintain positive, cooperative and mutually supportive relationships with . . students . . .
>
> 35. Adhere to New Jersey school law, State Board of Education rules and regulations, Board of Education policies and regulations, school regulations and procedures, and contractual obligations."

She also acknowledged that she is required to adhere to all related Board Policies and Regulations and state laws pertaining to her supervision of students in her care.

In explaining how her actions depicted in the video are not inconsistent with her job description and Board policies, Ms. Godinez's testimony and February 28, 2019 statement (Ex. B24) – authored prior to seeing the video evidence - starts off with some

credibility, even if it is somewhat exaggerated. Ms. Godinez writes in her statement to Assistant Superintendent Rojas: "I heard/saw a student pick up a tiny tike car and throw it at the other students. I told him "Stop! You cannot do that. He screamed "no" and then ran out of the locker room toward the gym" (Ex. B24, first paragraph). The video evidence of J.W. riding the Little Tykes in the moments before he entered the equipment/locker room, and as he entered that room, shows that J.W. was acting somewhat reckless, and that his actions did present a risk of harm to students (Frames 24-26). Here, I credit at least the gist of Ms. Godinez's testimony that J.W. presented a risk or harm to other students inside the equipment/locker room in connection with the Little Tykes car.

However, from that point forward, I observe, Ms. Godinez's testimony and statement begin to precipitously lose credibility in relation to the video evidence and the credible testimony of others. In her statement, for example, Ms. Godinez writes that, after J.W. exited the equipment/locker room, she followed him into the gym "where I observed him pick up a backpack and fling it towards a group of students sitting in the bleachers" (Ex. B24, second paragraph). Contrary to Ms. Godinez's statement, however, the video evidence does not depict her following J.W., as if she was still concerned with whatever happened inside the equipment/locker room. Rather, the video evidence clearly shows J.W. appropriately interacting with his classmates for over one minute by, and in, the bleachers. In fact, during that time, Ms. Godinez is observed engaged in a number of activities by the bleachers none of which even remotely involved observing J.W. (Frame 29 [12:16:12] to Frame 37 [12:17:17]). To me, this means that Ms. Godinez could not

have been genuinely concerned that J.W. posed an immediate risk of harm to himself or to others as he left the equipment/locker room.

Having said this, I do not completely discount Ms. Godinez's prior concern over J.W.'s behavior inside the equipment/locker room. In fact, it is entirely possible and reasonable that Ms. Godinez may have become extra concerned after she eventually witnessed J.W.'s second act of misbehavior, i.e., tossing his backpack a few rows into the bleachers. To that point, I find, segments of the video combined corroborate, in part Ms. Godinez's testimony that J.W. did toss his backpack into the third or fourth row of the bleachers (Frame 37, second paragraph). Indeed, even J.W. admits that he threw his backpack at the other student after the other student had hit him with a backpack (Ex. B13; BATES 000055).[4] Having said this, however, it does appear that Ms. Godinez felt a need to exaggerate certain facts related to J.W.'s behaviors which, in my opinion, only served to detract from her credibility as a witness.

For example, Ms. Godinez, in complaining about the fifteen second gap in video, filled in that gap on cross-examination:

> I heard a child screaming. I walked over by the bench. There were two boys scuffling. I went over to see. One of the boys ran away. The other boy has a bookbag, took it, flung it. It went past the aide's head, who was sitting on the bench into a group of children. At that point in time I was afraid that one of the children was going to be knocked in between the benches and actually snap their neck. So when he flung the bookbag, I took him by the wrist. You don't see any of that (Tr. 3, 464:8-18; 465:13-18).

However, the video evidence contradicts Ms. Godinez's testimony and written statement that two boys were scuffling. In fact, at one point in her testimony, Ms.

[4] It is evident that Ms. Godinez did not see the first student hit J.W. with his backpack prior to J.W. tossing his backpack at that student.

Godinez claimed she observed J.W. "beating" on another boy with his backpack (Tr. 3, 454:24-25). In stark contrast, the video evidence clearly shows no such activity on the part of J.W. Nor does the video show that J.W. flung his backpack at "a group of students seated in the bleachers" or that the backpack passed nearby the aide's head. Rather, it appears from the video evidence, as corroborated by J.W.'s input to Principal Castro on February 22, 2019, that J.W. tossed his backpack at the one student who hit him first, as that student was attempting to escape by running up the bleachers (Frame 37; Ex. B13, BATES 000053). In the same video segment, no other student and/or staff member is viewed in harm's way (Frame 37, third paragraph).[5] Thus, I observe, Ms. Godinez clearly exaggerated the magnitude of J.W.'s bleacher behavior.

In addition, Ms. Godinez's claim that she was concerned about J.W. throwing another object is belied by the video evidence. In fact, during most of the physical restraint, J.W. had no other object nearby to throw, even if he was so inclined. Indeed, only after Ms. Godinez finally got off of J.W. is it apparent that J.W.'s backpack is present. (Noting that it was brought to him by a female student wearing a green hat while J.W. was restrained; see, Frame 47). Completely contrary to Ms. Godinez's claim that she was concerned that J.W. may throw another object, Ms. Godinez is observed walking away from J.W. while actually leaving him with the only object that he could have thrown, i.e., the same backpack which he tossed in the first place (Frame 54). Thus, in my opinion, Ms. Godinez's claimed concern over J.W. throwing additional objects is contradicted by the video evidence.

[5] The video evidence would later reveal that J.W.'s backpack contained two jackets, one denim and one a light weight winter jacket (Frame 37, third paragraph, third sentence).

Next, I find, Ms. Godinez's physical description of the incident in relation to her alleged physical limitations are not borne out by the video evidence. Ms. Godinez testified that she grabbed J.W. by the arm; he escaped her grasp; and he pulled her down to the floor with him where he began flailing about. Of course, if J.W. had physically pulled Ms. Godinez to the floor, this may have legitimized Ms. Godinez's initial decision to try and physically restrain J.W. As such, the importance of such an occurrence cannot be understated. In fact, in my view, it was perhaps the most important fact that Ms. Godinez could have conveyed to those who subsequently questioned her actions. This notwithstanding, Ms. Godinez did not assert this alleged fact until answering the Board's demand for interrogatories. Importantly, she made no such commentary to Assistant Superintendent Rojas when he interviewed her, or in her written statement (Tr. 2, 297:13-14; 298:15-299:1-4; Ex. B24). Notably, but for the somewhat fortuitous gap in the video, Ms. Godinez would not have even had an opportunity to raise such a *post hoc* justification.[6]

In Ms. Godinez's contemporaneous written statement to Rojas, she writes: "He removed his arm from my hand and immediately flung himself on the floor and flailing about . . . Because of my back condition, I sat down on the floor with my back towards him" (Ex. B24). Notably, Ms. Godinez, by way of her written statement, attests to five distinct actions in sequence: (1) Ms. Godinez grabbing J.W. by the hand; (2) J.W. breaking free of Ms. Godinez's grasp; (3) J.W. flinging himself on the floor; (4) J.W.

[6] It is also observed that no allegation that J.W. attempted to injure Ms. Godinez is contained in her Answer to the Tenure Charges (Ex. J2). In paragraph 5, however, Ms. Godinez does fault the Board's Tenure Charge for failing to "indicate that J.W. had attempted to injure his fellow classmates on two occasions moments before Godinez interceded for the safety of J.W. and other students."

flailing about; and, (5) Ms. Godinez sitting down on the floor with her back towards J.W. Conversely, Ms. Godinez makes no mention whatsoever of J.W. pulling her to the ground. Thus, the belated assertion by Ms. Godinez of this important fact leads me to discredit her testimony in this regard.[7]

I further find and conclude that the initial and follow-up written statements of Beverly Thomas do not credibly add justification for Ms. Godinez's actions. While Ms. Thomas' written statements allege that J.W. was laying on the floor, disruptively kicking and screaming (Ex. B14-B15), the video evidence does not depict this as occurring; Ms. Thomas is viewed in the video, for the most part, barely paying attention to the incident; and Ms. Thomas curiously includes a fact which is not even seconded by Ms. Godinez, i.e., that J.W. was acting out "because Ms. Godinez did not ask him to help clean up" (Ex. B15). Lastly, due to her substantial inattentiveness to the confrontation, while I find Ms. Thomas' written statements are not entitled to much weight, it is noteworthy that even she did not assert that J.W. pulled Ms. Godinez to the floor. For all these reasons, I do not credit Ms. Godinez's assertion that J.W. pulled her down to the floor with him which may have given her justification to initially restrain him.

Additionally, I do not find credible Ms. Godinez's assertions in her statement and related testimony that her back condition influenced her response to J.W. On the contrary, Ms. Godinez is observed in the video lying in a chair on a 45-degree angle, with legs straight, feet crossed and no lumbar support (Frames 17-18). Moreover, for over two minutes (and not 30 seconds, as asserted by Ms. Godinez in her statement), Ms. Godinez is observed down on all fours, leaning forward while covering J.W., rolling over and

[7] Parenthetically, I note, given the size differentiated between the two, it is even hard to image that J.W. was physically able to pull Ms. Godinez to the ground.

around J.W., holding him down with her hands while leaning forward on her knees with her lumbar extended, and crouching over him in a standing position. In short, contrary to someone suffering from back pain, regardless of an underlying injury, Ms. Godinez is essentially observed engaged in a two-minute wrestling match with an undersized second grade student without once asking for assistance from two nearby co-workers (Frames 37-53). She is also observed getting off J.W., walking toward the teachers' table, verbally confronting J.W. for over one minute, and then completing her duties for the remainder of the class without any sign of physical discomfort (Frames 54-64). Thus, I do not credit Ms. Godinez's testimony that her physical actions toward J.W. were influenced in any way by a manifestation of a previously injured back.

In addition, even assuming, for the sake of discussion, that Ms. Godinez had reason to restrain J.W., which I do not find, nonetheless, the choice that she made to employ this particular physical restraint technique is baffling even in the absence of training. This is so because teachers stand in *loco parentis*. Put simply, I cannot fathom any parent doing this to his/her child in response to a tantrum. Compounding matters, I find, this record reveals that Ms. Godinez did not even spontaneously decide to use this over-the-top technique. According to the testimony of Mr. Vanderlofske, and more contemporaneous written statement to Assistant Superintendent Rojas, both of which I credit, Vanderlofske spoke with Ms. Godinez prior to February 20, 2019 about how to control difficult students who were acting out: "Ms. Godinez told me that she uses – or threatens the students with sitting on them or laying on them as a method of classroom management and it makes them stop doing whatever they're going to do or are doing"

(Tr. 1, 38:1-12; 71:17-25 to 72:1-9; Ex. B12).[8] In the end, I find that the Board has demonstrated that Ms. Godinez unjustifiably decided to physically restrain J.W. in the first instance, and then she unjustifiably tried out a risky restraint technique that she had previously contemplated.

As to the riskiness of Ms. Godinez' restraint technique, I find, the greater weight of the credible evidence shows that Ms. Godinez caused both temporary physical and emotional harm to J.W. and she created the potential for undue emotional harm to other students, especially those with special needs. Mr. Vanderlofske credibly testified to the physical and emotional harm caused by Ms. Godinez to J.W. According to Vanderlofske, once Ms. Godinez got off of J.W., he "was hysterically crying and pretty upset and he was saying that she hurt him" (Tr. 1, 29:16-19; 30:6-8; 36:20-24). Consistent with Vanderlofske's testimony and statements, J.W. told Principal Castro on February 22, 2019 that Ms. Godinez hurt his stomach and that as a result he cried "all the way to class" (Ex. B13; BATES 000055-000056). Conversely, I do not credit Ms. Godinez's testimony that she did not significantly put her weight on J.W. while he was lying face down. Consistent with certain segments of the video evidence (Frames 40, 41, 45, 46 and 48), Vanderlofske's testimony, and J.W.'s contemporaneous and subsequent articulation of pain to his stomach while he was crying, I find that Ms. Godinez did rest her weight on

[8] Mr. Vanderlofske admitted that he never witnessed Ms. Godinez employ such a technique prior to February 20, 2019. However, I found Vanderlofske to be a credible witness. The video does show Vanderlofske attentive to J.W. and Ms. G. as the two were speaking to one another (Frame 56). Vanderlofske admitted to having new teacher paralysis, i.e., freezing during the incident and not doing anything to help J.W. He spontaneously reported the incident to Mr. Olsen and then gave statements to Principal Castro and Assistant Superintendent Rojas (Ex. B11 and B12). Here, I find it highly unlikely that Vanderlofske, a new teacher with no axe to grind, would submit falsified reports to such higher level school officials. Accordingly, for all these reasons, I credit Vanderlofske's testimony.

the back portions of J.W.'s body. Therefore, for all these reasons, I conclude that Ms. Godinez did temporarily hurt J.W. both physically and emotionally.

Compounding matters, in my opinion, the reason why J.W. was not sent to the nurse has much to do with the ensuing improper actions of Ms. Godinez. Specifically, the video evidence shows that Ms. Godinez's inappropriate conduct toward J.W. did not end with the undue physical conflict. Rather, it continued for over one minute in the form of verbal hostility. In fact, the video evidence shows that Ms. Godinez verbally jabbed at J.W. four separate times (Frames 56-63). Ms. Godinez is viewed, at times, with her hands on her hips, leaning forward and yelling at J.W. and, at other times, standing over and admonishing him while he is seated in a bleacher row (Frames 58 and 62). I further credit Mr. Vanderlofske's contemporaneous written statements and related testimony which collectively confirm that Ms. Godinez angrily addressed J.W., while he was crying, and after he had been physically restrained for two minutes.

More specifically, Mr. Vanderlofske testified that, after Ms. Godinez got off J.W., she asked him if he had any scratches or red marks and "if he wanted to go to the nurse in a more like threatening manner towards him." (Tr. 1, 29:15-16). In his email to Principal Castro of February 21, 2019, Vanderlofske similarly writes: ". . . the student cried and was yelling 'you hurt me.' Ms. Godinez then said 'show me a red mark or a scratch' to the student as well as 'you want to go to the nurse? The student was upset and got in line" (Ex. B11). Similarly, in his contemporaneous handwritten statement, Vanderlofske states: "the student was crying and yelling 'she hurt me.' Ms. Godinez then came up to the student and yelled, 'I did not touch you, show me a scratch or red mark'. Ms. Godinez then yelled at the student, 'let's go to the nurse then.' The student said 'no' and

left crying" (Ex. B12). Frankly, I am not surprised that J.W. did not want to go to the nurse with Ms. Godinez, especially after she physically and emotionally hurt him and then, in essence, challenged his claim that he was even hurt.[9]

In light of the foregoing credible evidence, I do not credit Ms. Godinez's countervailing version of what she said to J.W.: "[I] speaking to him, asking him to show where he was hurt and telling him that we don't hurt our friends. . . . "I put my hands behind my back because I don't want him to feel any kind of threat from, especially because of what just happened and I make sure that I just talk with him. I want to make sure he is okay. I want to make sure he calms down. I don't want him to look at me as a person who is a threat to him. I want him to see me as what I was – believed to be doing, which was helping him" (Tr. 3, 485:9-17; 522:23-25). Simply stated, whereas Ms. Godinez's testimony is clearly not supported by the video evidence or any other corroborating evidence, Mr. Vanderlofske's testimony and written statements are supported by the video evidence and J.W.'s interview responses. In the end, I find, Ms. Godinez's unnecessary physical restraint of J.W., followed by undue verbal hostility toward him, when a calming demeanor was most needed, caused J.W. to suffer both temporary physical and emotional harm.

I next find that Ms. Godinez, by way of her actions, also created an appreciable risk of potential emotional harm to the numerous young special education students who observed the incident. These students include a girl who walked over to Ms. Godinez and J.W. and quizzically stared at them (Frame 43); two male students doing the same

[9] I do not credit Ms. Godinez' testimony that she told Ms. Thomas to take J.W. to the nurse. Not only did Ms. Godinez fail to report this incident but, Ms. Thomas, in her statements, acknowledges no such direction from Ms. Godinez. Since Ms. Thomas did not testify, I find that Ms. Godinez failed to provide any corroboration to her attempt to ameliorate her own actions. Therefore, I do not credit her testimony.

(Frame 44, second sentence); a female student who joins the two male students (Frame 46, second sentence); a girl wearing a green hat, who brings J.W. his backpack (Frame 47, first sentence); a male student who walks over and sits down in Ms. Godinez's chair, hovering above J.W. as he lays on his stomach reaching out for help (Frame 47, first through fourth sentences)[10]; approximately six students who are observed standing nearby in a semi-circle watching what was happening to J.W. (Frame 47, fifth sentence to Frame 50, sixth sentence); and, the same student who sat down in the chair is observed trying to calm and console J.W. while a second student is also talking to him (Frame 54, fifth and sixth sentences). Unfortunately, all of these students witnessed Ms. Godinez's misconduct and the resulting impact on J.W., especially his crying both inside of, and on his way out of, the gym. Consequently, I find, Ms. Godinez's reckless behavior also created an appreciable risk of harm to numerous other students.

Also, I observe, that Ms. Godinez failed to report the incident to the administration is not challenged. Nor is there any genuine dispute that reporting this type of an incident is required by Board Policy 3280 (Ex. B3). While it is true that Ms. Godinez is not charged with such a violation, it does go to her credibility in that it gives the appearance that she did not wish to draw attention to the incident. The same may be said about her manner of "asking" J.W. if he wanted to go to the nurse, as discussed previously. Also, in PART II of this Opinion, a discussion of the February 25, 2019 incident at EWK notes that Ms. Godinez twice failed to even respond to Anita Fulmore's requests that she write up an incident report and, only after the third time, did she try to

[10] In his statement to Principal Castro, J.W. described the same interaction: "And then Jimmy came and sit on a chair by her and she said, 'Go away' and Jimmy said, 'Never.' And then he was trying to help me. He was holding my hand. I wanted him to help me so he could pull me out." (Ex. B13; BATES 000055).

extricate herself from the request by claiming that she did not have a computer. Collectively, I find, the above evidence and inferences to be drawn therefrom suggest that even Ms. Godinez realized that her actions were improper and, for that reason, she did not wish to draw attention to her conduct by submitting standard or requested reports.

Lastly, I do not consider the inactions of Mr. Vanderlofske and Ms. Thomas to have a significant bearing as to Ms. Godinez' fault. I agree that the two, or at least one of them should have intervened at some point for J.W.'s sake. However, although Ms. Godinez would testify that she was not responsible for supervising Mr. Vanderlofske's class, which encompassed J.W., she elected to handle J.W. herself when he tossed his backpack at his fellow student. Ms. Godinez did not ask or motion for assistance at any time during the two minutes when she was physically restraining J.W. Mr. Vanderlofske was a new teacher who admittedly froze in response to what was occurring and continued to attempt to pair his apple watch with a speaker. Ms. Thomas' state of mind cannot be ascertained because neither party called her as a witness. Accordingly, while I do not find that Mr. Vanderlofske's and/or Ms. Thomas' inattentiveness to the incident excuses Ms. Godinez's misconduct, in my opinion, further discussion is set forth under PART III of this Opinion, pertaining to penalty.

In light of the foregoing, I find that the Board has sufficiently demonstrated that Ms. Godinez's actions constitute Conduct Unbecoming a public school teacher within the meaning of N.J.S.A. 18A:6-10. See, e.g., In re Young, 202 N.J. 50, 66 (2010) (Unbecoming conduct involves a different standard than the Title 9 abuse-or-neglect standard and has been defined as conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services");

Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (Unbecoming conduct may include "any conduct which adversely affects the morale or efficiency of the [department.); In re Grossman, 127 N.J. Super. 13, 29 (App.Div.1974) ("Such misconduct need not necessarily 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.' [Citation omitted]); In the Matter of the Tenure Hearing of Courtney Watson, School District of Franklin Township, 2014 WL 2480173 *5 (App. Div. 2014)("tenure charges may be sustained based on a pattern of unprofessional conduct or even a single incident that is found to be 'sufficiently flagrant); In re Tenure Hearing of Fulcomer, 93 N.J. Super 404, 421 (App. Div. 1967)(while [Fulcomer] was teaching an eighth grade arithmetic class, a girl's pocketbook was passed among several pupils until it came to rest beside the desk of Donald Yowell. The teacher, becoming aware of inattention and discovering its source, dropped his textbook on the first pupil's desk, went to Donald and laid hands upon him. When released, the boy went to the front of the room, was directed to resume his seat by the teacher, made as though to do so, but instead ran toward the door in the rear to leave the classroom. The teacher pursued the boy, again laid hands upon him, and both of them fell to the floor); and, In the Matter of the Tenure Hearing of Edith Craft, 2012 WL 2579497 (App. Div. 2012)(found guilty of conduct unbecoming when she slapped a special education student after the student slapped her). Accordingly, I sustain Tenure Charge I with respect to the Conduct Unbecoming a public school teacher.

Also, in light of the foregoing findings related to Conduct Unbecoming, I am satisfied that the Board appropriately relies upon item #4 of Board Regulation 3280, "Liability for Pupil Welfare" (created in 2009), which addresses a teacher's right to physically restrain a student or students as part of a teacher's responsibility to prevent and stop pupil fights and assaults (Ex. B17). Board Regulation 3280 permits a teacher to restrain a pupil only with the reasonable amount of force necessary to a. Quell a disturbance; b. Obtain possession of weapons or dangerous objects; c. offer self-defense; or d. protect persons or property. In my opinion, Ms. Godinez's non-compliance with Regulation 3280 on February 20, 2019 is demonstrated because J.W.'s observed conduct did not present any justification for Ms. Godinez to restrain him in the first instance.

Conversely, I do not find that the Board has sufficiently demonstrated that Ms. Godinez's conduct amounted to a violation of state law prohibiting corporal punishment, N.J.S.A. 18A:6-1 and corresponding Board Policy 3217 (Ex. B2), at least not as the standard has been interpreted to require an intent to punish or inflict bodily harm, cruel or vicious behavior, etc. See, e.g., In the Matter of the Tenure Hearing of Edith Craft, 2012 WL 2579497 (App. Div. 2012) and cases cited therein. Rather, I have previously determined that Ms. Godinez's actions were ill conceived from the beginning and even reckless, in my opinion. However, the Board has failed to demonstrate that Ms. Godinez was motivated by an intent to inflict corporal punishment on J.W. Accordingly, while I will fully address the seriousness of Ms. Godinez's actions, and the harm caused thereby, under a determination of penalty, I dismiss Tenure Charge I insofar as Ms. Godinez is accused of inflicting corporal punishment on J.W. in violation of state statute.

In addition, I do not find that the Board has demonstrated the applicability of N.J.S.A. 18A:46-13.5 and related Board Policy 5561/Regulation 5561 (Ex. B6 and B7, respectively). Specifically, N.J.S.A. 18A:46-13.4 states, that "Physical restraint' means the use of a personal restriction that immobilizes or reduces the ability of a student to move all or a portion of his or her body." N.J.S.A. 18A:46-13.5 (1) states, physical restraint is used only in an emergency in which the student is exhibiting behavior that places the student or others in immediate physical danger; (2) a student is not restrained in the prone position, unless the student's primary care physician authorizes, in writing, the use of this restraint technique. As the Board concedes in its initial brief, District Policy 5561, Use of Physical Restraint and Seclusion Techniques for Students with Disabilities (Ex. B6); and District Regulation R5561, Use of Physical Restraint and Seclusion Techniques for Students with Disabilities (Ex. B7) mirror N.J.S.A. 18A:46-13.5. In my opinion, the authorities cited above are not applicable to the facts of this matter.

N.J.S.A. 18A:46-13.5, in pertinent part states:

> staff members who are involved in the restraint of a student receive training in safe techniques for physical restraint from an entity determined by the board of education to be qualified to provide such training, and that the training is updated at least annually. N.J.S.A. 18A:46-13.5

Further, District Regulation R5561, Use of Physical Restraint and Seclusion Techniques for Students with Disabilities (Ex. B7) requires:

> C. Physical Restraint Training Requirements The training requirements on the use of physical restraint shall be as follows: 1. Building level administrators and school staff members designated

> by the Principal likely to be confronted with the need to use physical restraint shall be trained on the use of physical restraint. a. If, in the event of an emergency, a person(s) who has not received training uses physical restraint, training for the person(s) that used such restraint shall occur within thirty days of the incident.

Notably, both the statutory and Board policy versions recited above address the use or misuse of learned techniques to restrain and/or place in seclusion a special education student with a disability in the event of "an emergency in which the student is exhibiting behavior that places the student or others in immediate physical danger." In order for the statute and policies to be applicable, in my opinion, a teacher must apply learned techniques to a situation where he or she believes physical restraints and/or seclusion are justified. In this case, I note, Ms. Godinez clearly was not misapplying or misusing any learned physical restraint technique. On the contrary, she was never taught any technique contemplated by the statute and/or by related Board policies. Having possessed no learned technique of restraint or seclusion prior to February 20, 2019, I find, the Board cannot seek to impose discipline on Ms. Godinez for her untrained actions on that date.[11] Due to the Board's failures in this regard, I must dismiss Tenure Charge I, insofar as Ms. Godinez is accused of violating N.J.S.A. 18A:46-13.5 and related Board policies.

Additionally, while I acknowledge that the Board accuses Ms. Godinez of violating several other policies, I find that such policies either do not unambiguously

[11] In fact, I do not deem it coincidence that the Board offers no case law supporting the application of N.J.S.A. 18A:46-13.5 to the facts of this matter.

address the subject matter of Ms. Godinez' February 20, 2019 conduct, or they add little to the undersigned's previous finding of Conduct Unbecoming a school teacher.[12]

Based on the foregoing, I find and conclude that the Board has sufficiently demonstrated Ms. Godinez's Conduct Unbecoming a public school teacher on February 20, 2019 in violation of N.J.S.A. 18A:6-10 and Board Policy 3280. Tenure Charge I is sustained, to that extent and is dismissed in all other respects.

PART II

Tenure Charge II

The February 25, 2019 Incident at EWK

The Board Has Demonstrated
That Ms. Godinez, Through Inaction
Engaged In Conduct Unbecoming a Teacher
And Failure to Perform Duties in Violation of
N.J.S.A. 18A:6-10 and Corresponding Board Policies.

Initially, I am satisfied that a teaching staff member who allows two or more students to fight by failing to intervene is liable under a Conduct Unbecoming and Failure to Perform Duties analysis within the meaning of N.J.S.A. 18A:6-10. This is so because a teacher is responsible for his or her actions or inactions that unnecessarily bring about harm or create the potential for harm to students entrusted to his/her care. To that point, I observe, Board Regulation 3280, "Liability for Pupil Welfare" (discussed previously) provides, in pertinent part, "A. A teaching staff member must maintain a standard of care for supervision, control and protection of pupils commensurate with the member's

[12] Board Policies 3280 (2002) and 3281 (Ex. B3-B4) address the general responsibilities of a teaching staff member to supervise and protect students and to maintain appropriate boundaries. Regulation 3281 (Ex. B5) clearly pertains to inappropriate touching of a sexual nature and corresponding reporting requirements and procedures. Lastly, I observe, Board Policy 3150, "Discipline" (Ex. B8) is of general applicability only.

assigned duties and responsibilities". Under item A.4., the regulation specifically states "Pupils shall not be allowed to inflict bodily harm on one another. Teaching staff members are responsible for preventing and stopping pupil fights and assaults, whatever the cause or intent; if necessary, responsible assistance must be quickly summoned. Teaching staff members may restrain a pupil only with the reasonable amount of force necessary to a. Quell a disturbance; b. Obtain possession of weapons or dangerous objects; c. offer self-defense; or d. protect persons or property", e.g., stopping two students from fighting with one another.

For the reasons which follow, I am satisfied that the Board has demonstrated, by the greater weight of the credible evidence, that Ms. Godinez did not take any affirmative action on February 25, 2019 to quell a fight between two juveniles at EWK; and that, by failing to so act, she placed two of her own students at risk of harm. I am also persuaded that the inaction of Katherine Grundman, who was supervising her own class in the same gym, and seated further away from the site of the altercation, does not serve as a mitigating factor.

Initially, EWK is primarily a general education, pre-K to grade 3 school with a predominantly Hispanic population (Tr. 2, 190:10-15). Anita Fulmore is a special education resource teacher at EWK School (Tr. 2, 156:3-6). She teaches students from kindergarten through third grade providing both in-class support and pullout support (Tr. 2, 158:20-25). She is also the HIB ("harassment, intimidation and bullying") specialist for the building (Tr. 2, 156:5-7). Ms. Fulmore has taught in the Paterson school district for twenty (20) years (Tr. 2, 156:8-10). She has been at EWK for six (6) years (Tr. 2, 156:11-13; 158:10-15). Ms. Fulmore has known and worked with Ms. Godinez for

approximately three (3) years (Tr. 2, 159:3-10). Consistent with a finding of lack of bias, I observe, Ms. Fulmore did not have any prior conflict, issue, or incident with Ms. Godinez or any other reason to bear false testimony against her (Tr. 2, 159:17-20).

In addition to being an unbiased witness, I found Ms. Fulmore's testimony to be consistent with both her contemporaneous statements to Principal Derrick Hoff and with a contemporaneous and unprompted statement made by one of the students involved in the February 25, 2019 incident. As to the incident, Ms. Fulmore testified:

> I recall approaching the gym door, which I was actually waiting to catch the elevator to my floor where my class is located. Upon approaching the gym, I heard a commotion. As I reached the gym, the elevator door, two other teachers approached, came out of their classroom and stated to me there's a commotion going on inside the gymnasium. When I walked into the gymnasium, I saw like a crescent of students crowding around an incident and I walked directly to the students that were involved and I basically did not even have to apply any pressure to break the fight up. I actually said what are you guys doing. They all separated on their own and when the students separated, that's when I observed Ms. Godinez sitting seated in a chair (Tr. 2, 160:2-16).

Ms. Fulmore identified the two preschool teachers whom alerted her to the commotion as Natalie Cruz and Erica Mann. Their classroom is adjacent to, and shares a wall with, the gym (Tr. 2, 160:22-161:4). Ms. Fulmore testified that Dana LeGarde, a building technology teacher, entered the gym with her (Tr. 2, 161:8-13). She also testified that approximately 18 students were standing around the altercation and the two participants were situated approximately ten (10) feet from the gym/hallway door (Tr. 2, 162:8-162:16; 171:8-10). She described the two students involved in the fight as third-grade boys, about four feet tall (Tr. 2, 161:15-23). Later she added that the two were general education students (Tr. 2, 174:4-7).

Ms. Fulmore testified that she and Ms. LeGarde were able to quell the dispute by saying, in a calm but assertive manner, "what are you guys doing" and "cut it out" (Tr. 2, 170:24-25 and 171:1-3). When asked if she had to physically grab the students in order to break up the fight, Ms. Fulmore responded that she recalled "touching one of the student's arms and then Ms. LeGarde touched the other student and they easily separated" (Tr. 2, 163:3-5). Ms. Fulmore further testified that from the time she entered the gym until she turned around and saw Ms. Godinez sitting 20 feet away (or ten feet away from the altercation), she did not hear Ms. Godinez say anything to the boys engaged in the fight (Tr. 2, 164:7-8 165:1-6).

On cross-examination, Ms. Fulmore was asked to describe the commotion that prompted her to enter the gym. She replied, "yelling, screaming, chanting, cheering, bubbling, bumping" (Tr. 2, 180:21-24). When asked if it could have been a teacher screaming at the students to stop, Ms. Fulmore responded, "The elevator door is at least maybe arm's length away from the gym. So, I heard children" (Tr. 2, 181:4-5). When pressed as to whether she heard a teacher screaming to stop, Ms. Fulmore responded that she did not (Tr. 2, 181:6-8).

Also, Ms. Fulmore did not "recall seeing Ms. Godinez get up. I know as I entered I was – I approached one student. I had his arm, Ms. LeGarde had the other student's arm and I remember turning around and stating you need to get up and write this up" (Tr. 2, 164:18-22). In fact, Ms. Fulmore told Ms. Godinez twice to get up and write this up. "The third time I told Ms. LeGarde to tell Godinez she needs to write this up" (Tr. 2, 165:25-166:1). Ms. Fulmore, apparently relying upon what Ms. LeGarde told her,

testified that Ms. Godinez replied after the third time she was asked to write up an incident report that she did not have a computer (Tr. 2, 167:6-167:12).

Ms. Fulmore acknowledged the presence of another physical education teacher, Katie Grundman. However, she observed Ms. Grundman on the other side of the gym at the time. When asked what Ms. Grundman was doing during the fight, Ms. Fulmore responded:

> I basically was focused in on the two students that were involved in the fight and basically when we separated them, focusing on the teacher that was responsible for their supervision. I don't recall her [referring to Ms. Grundman] saying anything but her body – her body language was almost like she was trying to restrain her students or basically encourage them not to get involved or run over there (Tr. 2, 172:15-22).

Ms. Fulmore was certain that Ms. Grundman was watching her own class on the "other side of the gym" at all material times.

Ms. Fulmore further testified that, as she and Ms. LeGarde were leaving the gym with the two boys, Ms. Fulmore's student said, "she just let us fight, I'm telling my mother" (Tr. 2, 170:8-12). Ms. Fulmore said that she did not ask the students if it was true that Ms. Godinez did not do anything; she did not respond at all - she just listened as she was walking him to the office[13] (Tr. 2, 170:15-20).

---

[13] At the hearing, Counsel for Ms. Godinez objected to the admissibility of what students were saying. The concern raised was that it was not part of the proffer. The Board replied that such testimony was consistent with the proffer provided by the Board: The following is the summary of expected testimony by Ms. Fulmore and/or Ms. LeGarde provided to Mr. Ricci: "the facts/circumstances that led them to enter the gym; their observations of the scene and the student altercation; their observations of Ms. Godinez including any action or inaction by her; their actions to break up the student altercation; any communications they had with Ms. Godinez regarding the February 25, 2019 incident; **any communications they had with the students** regarding the February 25, 2019 incident; and, any communications they had with Edward W. Kilpatrick school administration regarding the incident. Here, I am satisfied that admitting the hearsay testimony of what Ms. Fulmore's student said to her on the way to the principal's office is consistent with the highlighted parameters of the Board's disclosure. However, I am not convinced that the commentary made by the remaining students to one another was properly disclosed. Thus, I will not consider same.

Lastly, Ms. Fulmore testified that she subsequently spoke with Principal Hoff about the incident. In essence, according to Ms. Fulmore, she relayed her observations of the altercation to Principal Hoff "somewhat" mirroring her arbitration hearing testimony (Tr. 2, 176:18-22).

Principal Hoff has worked with Ms. Godinez at EWK since 2013. This record contains no credible evidence that Hoff had an axe to grind with Ms. Godinez or that he ever sought disciplinary action against her based on her conduct. In addition to a lack of bias, I find, Hoff's testimony adds consistency to Ms. Fulmore's overall testimony. As to shoring up Ms. Fulmore's overall testimony, Hoff relied upon his notes of meeting with the student ("HC") on February 27, 2019 (Ex. B18, page 1); and his notes of meeting with Ms. Fulmore and Ms. LeGarde on February 28, 2019 (Ex. B18, page 3). Hoff confirmed the grade and age of the two students and that they were Ms. Godinez's students (Tr. 2, 194:5-13).

Immediately after the altercation had ended, as Hoff testified, Ms. Fulmore and Ms. LeGarde generally informed him that "there was a fight, the teacher did not intervene and they had told the teacher – they had told the teacher to put it in Infinite Campus, which is our student information system" (Tr. 2, 193:25-194:4). On February 28, 2019, after dealing with the parents and the disciplinary issues, Hoff testified that he had a more in-depth conversation with Ms. Fulmore and Ms. LeGarde (Tr. 2, 195:9-18; 196:4-7). Hoff asked Ms. Fulmore to tell him what happened in the gym on February 25, 2019. Hoff described Ms. Fulmore's response, which I find to be consistent with her testimony, as follows:

> She said that she was standing by the elevator, her and Ms. LeGarde. They heard a loud noise coming from the gym. They immediately entered into the

> gymnasium and they observed, as they called – as Anita told me, the students had formulated a circle and that the two students who were fighting were in the middle of the circle fighting, and I said to them, where was Ms. Godinez, and they said Ms. Godinez was in the corner sitting in a chair by the window. . . Ms. Fulmore followed up with telling me that when she intervened and she broke it up, her and Ms. LeGarde, that they told Ms. Godinez two or three times to please put that information in Infinite Campus, and then they proceeded to take the kids out of the gym to my office (Tr. 2, 196:9-25).

Principal Hoff further stated that he asked Ms. Fulmore about how far away Ms. Godinez was from the fight, to which Ms. Fulmore responded approximately 20 feet (Tr. 2, 197:3-8). He also added that there was a phone inside the gym office that, as Ms. Fulmore explained, Ms. Godinez was not using to call security (Tr. 2, 197:3-11).

Later, on cross-examination, Hoff would testify that, based on his discussion with Ms. Fulmore, it was his impression that the fight had just begun at the time she and Ms. LeGarde interceded (Tr. 2, 227:10-21). This testimony, I note, must be construed in harmony with the indisputable fact that the fight lasted at least as long as it took staff members in the hallway to hear and react to a commotion, and for Ms. Fulmore and Ms. LeGarde to thereafter enter the gym and separate the two students.

Principal Hoff's testimony also lends credibility to the hearsay statement of the student who informed Ms. Fulmore on the way to the main office that Ms. Godinez let them fight. Hoff related, "during the disciplinary hearing the parent of one of the students indicated to me that she understood her child was wrong for fighting in the gym, but her son told her that evening that the teacher just sat there and watched them fight and did not intervene" (Tr. 2, 194:20-25; 198:21-25). Hoff's notes of his contemporaneous meeting with HC confirm that HC informed him that Ms. Fulmore and Ms. LeGarde "broke it up" and that the "teacher was sitting down and did nothing" (Ex. B18, page 1). This hearsay statement is consistent with what was contemporaneously told to Ms.

Fulmore by one of the students, likely the same student, as she was escorting him to the main office.[14] Thus, the testimony of Ms. Fulmore and Principal Hoff and the contemporaneous and unprompted hearsay statement from one of the participants in the fight collectively support a finding that Ms. Godinez did not at all intervene in the altercation.[15]

Also, referring to his notes, Principal Hoff testified as to his interview with Ms. Godinez:

> Q. And can you give us -- and refer to your notes if you need to, but can you give us a description of that meeting.
>
> A. Yeah. I called her in because I want to get her side of the story because I'm hearing different sides about what happened in that fight, and so I make a note that Ms. Godinez shared with me that she was five feet, she was only five feet from the fight. She was yelling. This is her testimony. She was yelling for the students to stop and I may --I asked her a question when she told me she was yelling. I said, well, did you break up the fight, and she said no, and I said why, and she said, well, it's due to my ADA accommodation and she talked about her spine issues, prevented her from breaking up fights. She also added to me that she believed, in this meeting, that breaking up fights was not -- not a part of her duties as a teacher and that she physically just can't do it, and these were things that she had shared with me when I interviewed her as to what happened in the incident and why did she not intervene (Tr. 2, 202:20-25 and 203:1-17).

Principal Hoff testified that prior to his meeting with Ms. Godinez she never informed him that she was physically unable to break up a fight (Tr. 2, 222:16-23). And, in any

---

[14] Principal Hoff explained the disciplinary process, noting that whenever there is a fight, he reaches out to both parents, they have a disciplinary hearing and then there is a penalty imposed since fighting is a violation of the Student Code of Conduct (Tr. 2, 195:21-196:3).

[15] To the extent there are discrepancies between Ms. Fulmore's and Principal Hoff's testimony as to Ms. Fulmore's observations, it is, at the very least understandable that what got lost in the translation was (1) whether the students gathered around the fight formed the shape of a crescent or circle and (2) whether Ms. Godinez was seated 20 feet away from the door or 20 feet away from the fight. In my opinion, neither discrepancy warrants discrediting the overall, unbiased testimony of Ms. Fulmore describing the involvement of both she and Ms. LeGarde in quelling a fight between two of Ms. Godinez's students, while Godinez passively observed seated in a chair 10-20 feet away.

event, nothing prohibited Ms. Godinez from yelling at the students and/or from calling security (Tr. 223:2-20).[16]

Principal Hoff was asked based on his education, experience and position within the school district for some 20 years whether teachers are responsible to intercede if students are engaged in a fight? He replied: "Absolutely". . . . They can call for security. They can physically intervene and try to restrain the students. They also can summon another teacher who's in the gym to help them break up a fight." He concluded his remarks to this line of questioning by noting that no other witness supported Ms. Godinez's testimony that she intervened and helped quell the confrontation. Rather, Ms. Fulmore, Ms. LeGarde and the student informed him that Ms. Godinez took no action (Tr. 2, 219:13-24).

Principal Hoff was asked to review a "Behavioral Detail Report" of the incident ("Incident Report") which he believed was completed and submitted by Ms. Godinez, consistent with what Ms. Fulmore and Ms. LeGarde thrice asked her to do at the end of the February 25, 2019 incident (Ex. B19). Ms. Godinez would ultimately testify that Ms. Grundman prepared and submitted the Incident Report because she did not have a computer. In a *voire dire* exchange with Ms. Godinez's attorney, Principal Hoff denied that Ms. Godinez lacked access to a computer. On the contrary, he testified that the gym office computer was for all teachers to use (Tr. 2, 216:11-16). Counsel for the Board then elicited the following testimony from Principal Hoff:

Q. Are you aware of Ms. Godinez ever reporting that someone had filed

[16] Principal Hoff testified that he was previously made aware of Ms. Godinez's requests to him for a parking accommodation due to her back condition and he was aware that she could not climb stairs (Tr. 2, 229:3-21).

something by using her pass code?

A. No.

Q. Are employees and staff supposed to keep their pass code confidential and to themselves?

A. Yes.

Q. Now, who did she indicate in this report broke up the fight?

A. "The fight broke up only when three teachers intervened, A.F., D.L. and B.G."

Q. And who did you understand A.F., D.L. and B.G. to be?

A. A.F. is Anita Fulmore, D.L. is Dana LeGarde, and B.G. is Blanca Godinez.

Q. And was that consistent or inconsistent with what Ms. Fulmore told you?

A. That was inconsistent.

Q. Was that consistent or inconsistent with what Ms. LeGarde told you?

A. Inconsistent.

Q. Was it consistent or inconsistent with what Ms. Godinez told you?

A. Inconsistent.

Q. Was it consistent or inconsistent with what the students told you?

A. Inconsistent.
(Tr. 2, 218:20-25 to 219:1-6).[17]

[17] After he concluded his interviews of Ms. Fulmore, Ms. LeGarde and Ms. Godinez, Principal Hoff testified that he prepared an email to Assistant Superintendent Rojas because he "needed some guidance in terms of I had this incident that was confirmed by the witnesses, as to what should be my next steps, and the reason why I wanted to know next steps is because assuming that the ADA accommodations are real, then I need to know what I can put in place to be able to protect kids if another altercation occurs in the gym" (Tr. 2, 220:3-11). Hoff confirmed that B20 in evidence was the email he sent to Assistant Superintendent Rojas requesting guidance to create a safety plan (Tr. 2, 220:12-22).

Ms. Godinez testified that she was getting ready to take attendance as the class was coming in. There was a boy standing and "barking" and another boy came into the class late and made a comment to the boy who was barking. The boy barking swung at the boy who commented and they both then starting swatting at each other (Tr. 3, 425:18-428:14). Ms. Godinez claims she was seated about five feet away from the boys when the fight started and Ms. Grundman was about ten to twelve feet away (Tr. 3, 434:7-11). The two teachers were seated because they were about to take attendance (Tr. 3, 527:3-8). According to Ms. Godinez, when the scuffle began, her back was bothering her from the incident on February 20, 2019, so she looked to Ms. Grundman, who was not called as a witness by either side, to react. However, Ms. Grundman allegedly did not respond to the fight (Tr. 3, 528:2-11). Because Ms. Grundman did not respond, as Ms. Godinez testified, she got up, went to where the boys were, stood there and yelled at them to stop. In a matter of seconds, notes Ms. Godinez, two other teachers, Ms. Fulmore and Ms. LeGarde arrived. Contrary to Ms. Fulmore's testimony, the spontaneous statement of the student participant to Ms. Fulmore, and what the parent of a student participant conveyed to Principal Hoff, Ms. Godinez testified that all three of them collectively quelled the fight by yelling at the students. According to Ms. Godinez, Ms. Fulmore and Ms. LeGarde walked out with the students because she had a class waiting.

In contrasting the February 20 and 25, 2019 incidents, Ms. Godinez believed that the February 20th incident could have resulted in a very bad injury, even the death of a child. This is so despite, as noted previously, that J.W. had no object nearby to throw after he tossed his lightweight backpack at the student who had just hit him with his backpack, and that Ms. Godinez walked away from J.W. leaving him with the same

backpack after she decided he had had enough. Meanwhile, in my opinion, Ms. Godinez disingenuously downplayed the risk of harm created by two third-grade boys wrestling and throwing punches at each other without adult intervention.

According to Ms. Godinez, although she acknowledged that a fight can be dangerous, she did not think that particular incident warranted more than a verbal intervention because the fight had not yet escalated to a point where there was a danger in that room for any child (Tr. 3, 435:4-12). However, I observe, the duration of the fight belies Ms. Godinez's attempt to downplay the risk. Clearly, significant time passed from the point other staff members heard and reacted to a commotion inside the gym to the time that Ms. Fulmore and Ms. LeGarde entered the gym and convinced the two students to cease and desist (Tr. 3, 527:25-528:1). In fact, but for the relatively timely intervention of Ms. Fulmore and Ms. LeGarde, it appears obvious that the fight could have escalated to the point that Ms. Godinez herself feared.

Ms. Godinez also attempted to add support to her version of events by claiming that Ms. Grundman authored the Incident Report requested by Ms. Fulmore. That report identifies "A.F., D.L., and B.G." as breaking up the fight (Ex. B19). Obviously, this testimony serves Ms. Godinez's interests. Ultimately, in my opinion, the burden to clarify such an unusual development concerning the writing of the Incident Report properly rests with Ms. Godinez. Ms. Godinez did not call Ms. Grundman as a witness or even attempt to produce a corroborating statement from her. Standing alone, for the following reasons, I do not find Ms. Godinez's testimony to be credible.

To begin with, the two students involved belonged to Ms. Godinez. Additionally, Ms. Godinez's name is listed as the person submitting the report. Also, it was established

that each teacher has their own passcode to access the computer. Contrary to Ms. Godinez's testimony, I do not find any reason why only Ms. Grundman would be permitted to use the gym office computer at EWK. Rather, as Principal Hoff testified, both gym teachers have access to that computer. Lastly, it is noted that Ms. Godinez remained silent after Ms. Fulmore twice asked her to write up an incident report. Only after the third such request (interjected by Ms. LeGarde) did Ms. Godinez claim that she did not have a computer. Collectively, I find, Ms. Godinez, more likely than not, had access to a computer, she was responsible for the report submitted in her name and concerning her students and she submitted a report which inaccurately included herself as one of the three staff members who intervened and stopped the fight.

Nonetheless, Ms. Godinez insisted that Ms. Grundman told her that she would write the report and that she [Grundman] could access Ms. Godinez's login to the system. But, here, I must ask the 64,000 question, that is, why would Ms. Grundman volunteer to do the report? Ms. Fulmore and Ms. LeGarde thrice asked Ms. Godinez to complete and submit the report? No one asked Ms. Grundman to submit a report. Also, as this record bears out, not only did the students belong to Ms. Godinez, but Ms. Godinez was closer to the altercation. In fact, Ms. Fulmore observed Ms. Grundman significantly further away from the altercation and trying to keep an eye on her own students. Why Ms. Grundman would volunteer to write a report thrice requested of Ms. Godinez, concerning Ms. Godinez's students, and when Ms. Godinez was clearly the better eyewitness, makes little to no sense to me.

Having said this, however, even if I believe that, for whatever reasons, Ms. Grundman typed the report for Ms. Godinez, I cannot conclude that Ms. Grundman

would take responsibility for the content of the report while submitting the report under Ms. Godinez's name. Rather, the much more likely explanation, even if I believed that Ms. Grundman typed the report, is that Ms. Godinez provided the substantive input for Ms. Grundman to type. Therefore, for all these reasons, I cannot credit Ms. Godinez's assertion that Ms. Grundman independently generated the content of the report concerning Ms. Godinez's students and then submitted the report under Ms. Godinez's name.

In sum, I find that a preponderance of the credible evidence demonstrates that the Board has sufficiently proven that Ms. Godinez knowingly failed to intervene in a fight between two third-grade boys on February 25, 2019. The Board has also adequately shown that by knowingly failing to intervene, she placed both students at risk of physical injury. But for the fortuitous intervention of Ms. Fulmore and Ms. LeGarde, that risk could have been much higher. Also, I observe, the fact that Ms. Fulmore and Ms. LeGarde were able to quell the dispute primarily by way of verbal commands with only minimal physical effort relegates Ms. Godinez's physical incapability defense to the sidelines in this matter. Accordingly, I sustain Tenure Charge II with respect to the charges of Conduct Unbecoming and corresponding Board Regulation 3280. Tenure Charge II is dismissed in all other respects.

PART III

The Appropriateness of the Removal Penalty

N.J.S.A. 18A:6-10 provides that a tenured teacher may not be dismissed "except for inefficiency, incapacity, unbecoming conduct, or other just cause." A school district bears the burden of proving by a preponderance of the credible evidence its charges

seeking removal of a tenured employee. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Tenure Hearing of Ziznewski, A-0083-10T1, 2012 WL 1231874 (N.J. Super. Ct. App. Div. Apr. 13, 2012) (unreported). In addressing the appropriateness of the penalty in cases involving tenure charges, relevant factors "include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct in the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." In the Matter of the Tenure Hearing of Erroll Goodwater, School District of the City of Camden, Agency Docket Nos. 185-7/11 and 187-7/11 (April 27, 2012). The Commissioner has previously stated that "unfitness to remain a teacher is best demonstrated by a series of incidents but might be shown by a single incident if sufficiently flagrant". In the Matter of Norma Pollard, 96 N.J.A.R. 2d (EDU) 170 at 190.

For the reasons which follow, I find that the Board has demonstrated that, notwithstanding Ms. Godinez's long-term employment, removal is an appropriate penalty based upon the severity of Ms. Godinez's collective misconduct on February 20 and 25, 2019.

Initially, I acknowledge that both parties have flooded this record with a plethora of administrative and arbitral decisions addressing the propriety of removing a long-term teacher for actions allegedly analogous to Ms. Godinez's conduct in this case. Although I have carefully studied each and every one of them, as a caveat, I note, this case rests on its own unique and troubling facts. It involves two alarming incidents within a short period of time that reflect polar opposite, egregious actions on the part of Ms. Godinez. Specifically, on February 20, 2019, Ms. Godinez recklessly, but not intentionally

overreacted and unduly restrained a special education student causing him temporary physical and emotional harm, and potentially harming other students. Then, just five days later, Ms. Godinez knowingly took no action as two of her third-grade students engaged in a physical altercation which, but for the intervention of two other staff members, could have resulted in significant physical harm.

Although the severity of Ms. Godinez's February 20 and 25, 2019 misconduct combined has been determined *de novo* by the undersigned, I have considered as part of that determination the reactions and opinions of Principals Castro and Hoff and Assistant Superintendent Rojas. Regarding the February 20, 2019 incident involving J.W., after viewing the video, Principal Castro opined: "I was mortified. I was mortified. I'm a parent and the only thing I could think was what if it was my child" (Tr. 1, 86:21-23). When asked if she had ever been aware of that type of action by a teacher, Principal Castro responded, "Absolutely not. Not during my tenure in Paterson" (Tr. 1, 87:1-2). Watching the video during the hearing, Principal Castro had a similar reaction. She testified "it's like reliving it after - - it's mortifying. It's like my initial thought was what if that's my child and I am responsible for five -- approximately 500 children and my reaction was my duty is to these children and I immediately thought of my son" (Tr. 1, 88:13-18).

Assistant Superintendent Rojas, who was influential in the decision below, described the severity of Ms. Godinez's misconduct as follows:

> I saw Ms. Godinez, the way I can describe it, is manhandling a – – you know, a small – – a small student. At that time, I didn't know he was special ed. but clearly a student that was maybe one-third her size, putting all her weight on him, really, you know, and a manner that was just totally inappropriate (Tr. 2, 260:1-8).

When asked if he was bothered by what he saw, Assistant Superintendent Rojas responded "100 percent" (Tr. 2, 260:16-18). Rojas went on to testify:

> I thought it was disgraceful that you have an adult – – and I put myself in the situation that if that was my child, I would be irate having a teacher with the audacity to roll and put her weight on my child and then especially that he was – and knowing that he was a special ed student, I was infuriated. I mean that student regardless of what had occurred that precipitated, for her to be on top of him, her keeping her weight on top of him, rolling around on the ground while I watched and the more times I watched it, it was just infuriating (Tr. 2, 260:20-261:5).

> There's absolutely nothing that she could have justified rolling on the ground with a special ed. student who was one-third her size who at the end of the day wasn't hurting anyone in the video, wasn't hurting her. If he was such a threat, he would have been – his hands were free. He could have punched her. He could have slapped her. He could have pulled her hair. I mean and he would have probably rightfully so been justified in trying to get this woman off of him and he did nothing of the sort (Tr. 2, 291:19-292:4).

When asked if it concerned him that the entire class was watching this, Assistant Superintendent Rojas responded:

> Absolutely. It was – – you know, it had to have been – – again, put myself in the situation of one of those kids, it would have been shocking to see, you know, one of my students, one of my co--fellow students, you know being manhandled by a teacher on the ground and watching her just be, to my opinion, very comfortable doing what she was doing, which was really just disheartening, but the other students and putting those individuals and those students, you know, into that situation where they had to observe, you know, one of their students or one of their co-students or friends, you know, being thrown and manipulated on the ground that way was just uncalled for (Tr. 2, 261:13-262:1).

> .....

> Well, I mean it's in front of the whole class and not only did--after watching the video not only did you, you know, watch the young man, you know, have to have Ms. Godinez on top of him for two minutes and if that wasn't shocking enough, after he gets up and tries to collect his, you know wit's [sic] about him, you know, she's in his face yelling. At one point she's bent over, you know, yelling in his face. You can see those gestures and that body language where she's screaming at him, you know, and she

> could care less that he's wiping tears, you know, away from his eyes, you know. It was heartless. To me it was cold hearted" (Tr. 2, 266:24-267:11).

With respect to the February 25, 2019 incident at EWK, Principal Hoff testified that he was concerned with Ms. Godinez's response:

> Well, when you're talking about children fighting and you're talking about children's welfare, when you have an alteration, something – I mean building protocol calls for, you know, either intervene, call security, somehow some way – what we didn't want was a situation where based on what the kids described and the staff member described that the kids were in a circle observing this fight. Someone could have got very seriously hurt (Tr. 2, 204:13-21).

Assistant Superintendent Rojas added:

> "because it's the responsibility of all adults no matter who you are, whether it's me all the way down to the cafeteria, if I'm in a building and see two students or I see a group of students fighting, it is my duty and my responsibility as an adult in district, as an employee of the Paterson Public School District to intervene and break up the fight to the best of my abilities" (Tr. 2, 280:25-281:7).

Frankly, after a *de novo* review of the record, I find that, more or less, the reactions and concerns expressed by the two administrators and Assistant Superintendent Rojas above coincide with my own.

In addition to considering Ms. Godinez's long-term employment, I did fully consider other defenses raised by Ms. Godinez including, but not limited to a lack of intent to punish regarding the February 20, 2019 incident, the inactions of Ms. Godinez' co-workers, her lack of training on the use of physical restraints, and the alleged lack of a full and fair investigation by the administrators and Assistant Superintendent Rojas, etc. Ultimately, for the reasons which follow, I did not find these additional defenses persuasive or persuasive enough to override the severity of Ms. Godinez' dual offenses.

Initially, I generally agree with the cases submitted by Counsel for Ms. Godinez which distinguish the severity of corporal punishment type offenses based on the intent of the teacher. Here, it is true that Ms. Godinez did not intend to inflict punishment on J.W. Rather, she acted with a misguided mindset to restrain J.W. in the first instance and then employed a risky and bizarre form of physical restraint which she had previously contemplated. While I agree that Ms. Godinez cannot be fairly found guilty of intentionally harming J.W., i.e., statutory corporal punishment, I do find that she acted recklessly and did temporarily harm J.W. both physically and emotionally, and she also created an appreciable risk of emotionally harming the other students who closely witnessed the incident. Here, even adopting and applying one of the more pertinent cases offered by Ms. Godinez, In the Matter of the Tenure Hearing of Edith Craft, 2012 WL 2579497 (App. Div. 2012) and applying the Fulcomer test, I still find and conclude that Ms. Godinez' reckless conduct of February 20, 2019 leaves her at the edge of removal; and that her February 25, 2019 misconduct pushes her over that ledge.

In this case, unlike Craft, Ms. Godinez's misconduct did not involve a reflexive slap or isolated grab of J.W. Rather, on February 20, 2019, Ms. Godinez clearly had time to choose a course of action and she chose to unjustifiably subject J.W. to two minutes of physical and emotional stress and an additional one minute of hostile verbal treatment when calm and consolation were most needed. Also, unlike Craft, Ms. Godinez's February 25, 2019 inaction was not reflexive. On the contrary, in the absence of any evidence suggesting Ms. Godinez was not lucidly observing her class, I must conclude that her inactions were deliberate.

Also, in Craft, referring to other cases, the ALJ held that respondent's interaction with D.S. represented a single, isolated incident in a teaching career otherwise unmarked by wrongdoing. Here, however, the Board has sufficiently demonstrated Ms. Godinez's commission of comparatively more egregious misconduct on two separate occasions within just five days of one another.

The ALJ in Craft also observed that the Board presented no evidence showing that respondent's conduct had an injurious effect on the maintenance of discipline and the proper administration of the school system. Here, conversely, the Board is understandably concerned that Ms. Godinez cannot properly maintain discipline or earn the respect of students as exhibited by way of a confluence of two separate, but extremely close in time incidents whereby she plainly gave students and administrators ample reasons not to trust her in the classroom. Such lack of trust over important matters of student safety is reinforced by Ms. Godinez' failures to report the J.W. incident and to take J.W. to the school nurse and by her attempts to twice avoid responding to Ms. Fulmore's requests that she submit a report concerning the EWK incident. Accordingly, for these additional reasons, this matter is distinguishable from Craft.

Also, the ALJ in Craft, referring to two other cases, noted that the incident did not appear to have any immediate impact on D.S. According to Duffy, after respondent slapped D.S., D.S. simply returned to his seat. Duffy stated that D.S. did not appear agitated or injured, and he did not cry. Instead, according to Duffy, D.S. went back to his seat and he sat there and sucked his thumb as he normally did on any other day. Clearly, here, the facts are opposite. J.W. spontaneously complained of stomach pain and cried from the time Ms. Godinez got off of him and past the time he left the gym. The

potential harm Ms. Godinez's actions caused to the two students on February 25, 2019 only compounds matters.

The ALJ in Craft noted evidence of provocation. That factor does not even exist in this case.

Finally, the ALJ in Craft noted that the teacher was truly remorseful for her actions. Here, I find, Ms. Godinez was not genuinely remorseful. Instead, she faulted others and disingenuously exaggerated J.W.'s conduct and conversely downplayed the risk of harm to the students who were fighting at EWK.

In light of the foregoing, I agree with Counsel for Ms. Godinez that she did not intentionally inflict corporal punishment on J.W. However, as demonstrated above, whether it is determined that Ms. Godinez acted intentionally or recklessly, the negative impact caused by her actions on February 20, 2019 is the same. Also, I have previously found that Ms. Godinez knowingly allowed two students to fight in her presence without intervention. It is the combination of her misconduct and the collective severity of same that, in my opinion, brings her over the edge.

I also agree, in part that the Board should have implemented some form of discipline or corrective action against Mr. Vanderlofske and Ms. Thomas. However, I disagree that the failure of the Board to do so requires a modification of the removal penalty herein. Put simply, the comparison is not apples to apples. It is true that the same obligations imposed on Ms. Godinez to have intervened in the February 25, 2019 incident generally applied to Mr. Vanderlofske and Ms. Thomas on February 20, 2019 when they witnessed their student, J.W. unnecessarily being restrained by Ms. Godinez. Having said this, however, Ms. Godinez was the antagonist on both February 20 and 25,

2019 and, unlike Ms. Godinez' conduct on February 25, 2019, Mr. Vanderlofske and Ms. Thomas did not sit by and watch two students fight. Rather, Vanderlofske, a new teacher and Ms. Thomas, his aide, did not witness the incident until it was significantly underway and, from what can be gleaned from this record, they deferred out of fear and/or bewilderment of the actions being taken by a much more experienced teacher for the remaining one minute or so until she stood up. For these reasons, while I believe the Board should have taken some form of corrective action against Mr. Vanderlofske and Ms. Thomas, I do not believe that its failure to do so warrants a reduction in the removal penalty.

As to the February 25, 2019 incident at EWK, I do not find that the inaction of Ms. Grundman is relevant to either Ms. Godinez's liability or the propriety of the removal penalty. Ms. Grundman was situated further away from the scene of the students fighting on February 25, 2019 than Ms. Godinez; the two students belonged to Ms. Godinez; and Ms. Grundman was watching her own students for the brief period of time it took Ms. Fulmore and Ms. LeGarde to respond. Thus, I do not find that Ms. Godinez' misconduct is in any way explainable by an examination of Ms. Grundman's conduct.

Next, I will briefly address Ms. Godinez' lack of training defense. I have previously dismissed Tenure Charge I, to the extent that the Board incorrectly, in my opinion, relied upon N.J.S.A. 18A:46-13.5, and related Board Policies. However, I observe, a lack of training was not at issue when Ms. Godinez elected to respond in the manner which she did to a diminutive second grade student who no longer presented any realistic threat of harm. Common sense, regardless of training, should have told her not to do what she did due to the obvious prospect of causing physical injury to J.W. Finally,

a lack of training had nothing to do with Ms. Godinez knowingly allowing two of her students to fight on February 25, 2019. In fact, during the EWK incident, it is obvious that Ms. Godinez, if she chose to, could have forcefully verbally directed an end to the fight. This is so because, as noted previously, Ms. Godinez had no difficulty forcefully admonishing J.W. on February 20, 2019. Thus, for these reasons, I do not credit a lack of training as a factor as to liability and/or penalty mitigation.

Ms. Godinez also claims that the investigations into the incidents did not comply with Board Policy, e.g., Principal Castro did not interview certain witnesses, Principal Hoff did not interview Ms. Grundman, the Director of Security, instead of Assistant Superintendent Rojas, should have investigated both matters, etc. In my opinion, regardless of the adequacy of the investigation(s) below, I have been provided with no reason to believe that the outcome of this proceeding would be any different had the investigation been conducted precisely as Ms. Godinez' claims it should have been.

In this *de novo* proceeding, both parties, represented by skilled attorneys, had essentially two opportunities – one before the Board of Education and the second this proceeding - to develop and present their respective cases, e.g., to engage in discovery, to interview any and all relevant witness, to call any and all relevant and available witness, to introduce any and all documentary evidence, etc. In short, nothing in this record convinces me that either party benefitted or was prejudiced by the nature of the Board's investigation which led to the initial certification of tenure charges against Ms. Godinez.

Lastly, Ms. Godinez has referred to no authority requiring the dismissal of tenure charges or the exclusion of any evidence based upon the conduct of the administration's investigation which led to the initial filing of tenure charges. Accordingly, I do not credit

the adequacy, or lack thereof of the investigation below as a reason to alter any finding of fact or conclusion of law in this *de novo* proceeding.

Based on the foregoing, pursuant to N.J.S.A. 18A:6-10, I find and conclude that the Board had just cause to remove Ms. Godinez from her position of employment as a public school teacher in the City of Paterson School District for committing two serious Conduct Unbecoming offenses pertaining to student safety.[18]

[18] Nothing herein should be construed as addressing whether or not Ms. Godinez is fit to continue teaching in another school district. That determination if left to the State Board of Examiners.

AWARD

For the reasons more fully set forth herein, pursuant to N.J.S.A. 18A:6-10, I find and conclude that the School District of the City of Paterson, Passaic County had just cause to remove Blanca Godinez from her position of employment as a teacher for committing two serious Conduct Unbecoming offenses pertaining to student safety on February 20 and 25, 2019, respectively.

Respectfully submitted,

Joseph Licata

Dated: March 9, 2020

State of New Jersey)
):SS
County of Bergen)

On this 9th day of March 2020, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

Jacqueline M. Licata

JACQUELINE M. LICATA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 11/9/2020

91-20

OAL Dkt. No. EDU 15490-19
Agency Dkt. No. 268-10/19

New Jersey Commissioner of Education

Final Decision

Peter Kowalsky,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/20

Date of Mailing: 3/12/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 15490-19
AGENCY DOCKET NO. 268-10/19

PETER KOWALSKY,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Eugene G. Liss, Esq. on behalf of petitioner

Arsen Zartarian, Esq., on behalf of respondent, Newark Board of Education

Record Closed: February 20, 2020 Decided: February 24, 2020

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 4, 2019, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on November 25, 2019, wherein the parties engaged in settlement discussions. A telephone status conference was scheduled for January 27, 2020. During the conference call, respondent's counsel advised that the matter is tentatively settled. A follow up conference was

scheduled for February 27, 2020. Prior to that date, the parties submitted a fully executed settlement agreement which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

February 24, 2020
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: 2/25/20

Date Mailed to Parties: 2/25/20

ljb

NEWARK BOARD OF EDUCATION
Office of the General Counsel
765 Broad Street, 7th Floor
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Respondent

RECEIVED
2020 FEB 20 P 3:21
STATE OF NEW JERSEY
OFFICE OF THE SECRETARY

PETER KOWALSKY, Petitioner, NEWARK BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Docket No. EDU-15490-2019 N Agency Ref. No. 268-10/19 **SETTLEMENT AGREEMENT**

The parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement Agreement") that fully disposes of all issues in controversy between Peter Kowalsky ("Kowalsky") and the Board of Education of the City of Newark, County of Essex (the "Board"):

1. Kowalsky hereby agrees to retire from his tenured position effective March 1, 2020. Attached is a copy of Kowalsky's signed Letter of Retirement. (Exhibit A). Kowalsky's separation from employment will be deemed a voluntary resignation and retirement in good standing. Other than as required by law, upon inquiry from any third parties, the Board will only confirm Kowalsky's employment, position, title, salary and dates of employment.

2. Kowalsky also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the Board that are still pending in any and all courts and/or before any and all agencies with the exception of workers' compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the Board and Kowalsky, including this Petition, challenging Kowalsky's withholding of increment. Should Kowalsky fail to submit letters of withdrawals for any such pending claims or suits, this Settlement Agreement will serve as Kowalsky's formal written notice of withdrawal of those pending claims or suits, except for workers' compensation claims.

3. In exchange, upon final execution of this settlement agreement by the Board, the Board will restore Kowalsky's salary increment that had been withheld for the 2019-20 school year, and Kowalsky will be entitled to the higher rate of pay from the start of the 2019-20 school year through his date of retirement on March 1, 2020.

4. As of the date of his resignation, all of Kowalsky's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

5. Kowalsky agrees that he will not apply for reemployment with the Board at any time. Specifically, Kowalsky will be considered to have permanently resigned from his tenured position as a result of this Settlement Agreement. If Kowalsky does apply for reemployment with the Board and is approved for employment in any capacity, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Kowalsky's employment.

6. This Settlement shall not constitute a precedent in any matters involving other employees.

7. Except as noted above, Kowalsky waives all claims of any nature against the Board with regard to his employment with and/or his separation from the District, including fees, or other monetary relief, with the exception of workers' compensation claims.

8. By entering into this Settlement Agreement, and in exchange for good consideration as set forth above, the sufficiency of which is hereby acknowledged by the parties, Kowalsky releases and discharges the Board, the Board Superintendent, its Board of Education and its Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the Board regarding his employment with the District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Kowalsky's employment with the Board and separation from the Board except for workers' compensation claims. It specifically includes, without limitation, all claims which

Kowalsky may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensation laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment by and the termination of his employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims. Kowalsky agrees to save, hold harmless and indemnify the Board for any legal costs and attorneys' fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

9. It is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Board based upon any of the above-released claims, Kowalsky agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Kowalsky of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Kowalsky acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty one days within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Kowalsky understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period.

11. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

12. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

13. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

14. This Settlement Agreement is subject to final approval by the Board and will only become effective upon the approval of the Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue the matter further.

Dated: 1/13/20

PETER KOWALSKY

Dated: 1/16/20

EUGENE G. LISS, ESQ.
Attorney for Peter Kowalsky

Dated: 2/3/2020

JOSEPHINE GARCIA
Board Chairperson

Dated: 1/29/20

ARSEN ZARTARIAN, ESQ.
Attorney for Newark Board of Education

CERTIFICATION

I, PETER KOWALSKY, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 1/13/20

PETER KOWALSKY

Arsen Zartarian, Esq.
Newark Public Schools
Office of the Superintendent
765 Broad Street
Newark, New Jersey 07102

RE: PETER KOWALSKY

Dear Mr. Zartarian:

Please accept this letter as official notification of my intent to retire effective March 1, 2020. I shall forward to your office, immediately upon receipt, any correspondence from Teachers Pension Annuity Fund (TPAF).

I am also requesting that your office complete and submit a Certification of Service and Final Salary form to the Division of Pensions and Benefits. Please send me a copy of this completed form for my records.

Thank you for your consideration of my request. Should you need any additional information, please contact me.

Very truly yours,

PETER KOWALSKY

Dated: 1/13/20

EXHIBIT A

92-20

OAL Dkt. No. EDU 16273-18
Agency Dkt. No. 240-9/18

New Jersey Commissioner of Education

Final Decision

East Orange Education Association, on behalf of the East Orange Board of Education's Certified Teaching Staff Members,

Petitioner,

v.

Board of Education of the City of East Orange, Essex County,

Respondent.

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

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 3/11/20

Date of Mailing: 3/12/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16273-18
AGENCY REF. NO. 240-9/18

EAST ORANGE BOARD OF EDUCATION, ON BEHALF OF THE EAST ORANGE BOARD OF EDUCATION'S CERTIFIED TEACHING STAFF MEMBERS,

Petitioner,

v.

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

Respondent.

Samuel Wenocur, Esq., for Petitioner (Oxfeld Cohen, LLC, attorneys)

David T. Pfund, Esq., for Respondent (Pfund McDonnell, P.C., attorneys)

Record Closed: February 18, 2020 Record Decided: February 18, 2020

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

NATURE OF PROCEEDINGS

Petitioning Association challenges the Board's leave policy specifically the Board's rating system for teaching staff evaluations and its impact on summative evaluation scores.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on November 13, 2018.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

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

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

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

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

February 18, 2020
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 2/20/20

Date Mailed to Parties: 2/20/20
db

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, January 14, 2020 at 6:06 p.m.

The following members of the Board were present:

Ms. Darlene Clovis, Mr. Cameron B. Jones, Sr., Ms. Tashia Owens Muhammad, Ms. Andrea McPhatter, Mr. Wayne R. Stackhouse, Jr. and Ms. Marsha B. Wilkerson

The following resolution was offered by Ms. Tashia Owens Muhammad, duly seconded by Mr. Wayne R. Stackhouse, Jr. and adopted by the Board of Education

Authorizing Execution of Settlement Agreement in East Orange Educational Association V. East Orange Board of Education

WHEARAS, the Board hereby authorizes the execution of the Settlement Agreement for East Orange Educational Association v. East Orange Board of Education, under AOL Docket No. 16273-19 by the East Orange Board of Education;

WHEREAS, the Board hereby authorizes the release of payment in the amount of $517.44 as check payable to Fatima Belal, pursuant to the Settlement Agreement;

NOW, THEREFORE, BE IT RESOLVED, that Board President, Terry Tucker, is hereby authorized by the Board to sign the agreement on behalf of the East Orange Board of Education.

ROLL CALL: AYES: 6
ABSENT: 1

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Beth Brooks, Secretary of the Board of Education, of the East Orange Board of Education, 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 said district, fully called and held on Tuesday, January 14, 2020, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 28th day of January, 2020.

Beth Brooks

Beth Brooks, Board Secretary

SETTLEMENT AGREEMENT AND RELEASE

The **East Orange Board of Education** ("Board") and the **East Orange Education Association** ("Association") hereinafter jointly referred to as "the Parties," set forth the terms upon which the Parties have mutually agreed to permanently resolve the civil action of East Orange Educational Association v. East Orange Board of Education, OAL Docket No. 16273-18, Commissioner of Education Docket No. 240-9/18.

WITNESSETH:

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and is entrusted with maintaining and conducting the public schools of the East Orange Public School District; and

WHEREAS, the Association is a collective negotiations representative for Board employees, including Board teachers; and

WHEREAS, Fatima Belal worked as a teacher for the Board during the 2017-2018 school year; and

WHEREAS, the Association served as Fatima Belal's collective bargaining representative throughout her employment with the Board; and

WHEREAS, the Association, acting on behalf of Fatima Belal, filed a Petition of Appeal with the Commissioner of Education, which was subsequently transmitted to the Office of Administrative Law for hearing;

WHEREAS, the Parties mutually acknowledge that it is in their best interests to amicably resolve the matter

NOW, THEREFORE, the Board and the Association, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, hereby agree as follows:

(1) **CONSIDERATION**.

a. The Board shall issue a check payable to Fatima Belal, for the pre-tax value of $517.44. This amount represents the calculated value of one day salary for Belal during the 2017-2018 school year. The Board shall send this check to Oxfeld Cohen, P.C., at 60 Park Place, Suite 600, Newark, New Jersey 07102.

b. The Parties further agree that the terms set forth in this agreement are binding only on the parties herein and that this agreement does not constitute a waiver of any future claims or future defenses by either party.

(2) RELEASE. In exchange for the consideration provided above, the Association hereby releases and hereby surrenders any and all claims and rights which they may have

against the Board including the Board of Education's employees, elected officials, officers, its agents and/or its assigns not named above in connection the subject matter of East Orange Educational Association v. East Orange Board of Education., filed in the Administrative Office of the Courts Docket No. OAL Docket No. 240-9/18, including any claims not pleaded therein or any claims cognizable or allowable pursuant to amendment against this **Board**, including but not limited to, any and all past, present or future claims, demands, obligations, actions, causes of action, rights, damages, costs, loss of services, expenses, and compensation of any nature which have occurred up to and including the date of this Settlement Agreement and Release ("Agreement").

(3) **UNDERSTANDING OF THE PARTIES.** . This lawsuit is being settled, and the Association hereby agrees it will not seek anything further for itself or any of its members, including any other payment from the Board as to the claims made in the Complaint.

(4) **NON-ADMISSION**. This Agreement is not, and shall not in any way be considered or construed as, an admission of liability by either party of discrimination, retaliation, tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any education policy, practice, contract or agreement, or of any alleged duty owed, or of any unlawful or wrongful acts whatsoever by either party. Both parties specifically deny any wrongdoing of any kind.

(5) **TAXABILITY**. The Association hereby agrees that no representations have been made by the Board or his own legal counsel, who has instructed him to consult with a Certified Public Accountant, as to either the taxability or non-taxability of this settlement, and the Association hereby waives any and all claims against the Board in the event that Federal or state authorities deem this settlement or any portion thereof to be taxable, and upon such an occurrence the Association alone, is solely responsible for the payment of any such taxes that may have incurred.

(6) **LIENS**. It is specifically agreed by the **PETITIONER** that it is solely responsible for any and all liens arising from this claim which may exist, including but not limited to, Workers' Compensation liens, welfare liens and/or liens for medical bills. The **PETITIONER** expressly agrees to defend and hold harmless the releasees against any and all claims for payment of liens.

(7) **ENTIRE AGREEMENT**. This Agreement sets forth the entire agreement between the Parties and fully supersedes any and all prior agreements or understandings between the Parties.

(8) **REVIEW OF AGREEMENT.** The Parties hereby agree and certify that they have read the entire agreement, that they fully understand the terms and conditions as outlined in the Agreement, and that they have conferred with their attorney and has asked all relevant questions of their attorney concerning the terms and conditions of this Agreement and the settlement of their claims, and that they have voluntarily signed said Agreement with all the provisions contained herein.

(9) **SEVERABILITY.** If any portion of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Agreement is invalid or unenforceable but that by limiting such provision the Agreement would become valid or enforceable, then such

provision shall be deemed to be written, construed and enforced as so limited.

(10) **COSTS AND ATTORNEY'S FEES.** Each party's costs and attorneys' fees, if any, will be borne by the respective party.

(11) **SIGNATURES.** This Agreement may be signed in counterparts and it is subject to Board's receipt of the Association's signed Agreement.

(12) **EFFECTIVE DATE.** The Effective Date shall be the date of the final decision by the Commissioner of Education, approving this Agreement. If either the Office of Administrative Law or the Commissioner of Education rejects this Agreement, the Parties will maintain the same rights as prior to this Agreement, including the right to proceed with East Orange Educational Association v. East Orange Board of Education, OAL Docket No. 16273-18, Commissioner of Education Docket No. 240-9/18.

I understand and agree to the terms of this Agreement. If this Agreement is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

EAST ORANGE EDUCATION ASSOCIATION

By: _____
Jacqueline Greadington, President

EAST ORANGE BOARD OF EDUCATION

By: _____
Terry Tucker, Board President

OAL Dkt. No. EDU 14370-19
Agency Dkt. No. 176-7/19

New Jersey Commissioner of Education

Final Decision

Barbara Popp,

Petitioner,

v.

Board of Education of the Borough of Manville, Somerset County,

Respondent.

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

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 3/11/20

Date of Mailing: 3/12/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14370-19
AGENCY DKT. NO. 176-7/19

BARBARA POPP,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Anthony P. Sciarrillo, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: February 4, 2020 Decided: February 6, 2020

BEFORE **DAVID M. FRITCH,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 10, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Prior to hearing dates being scheduled, the parties filed a fully executed Settlement Agreement in this matter on January 24, 2020. The Board resolution approving the settlement was received on February 4, 2020. The Agreement and Resolution are attached and fully incorporated herein.

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

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

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

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

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

February 6, 2020
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: 2-10-2020

Date Mailed to Parties: 2-10-2020

/dw

2020 JAN 24 P 3:57

SEPARATION OF SERVICE AGREEMENT

This Agreement is hereby effective Jan. 14, 2020, by and between BARBARA POPP (hereinafter "Ms. Popp") and the MANVILLE SCHOOL DISTRICT (hereinafter the "Board") (collectively the "Parties") according to the following:

1. VOLUNTARY RETIREMENT: Ms. Popp hereby submits an irrevocable notice of resignation for retirement purposes effective at the close of business on June 30, 2020 (Exhibit A). The Board shall approve the resignation by resolution at its next scheduled Board meeting following receipt of Ms. Popp's resignation.

2. MEDICAL LEAVE: Ms. Popp shall submit written request to the Board for a medical leave for the period commencing the date of this agreement and ending June 30, 2020 (Exhibit B). The Board shall approve Ms. Popp's request for a medical leave of absence by resolution, and Ms. Popp shall be placed on a paid leave of absence with full salary and health benefits, subject to required payment and/or contributions as provided by law, effective the date of this agreement and ending June 30, 2020.

3. COMPENSATION: For good and valuable consideration and in consideration of this Agreement, Ms. Popp will earn her annual salary prorated from the date of this agreement through June 30, 2020, utilizing her accrued sick days. Upon the Board's approval of the resolution, Ms. Popp will have her 2019-2020 increment returned to her current salary, effective July 1, 2019, and she be entitled to all any relevant longevity or other provisions included in the Collective Bargaining Agreement. On June 30, 2020, Ms. Popp shall have her remaining sick and unused vacation days, for which she will be compensated in accordance with the Agreement. With the exception of the aforementioned payments for unused sick and vacation days Ms. Popp is entitled to compensation at retirement, Ms. Popp forever waives any and all claims for any additional compensation or benefits or reimbursement of any kind not otherwise specified in this Agreement.

4. RELEASE: Ms. Popp hereby releases, waives and forever discharges any and all past, present or future claims that relate to any action that predates this Agreement that she may have against the Board, including but not limited to OAL Docket No. EDU 14370-2019 and any and all claims for back pay or any other claim related to her employment with the Board, with the exception of the sick, personal and vacation days Ms. Popp is entitled through June 30, 2020 in accordance with this Agreement. Ms. Popp acknowledges that she has the opportunity to consult with legal counsel and representatives of her choice regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; and that she represents that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Ms. Popp also acknowledges that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

5. WAIVER: Ms. Popp agrees to accept the compensation referred to in Paragraph 3 in full and final settlement and waiver of any and all claims against the Board, specifically included in this waiver are Ms. Popp's claims as contained in OAL Docket No. EDU 14370-2019.Such compensation and health benefits shall be in full satisfaction and settlement and waiver of any and all claims or demands which Ms. Popp now has or may have had against the Board; and in recognition of and consideration for Ms. Popp's promise to provide the Board with a Release of all claims against it.

6. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Workers Benefit Protection Act of 1990, this Agreement advises Ms. Popp of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows:

a. Ms. Popp fully understands the terms and conditions of this Agreement;

b. Ms. Popp has been advised to consult with an attorney to review the Agreement;

c. Ms. Popp specifically waives her right to pursue any claims under the Age Discrimination in Employment Act;

d. Ms. Popp does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed.

e. Ms. Popp is receiving consideration above and beyond anything of value to which he already is entitled;

f. Ms. Popp has been given at least seven (7) days within which to consider this Agreement.

g. Ms. Popp has seven (7) days from the date of the execution of this waiver to revoke it.

7. ENTIRE AGREEMENT: This Agreement and General Release and Waiver contain the entire Agreement and understanding between the Parties and constitute a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

8. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties.

9. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

10. SEVERABILITY: If, during the term of this Agreement, a specific clause of the

Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

11. BINDING EFFECT: The Parties shall be bound by the terms and conditions of this Agreement, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

12. VOLUNTARY AGREEMENT: The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

13. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

14. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

15. BREACH: If either party breaches this Agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including but not limited to, reasonable attorneys' fees.

16. RATIFICATION: The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

17. GOOD FAITH: The Parties expressly agree that they shall act in good faith to ensure implementation of this Separation of Service Agreement and General Release and Waiver. The Parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The Parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

18. COBRA: Nothing contained within this Separation of Service Agreement shall alter Ms. Popp's rights, if any, to continuation of any health insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon

separation from employment with the Board.

19. OTHER TERMS: Letters placed in Ms. Popp's personnel file by the superintendent will be removed upon her retirement.

20. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this _____ day of _____, 2020.

On Behalf of the Board:
MANVILLE SCHOOL DISTRICT

Barbara Popp
BARBARA POPP

By: Heidi Zangara
HEIDI ZANGARA, BOARD PRESIDENT

WITNESS

Allison Bogart
ALLISON BOGART,
BOARD SECRETARY

MANVILLE PUBLIC SCHOOLS
1100 Brooks Boulevard
Manville, New Jersey 08835

RECEIVED
2020 FEB -4 P 1:07
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Robert Beers
Superintendent of Schools
Phone (908) 231-8500 x 8545
Fax (908) 707-3963

Allison Bogart
Business Administrator /Board Secretary
Phone (908) 231-8500 X 8504
Fax (908) 704-0510

Mr. Panfile moved the following:

D-3 RESOLVED, the Board of Education accepts the notice of resignation for retirement purposes for Dr. Barbara Popp, Director of Curriculum, Instruction and Professional Development (PreK-5) effective June 30, 2020.

The motion was seconded by Mrs. Zangara and approved by roll call vote as follows:

AYES: Mr. Agans, Mrs. Harabin, Mrs. Liszczak, Mrs. Lombardino, Mrs. Lukac, Mr. Panfile, Mr. Petzinger, Mrs. Pschar, Mrs. Zangara

I certify that this is a true, full and correct copy of the resolution adopted by Manville Board of Education at its meeting on January 21, 2020.

Allison Bogart
Business Administrator/Board Secretary

OAL Dkt. No. EDU 14641-19
Agency Dkt. No. 276-10/19

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

New Jersey Department of Education,

Respondent.

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 3/12/20
Date of Mailing: 3/12/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14641-19
AGENCY DKT. NO. 276-10/19

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Michael I. Inzelbuch, Esq. for petitioners

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

Record Closed: January 29, 2020 Decided: February 10, 2020

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 17, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the settlement agreement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. (J-1.) Also attached is the Board Resolution approving settlement. (J-2.)

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

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

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

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

February 10, 2020
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 2/12/2020

Mailed to Parties: 2/14/2020

/vj

J-1

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent
New Jersey Department of Education
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey, 08625

By: Jaclyn M. Frey
Deputy Attorney General
P: (609) 376-3100
F: (609) 943-5853
Jaclyn.Frey@law.njoag.gov

RECEIVED
2020 JAN 29 P 4:20
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

LAKEWOOD TOWNSHIP BOARD OF EDUCATION, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 276-10/19 OAL Dkt. No. EDU 14641-19 **SETTLEMENT AGREEMENT**

WHEREAS, Petitioner, Lakewood Township Board of Education ("Lakewood") and Respondent, New Jersey Department of Education ("DOE") (collectively "The Parties"), have mutually agreed to settle the above-captioned matter, with Gurbir S. Grewal, Attorney General of New Jersey, by Jaclyn M. Frey, Deputy Attorney General, appearing on behalf of DOE, and Michael I. Inzelbuch, Esq., appearing on behalf of Lakewood.

WHEREAS, Lakewood filed a "Petition and Request for Emergent Relief as to Appointment of Business Administrator" on or about October 10, 2019, seeking, in part, the approval of a

contract for Robert S. Finger to serve as Interim Business Administrator in Lakewood through June 30, 2020 at a rate of $700 per diem;

WHEREAS, DOE filed a letter brief in support of its Motion to Dismiss the Petition and in opposition to Lakewood's request for emergent relief, on or about October 25, 2019;

WHEREAS, The Parties appeared before the Honorable Susan Olgiati, Administrative Law Judge ("ALJ") on October 29, 2019, at which time this matter was conferenced and a settlement resolution was discussed;

NOW THEREFORE, it is hereby agreed by way of this Settlement Agreement as follows:

1. On October 30, 2019 Lakewood submitted for approval by the Executive County Superintendent, a proposed contract for Robert S. Finger to serve as Interim Business Administrator/Board Secretary in Lakewood for the period of November 1, 2019 through June 30, 2020 at a rate of $675 per diem, $105 per hour for overtime (excess of 7 hours per day) and $95 per hour for collective bargaining.

2. On October 31, 2019 Kevin W. Ahearn, Interim Executive County Superintendent ("IECS") for the Ocean County Office of Education sent a letter to Lakewood approving the aforementioned proposed employment contract for Robert S. Finger.

3. On October 31, 2019 Lakewood adopted a resolution, codifying the terms of the aforementioned contract as approved by the IECS.

4. By letter dated November 5, 2019 counsel for Lakewood advised ALJ Olgiati that the matter had settled and that Lakewood is withdrawing the Emergent Petition docketed under OAL Dkt. No. EDU-14641-19.

5. This Settlement Agreement resolves all aspects of the Petition of Appeal and Request for Emergent Relief filed under OAL Dkt. No. EDU-14641-19.

6. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

7. The parties are requesting that this Agreement be confirmed in a Decision by ALJ Olgiati.

MICHAEL I. INZELBUCH, ESQ.
Attorney for Petitioner

Michael I. Inzelbuch, Esq.

Dated: 1.14.20

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

Jaclyn M. Frey
Deputy Attorney General

Dated: 1/16/2020

J 2

Lakewood Board of Education
200 Ramsey Avenue, Lakewood, NJ 08701 Main Office: (732) 364-2400 Fax: (732) 905-3687
Laura A. Winters, Superintendent of Schools Robert S. Finger, Interim Business Administrator

RECEIVED
2020 JAN 29 P 4:20
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RESOLUTION

J. Move to approve the Execution regarding the Emergent Relief Petition, Lakewood Township Board of Education v. New Jersey Department of Education, State of New Jersey Office of Administrative Law, Agency Ref. No. 276-10/18, OAL Dkt. No. EDU 14641-19 approving Robert S. Finger to serve as Interim Business Administrator/Board Secretary for the period of November 1, 2019 thru June 30, 2020 at a rate of $675 per diem, $105 per hour overtime (excess of 7 hours per day) and $95 per hour for collective bargaining.

MOTION TO APPROVE THE MINUTES, ACCEPT THE ADDITIONS & CORRECTIONS TO THE AGENDA, AND BUSINESS & SUPERINTENDENT AGENDAS (passed)
Motion: Mrs. Gonzalez **Second:** Mr. Bender
5 Ayes: Mrs. Gonzalez, Mr. Stern, Mr. Trelsser, Mr. Jackson-Byers, Mr. Bender
0 Nays:
0 Abstained:
4 Absent: Mr. Zlatkin, Mr. Nakdimen, Mr. Newhouse, Mr. Rodriguez

Payment will not be made by the Board of Education Business Office until a contract is fully executed by the Board and prior to work commencing reviewed and initialed by General Counsel.

CERTIFICATION

I, Kevin Campbell, Assistant Business Administrator/ Board Secretary to the Board of Education of the Township of Lakewood, hereby certify the foregoing is a true copy of the Resolution adopted by the Board of Education of the Township of Lakewood, County of Ocean, at the public meeting held on the 16th day of December 2019.

Kevin Campbell/Assistant Business Administrator/ Board Secretary



Lakewood Board of Education
200 Ramsey Avenue, Lakewood, NJ 08701 Main Office: (732) 364-2400 Fax: (732) 905-3687
Laura A. Winters, Superintendent of Schools

RESOLUTION

RECEIVED
2020 JAN 29 P 4:28
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

13. FINGER, Robert
Interim Business Administrator/Board Secretary
Effective: November 1, 2019
Terminating: June 30, 2020; or
until a permanent Business Administrator is hired
Salary: $675.00 per Diem
$105.00 per hour for overtime
(excess of seven hours/day),
and $95.00 per hour for collective bargaining.
(As approved by the County Office and
OAL Docket #14641-19 Agency #276-10/19)
(budget account # 11-000-251-100-00-0000)

MOTION TO APPROVE THE MINUTES, TO ACCEPT THE ADDITIONS & CORRECTIONS TO THE AGENDA, BUSINESS AGENDA, SUPERINTENDENT AGENDA & OLD BUSINESS (passed)

Motion: Mrs. Gonzalez **Second:** Mr. Rodriguez
8 Ayes: Mr. Zlatkin, Mrs. Gonzalez, Mr. Nakdimen, Mr. Newhouse, Mr. Rodriguez, Mr. Stern, Mrs. Jackson-Byers, Mr. Bender
0 Nays:
0 Abstained:
1 Absent: Mr. Treisser

The Board voted with the understanding that "H" 18 was Rejected and "H" 19 was Removed.

Note: Mr. Nakdimen's vote should reflect his abstention from any item pertaining to or involving SCHI; Business Agenda, Letter "H" 1, 2, 4, 12, & 14, and Letter "P" and Superintendent Agenda #36.

Payment will not be made by the Board of Education Business Office until a contract is fully executed by the Board and prior to work commencing reviewed and initialed by General Counsel.

Lakewood Board of Education
200 Ramsey Avenue, Lakewood, NJ 08701 Main Office: (732) 364-2400 Fax: (732) 905-3687

Laura A. Winters, Superintendent of Schools

CERTIFICATION

I, Kevin Campbell, Assistant Business Administrator/ Assistant Board Secretary to the Board of Education of the Township of Lakewood, hereby certify the foregoing is a true copy of the Resolution adopted by the Board of Education of the Township of Lakewood, County of Ocean, at the public meeting held on the 31ST day of October, 2019.

Kevin Campbell/Assistant Business Administrator/ Assistant Board Secretary

95-20

New Jersey Commissioner of Education

Final Decision

Scott Baron,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent, New Jersey Department of Education (NJDOE), Office of Student Protection (OSP), that he is permanently disqualified from employment as a private school bus driver. Petitioner had driven a school bus for a non-public school since 2012; the school was fully aware at the time of his hiring that in 2008, he had pled guilty to two second-degree felonies for misappropriating a former employer's money. Petitioner was granted a school bus license and several subsequent renewals by the Motor Vehicle Commission (MVC), despite the fact that his background checks revealed his 2008 guilty plea. Petitioner was disqualified by OSP in 2019 after submitting to a criminal history background check through the NJDOE pursuant to *N.J.S.A.* 18A:39-19.1, which revealed his 2008 guilty plea; OSP subsequently notified the MVC of the disqualification, and the MVC revoked petitioner's school bus license. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; an analysis of applicable statutes indicates that *N.J.S.A.* 18A:39-19.1 applies only to public school bus drivers; private schools have the discretion to employ a person who would be disqualified from public school employment; the Commissioner's powers and responsibilities regarding background checks of nonpublic school employees are limited to determining whether such persons could work in a public school; these powers and responsibilities do not extend to persons employed in non-public schools; and the statutory provisions regarding background checks of nonpublic school employees do not require the Commissioner to notify the MVC regarding revocation of the license of a non-public school employee with a disqualifying offense on his record. The ALJ concluded that a private school has the discretion to employ a bus driver even if that person would be disqualified from public school employment; further, OSP should notify the MVC that petitioner's school bus driver credentials must be restored so that he may resume his employment as a private school bus driver. Accordingly, the ALJ granted the petitioner's motion for summary decision, and dismissed the OSP's cross motion.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner found that *N.J.S.A.* 18A:39-19.1 applies only to bus drivers employed by public schools or other educational entities under the supervision of the NJDOE. With regard to nonpublic school bus drivers, the Commissioner's authority is limited to reporting whether a criminal history record check reveals offenses that would be disqualifying in a public school. The OSP was ordered to notify the MVC to restore petitioner's school bus driver license.

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

March 13, 2020

95-20

OAL Dkt. No. EDU 11417-19
Agency Dkt. No. 207-8/19

New Jersey Commissioner of Education

Final Decision

Scott Baron,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto have been reviewed.

In 2008, petitioner pled guilty to two second-degree felonies for misappropriating his former employer's money. In 2012, a nonpublic school, which was aware of his criminal history, hired him as a bus driver. He applied for a school bus driver license through the Motor Vehicle Commission, and he was granted a license and several subsequent renewals even though his background checks revealed his 2008 guilty plea. In 2019, petitioner submitted to a criminal background check through the Department of Education, Office of Student Protection (OSP). The OSP, upon receiving information about petitioner's criminal history, issued a letter stating that petitioner was permanently disqualified from employment as a school bus driver pursuant to *N.J.S.A.* 18A:39-19.1. The OSP notified the Motor Vehicle Commission (MVC) of the disqualification and the MVC revoked petitioner's school bus driver license.[1]

[1] The MVC has represented that the license will be restored if the Department of Education determines that petitioner is qualified to operate a commercial vehicle for the purpose of transporting school children.

The ALJ analyzed the applicable statutes and concluded that *N.J.S.A.* 18A:39-19.1 applies only to public school bus drivers and that a private school has the discretion to employ a person who would be disqualified from public school employment. The Commissioner's powers and responsibilities with respect to background checks of nonpublic school employees are limited to determining whether such persons could work in a public school, not whether such person may work in a private school. Moreover, the statutory provisions pertaining to background checks of nonpublic school employees do not require the Commissioner to notify the MVC to revoke the license of a private school employee with a disqualifying offense on his or her record. The ALJ further found that, because petitioner had obtained a certificate under the Rehabilitated Convicted Offenders Act (RCOA), he could not be disqualified from employment as a bus driver.

In its exceptions, the OSP argues *N.J.S.A.* 18A:39-19.1 does not limit the background check requirements to drivers employed by public schools, and that petitioner's disqualification under that statute is mandatory. The OSP further contends that *N.J.S.A.* 18A:6-4.13 to -4.17 define only what a private school employer may do, while the issue here is what the OSP is required to do following a background check. Regarding the RCOA, the OSP argues that *N.J.S.A.* 18A:39-19.1 permanently disqualifies individuals convicted of the listed offenses from being a bus driver and that petitioner has not offered any proof to support the assertion that the RCOA negates that requirement.

Upon review, the Commissioner concurs with the ALJ's conclusion that petitioner is not disqualified from employment as a bus driver for a nonpublic school, for the reasons thoroughly explained in the Initial Decision. *N.J.S.A.* 18A:6-4.13 provides that nonpublic schools may require prospective employees, including bus drivers, to demonstrate that they have no criminal history that would disqualify them from employment in a public school. Following a criminal history record check, the Department shall provide written notification to the nonpublic school of the "determination as to whether the candidate would be qualified or disqualified for employment in the public schools." *N.J.S.A.* 18A:6-4.15. This provision stands in stark contrast to *N.J.S.A.* 18A:39-

19.1, which provides that following a criminal history record check for a school bus driver, the Department shall notify the applicant "of the applicant's qualification or disqualification as a school bus driver." Applying the mandatory disqualification provision of *N.J.S.A.* 18A:39-19.1 to nonpublic school bus drivers would render *N.J.S.A.* 18A:6-4.15 meaningless. The Legislature, which enacted both of these statutes in the same year, cannot be presumed to have intended such a result. The Commissioner therefore finds that *N.J.S.A.* 18A:39-19.1 applies only to bus drivers employed by public schools or other educational entities under the supervision of the Department of Education. With regard to nonpublic school bus drivers, the Commissioner's authority is limited to reporting whether a criminal history record check reveals offenses that would be disqualifying in a public school.[2]

Accordingly, the Initial Decision of the OAL is affirmed as modified herein. Petitioner is not disqualified from operating a school bus for a nonpublic school. The OSP shall notify the MVC to restore petitioner's school bus driver license.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 3/13/20
Date of Mailing: 3/16/20

[2] As the relief requested in the Petition of Appeal pertained solely to petitioner's ability to operate a school bus for a private school not under the jurisdiction of the Department, the Commissioner does not reach the RCOA issue.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11417-19
AGENCY DKT. NO. 207-8/19

SCOTT BARON,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION,
Respondent.

Scott Baron, petitioner, pro se

Sydney Finkelstein,[1] Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 21, 2020 Decided: January 29, 2020

BEFORE **DEAN J. BUONO,** ALJ:

---

[1] Geoffrey Stark. Deputy Attorney General, submitted both the opposition to the motion for summary decision and cross-motion, but has since left the Division of Law.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 12, 2019, Scott Baron, (petitioner or Baron), filed a Petition of Appeal with the Commissioner of the New Jersey Department of Education. He challenges respondent Department of Education's (DOE) determination that, under N.J.S.A. 18A:6-7.1, he is disqualified from employment as a private school bus driver as a result of his two second-degree felony convictions, and that N.J.S.A. 18A:39-19.1 and N.J.S.A. 39:3-10.1 required the DOE to notify the Motor Vehicle Commission (MVC) of Baron's employment disqualification so that the MVC could immediately revoke his school bus driver credentials.

As part of this matter, Baron seeks to amend his petition to add the MVC as a party, and the parties have filed cross-motions for summary decision on the issue of whether the school and motor vehicle laws requiring public school bus drivers' disqualification from employment and loss of licensure for certain criminal offenses also apply to private school bus drivers.

It was subsequently transmitted to the Office of Administrative Law (OAL) on August 19, 2019, as an application for emergent relief. However, after discussing the matter with the parties the application was withdrawn.

On November 15, 2019, Baron filed a motion for summary decision challenging his disqualification from employment as a private school bus driver. The DOE filed a cross-motion for summary decision. The undersigned provided the parties time for briefs. Oral argument was not requested, and on January 21, 2020, the record closed with respect to the motions for summary decision.

The question for me to decide is whether a private school bus driver is disqualified from employment or subject to license revocation if his criminal history includes an offense that would otherwise disqualify him from employment and subject him to license revocation if he were a public-school bus driver.

FACTUAL DISCUSSION

The essential facts of this case are not in dispute and as such **I FIND AS FACT** that Baron is a former attorney who, in 2008, pled guilty to two second-degree felonies for misappropriating his employer's money for his personal use. He served several months in prison for his crimes.

In 2012, Baron started a new career as an office clerk and a school bus driver for The Hebrew Academy (THA), which is a toddler through grade eight private school in Marlboro that his own children attended.

In July of that year, Baron applied to the MVC for the commercial driver's license (CDL) and P (Passenger) and S (School Bus) endorsements that he needed to work as a school bus driver for THA. The application stated that "an applicant must be fingerprinted as part of the background records check" under either the procedure for "school bus operators under the jurisdiction of the Dept. of Education (N.J.S.A. 18A:39-19.1)" or for "school bus drivers for private/parochial school . . . not under the jurisdiction of the Dept. of Education (N.J.S.A. 39:3-10.1)." Petitioner's Ex. D. Because THA is a private school, Baron selected the latter option—that he would not "be transporting school-age children under the jurisdiction of the Department of Education"—and submitted his fingerprints for a criminal background check by the MVC under N.J.S.A. 39:3-10.1. Ibid.

In support of his application, THA's Head of School, Yoti Golan, advised the MVC that THA is a private school that is not under the jurisdiction of DOE and that she intended to employ Baron as a school bus driver once he was properly licensed. Petitioner's Ex. E. After completing a background check, MVC issued Baron a CDL with P and S endorsements. Petitioner's Exs. F, F1, and G. In 2013, and again in 2017, the MVC renewed Baron's school bus driver credentials upon a background check in accordance with the procedures for bus drivers for schools not under the jurisdiction of the DOE. Petitioner's Exs. H, I, J, K, L, M, and N.

In 2019, all THA employees, including Baron, submitted to criminal background checks through the DOE. As a result of that background check, the DOE's Office of Student Protection advised Baron by letter dated July 5, 2019, that, due to his second-degree convictions in 2008, and pursuant to N.J.S.A. 18A:39-19.1, he was "permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education, or with a contracted service provider under contract with said school or educational facility." Petitioner's Exs. A and R. The DOE also advised THA of the results of Baron's background check and asked THA to "[p]lease notify this office in writing as to the final disposition of [Baron's] employment." Petitioner's Ex. S.

In response, Ms. Golan advised the DOE that THA is a private school that does not receive support from state appropriations and that, therefore, THA is not under the jurisdiction of the DOE and "disqualification of Mr. Baron from employment with a public school is not applicable to THA, a private school." Petitioner's Ex. T. She further advised the DOE that, despite Baron's criminal history, "it is my intention to retain Mr. Baron as an employee of THA." Despite Ms. Golan's protest, the DOE, by letter dated July 22, 2019, notified her that, while the DOE did not object to Baron's continued employment as an office clerk for THA, "[b]y law this office has advised the [MVC] of the DOE's disqualification [of Baron as a school bus driver] and the MVC will be suspending the 'S' endorsement." Petitioner's Exs. T and U.

On or about July 31, 2019, the MVC notified Baron that the agency "has received information from [the DOE] that you have been disqualified as a school bus operator pursuant to N.J.S.A. 18A:39-19.1 because . . . you have been convicted of one of the disqualifying crimes specified in N.J.S.A. 18A:6-7.1." Petitioner's Ex. B. The MVC further notified Baron that, as a result, "pursuant to authority under N.J.S.A. 39:3-10.1, 39:5-30 and N.J.A.C. 13:21-14.5(a) and (c), the Commission has suspended your privilege to operate school buses . . . used in the transportation of school children in New Jersey as of 07/29/2019, for an indefinite period." Ibid. Finally, the MVC advised Baron that "[i]f at some future time the [DOE] determines that you are qualified to operate commercial vehicles for the purpose of transporting school children, the [DOE]

will notify the Commissioner in writing of their decision and your privilege may be restored." Ibid.

On August 14, 2019, Baron challenged his disqualification from employment as a school bus driver by filing with the Commissioner of Education a petition of appeal, including a separate motion for emergent relief, seeking an order compelling the DOE to vacate his permanent disqualification from driving a school bus for a private school not under the DOE's jurisdiction, and compelling the DOE to advise the MVC to reinstate his school bus driver credentials. On August 19, 2019, the Commissioner transmitted the petition and motion for emergent relief to the Office of Administrative Law (OAL) for hearing.

Subsequently, Baron withdrew his motion for emergent relief, but filed with the OAL an amended petition to add the MVC as a party to this matter. The parties have also filed cross-motions for summary decision.

In support of his motion for summary decision, Baron argues that public school bus drivers and private school bus drivers are subject to different school and motor vehicle laws and that, although he is disqualified from employment as a public school bus driver as a result of his second-degree felony convictions, his criminal history does not disqualify him from employment as a private school bus driver and the DOE should not have notified the MVC to revoke his school bus driver credentials. In the alternative, Baron argues that, even if the laws requiring a public school bus driver's employment disqualification and license revocation for certain offenses also apply to private school bus drivers, he has, pursuant to the Rehabilitation of Convicted Offenders Act (RCOA), N.J.S.A. 2A:168A-1 to -16, received from the Superior Court of New Jersey Intensive Supervision Program a certificate suspending any and all disabilities, forfeitures and/or bars that would impede his ability to operate a school bus for employment purposes. In opposition to Baron's motion and in support of its cross-motion, the DOE maintains that "[t]he statutes governing school-bus-driver licensing and criminal background checks are not conditioned upon a licensee's employer[;] they apply to all school bus drivers in the state, in part because licensees have the ability to change jobs, or may be employed by a bus contractor that does business with both public and private schools."

DOE's December 11, 2019, Brief, p. 8. Thus, according to the DOE, because Baron "was convicted of two second-degree felonies, which are disqualifying offenses under N.J.S.A. 18A:6-7.1, . . . the Commissioner must [pursuant to N.J.S.A. 18A:39-19.1] disqualify [him] from working as a school bus driver, regardless of whether he is currently employed by a public school district, a bus contractor, or, as in [Baron's] case, a private, religious school" and, pursuant to N.J.S.A. 18A:39-19.1 and N.J.S.A. 39:3-10.1, "the Chief Administrator of the MVC must immediately revoke the school-bus-driver special license" upon notification of a school bus driver's employment disqualification. Ibid.

LEGAL DISCUSSION

First, I will address the procedural issues and concerns with Baron's attempt to amend his petition to add the Motor Vehicle Commission (MVC). Generally, under the Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1 to -21.6, parties may freely amend their pleadings in contested cases "unless precluded by law or constitutional principle." N.J.A.C. 1:1-6.2. However, because N.J.A.C. 1:1-1.3 specifically precludes third-party joinder in contested case hearings in the absence of statutory authority, and because the school laws, N.J.S.A. 18A:1-1 to -76-4, do not specifically authorize third-party joinder in hearings arising thereunder, Baron cannot amend his pleadings to join the MVC as a party to this matter.

Besides, the MVC is not a necessary party to this matter. When the MVC notified Baron of his license revocation, the agency advised him that "[i]f at some future time the [DOE] determines that you are qualified to operate commercial vehicles for the purpose of transporting school children, the [DOE] will notify the Commissioner in writing of their decision and your privilege may be restored." Thus, if Baron ultimately prevails in this matter, the DOE, which is a party to this matter, can provide Baron the relief he seeks without the MVC's involvement as a party.

Under the UAPR, the standards for summary decision are that "[a] party may move for summary decision upon all or any of the substantive issues in a contested

case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

In 1989, the Legislature passed two separate laws concerning criminal history checks of school bus drivers. Under one law, L. 1989, c. 104, the Legislature made criminal history checks of public school bus drivers mandatory. Under the other law, L. 1989, c. 229, the Legislature made criminal history checks of private school bus drivers optional.

First, through L. 1989, c. 104, the Legislature created procedures at N.J.S.A. 18A:39-19.1 for background checks of public school bus drivers and required their disqualification from public school employment for certain offenses. Specifically, under N.J.S.A. 18A:39-19.1, "[p]rior to employment as a school bus driver, and upon application for renewal of a school bus driver's license, a bus driver shall submit to the Commissioner of Education the driver's name, address, and fingerprints" for a criminal history check by the FBI and the State Police. The law further dictates that "[a] school bus driver . . . shall be permanently disqualified from employment or service if the individual's criminal history record reveals a record of conviction for which public school employment candidates are disqualified pursuant to [N.J.S.A. 18A:6-7.1], which includes "any crime of the first or second degree." N.J.S.A. 18A:39-19.1(a); N.J.S.A. 18A:6-7.1.

N.J.S.A. 18A:39-19.1 also requires the Commissioner to notify the MVC and "[t]he local board of education or the school bus contractor and the County Superintendent of Schools" of the bus driver applicant's disqualification from employment. N.J.S.A. 18A:39-19.1(d). Finally, the MVC "shall, upon notice of disqualification from the Commissioner of Education, immediately revoke the applicant's

special license issued pursuant to [N.J.S.A. 39:3-10.1] without necessity of a further hearing." Ibid.

Through L. 1989, c. 104 the Legislature also amended N.J.S.A. 18A:6-7.1 and N.J.S.A. 39:3-10.1 to account for the new procedures at N.J.S.A. 18A:39-19.1. N.J.S.A. 18A:6-7.1, which requires criminal record searches for all prospective public school employees whose jobs would involve regular interaction with pupils and lists the criminal offenses that permanently disqualify such individuals from public school employment, was amended to specifically state that "[a]n individual employed by a board of education or a school bus contractor holding a contract with a board of education, in the capacity of a school bus driver, shall be required to meet the criminal history record requirements pursuant to [N.J.S.A. 18A:39-19.1]." N.J.S.A. 18A:6-7.1.

And N.J.S.A. 39:3-10.1, which is a motor vehicle law governing licensure of school bus drivers, was also amended by L. 1989, c. 104 to reflect the license revocation requirement under N.J.S.A. 18A:39-19.1, such that "[n]otwithstanding the provisions of any law to the contrary, the chief administrator shall, upon notice of disqualification from the Commissioner of Education pursuant to [N.J.S.A. 18A:39-19.1], immediately revoke the special license . . . without the necessity of a further hearing."[2] N.J.S.A. 39:3-10.1.

Second, under L. 1989, c. 229, the Legislature gave nonpublic schools the choice of requiring candidates for employment, including bus drivers, to undergo criminal history checks facilitated by the Commissioner. That law, which is now codified as N.J.S.A. 18A:6-4.13 to -4.17, provides that "[a]ny nonpublic school may require all final candidates for employment or service under contract with the school as a . . . bus driver . . . to demonstrate that no criminal history record information exists . . . which would disqualify that individual from employment in the public schools of this State pursuant to [N.J.S.A. 18A:6-7.1]." N.J.S.A. 18A:6-4.13.

[2] The law originally referred to "the director," but was subsequently amended to refer to "the chief administrator" to reflect a change in title for the head of the MVC.

Based on the results of the check, the Commissioner shall "determin[e] whether the applicant would be qualified or disqualified for employment in the public schools and shall inform the applicant of his determination in writing" and "[t]he commissioner shall also provide written notification to the chief administrator of the nonpublic school, which requires the criminal history record check as a condition of employment, of his determination as to whether the candidate would be qualified or disqualified for employment in the public schools." N.J.S.A. 18A:6-4.15.

Thus, in the same year, the Legislature created procedures for mandatory criminal history checks of public school bus drivers under one law, and optional criminal history checks of nonpublic school bus drivers under a separate law. Moreover, that N.J.S.A. 18A:39-19.1 applies exclusively to public school bus drivers, while N.J.S.A. 18A:6-4.13 to -4.17 applies exclusively to private school bus drivers, seems obvious. First, the opening sentence of N.J.S.A. 18A:39-19.1 states that, "[p]rior to employment as a school bus driver, and upon application for renewal of a school bus driver's license, a bus driver *shall submit to the Commissioner of Education* the driver's name, address, and fingerprints" for a background check. N.J.S.A. 18A:39-19.1(a) (emphasis added). While this sub-provision does not modify "school bus driver" with public or nonpublic, it is clear that this requirement applies only to *public* school bus drivers, because prospective private school bus drivers are not required to submit to criminal history checks through the Commissioner *unless* the private school so chooses under N.J.S.A. 18A:6-4.13 to -4.17.

Second, N.J.S.A. 18A:39-19.1 is rife with specific references as to public schools, which are governed by local boards of education, but makes no mention of nonpublic schools, which are not governed by local boards of education. See, e.g., N.J.S.A. 18A:39-19.1(a) ("the commissioner shall notify the employing board of education or contractor, and the board or contractor shall take appropriate action;" "[t]he commissioner shall notify the employing board of education or contractor that the driver is no longer eligible for employment"); N.J.S.A. 18A:39-19.1(d) ("[t]he local board of education or the school bus contractor and the County Superintendent of Schools shall also be notified of the disqualification").

Finally, N.J.S.A. 18A:6-4.13 specifically lists bus drivers among the nonpublic school employment candidates who may be required to undergo a background check, and cross-references N.J.S.A. 18A:6-7.1 for the procedures the Commissioner shall follow to conduct such checks, but neither N.J.S.A. 18A:6-4.13 nor any of the other provisions governing criminal history checks of nonpublic school employment candidates references N.J.S.A. 18A:39-19.1.

And although there are similarities between the separate laws, there are also important differences. Unlike N.J.S.A. 18A:39-19.1, the provisions governing private school background checks, N.J.S.A. 18A:6-4.13 to -4.17, do not explicitly state that a school bus driver whose criminal history includes an offense listed under N.J.S.A. 18A:6-7.1 cannot be hired by a nonpublic school, and N.J.S.A. 18A:6-4.13 to -4.17 do not include MVC notification or license revocation requirements.

The differing language in these related laws that were enacted in the same year is important because "a comparative analysis of the language of contemporaneous statutes may, because of contrasting language applicable to similar subject matter, be indicative of an intent or purpose on the part of the Legislature to provide different treatment." Malone v. Fender, 80 N.J. 129, 136 (1979) (citing Smith v. Twp. of Hazlet, 63 N.J. 523, 527 (1973)).

Thus, in Smith v. Twp. of Hazlet, 63 N.J. 523, the Supreme Court addressed the difference between two contemporaneous statutes—one providing for the creation of police departments in cities (L. 1899, c. 135) and the other providing for the creation of police departments in townships (L. 1899,c. 169)—and concluded that:

> Where two comprehensive statutes are enacted by the same legislative body in the same year, one dealing with a certain class of cities and the other dealing with townships, and where the former designates the office of chief of police and accords the holder of the office some measure of statutory authority, while on the same subject the latter is silent, the inference is permissible that the distinction is a purposeful one.
>
> [id. at 527.]

Like in Smith, the fact that N.J.S.A. 18A:39-19.1 requires the Commissioner to notify the MVC if a public school bus driver applicant has a disqualifying criminal record and requires the MVC to revoke the bus driver's license, but N.J.S.A. 18A:6-4.13 to -4.17 are silent on the same subjects (and do not reference N.J.S.A. 18A:39-19.1), leads to the permissible inference that the distinction between public school bus drivers and private school bus drivers is a purposeful one, and that the Legislature intended to treat the two classes of drivers differently. Specifically, there is a permissible inference under the laws governing background checks of private school bus drivers that the Commissioner is not required to notify the MVC of an offense that would be disqualifying for public school employment, the MVC is not required to revoke the license of a private school bus driver applicant for such an offense, and a private school has the discretion to employ a bus driver even if such person would be disqualified from public school employment.

This conclusion is reinforced by the fact that, unlike the mandatory criminal background checks of public school employment applicants under N.J.S.A. 18A:39-19.1 ("a bus driver *shall* submit" to a background check) and N.J.S.A. 18A:6-7.1 (a public school bus driver "*shall be required* to meet the criminal history record requirements pursuant to [N.J.S.A. 18A:39-19.1]"), criminal history checks of applicants for private school employment, including bus drivers, are optional, such that "[a]ny nonpublic school *may require*" criminal background checks.[3] N.J.S.A. 18A:6-4.13 (emphasis added). And if the private school so chooses, and the Commissioner determines that a private school bus driver applicant "*would be* . . . disqualified for employment in the *public schools*," N.J.S.A. 18A:6-4.15 (emphasis added), there is nothing in N.J.S.A. 18A:6-4.13 to -4.17 that prohibits the private school head from nonetheless employing that person as a school bus driver (unless, of course, that person had previously applied for public school employment and had his driver's license revoked pursuant to N.J.S.A. 18A:39-19.1).[4] And again, N.J.S.A. 18A:39-19.1 requires the MVC to revoke the school

[3] The only caveat under N.J.S.A. 18A:6-4.13 is that a private school that elects to require background checks must apply the requirement uniformly to all applicants.

[4] The fact that N.J.S.A. 18A:6-4.15 is written in the conditional tense with reference to public school employment—"would be . . . disqualified for employment in the public schools"—is also indicative of the

bus driver license of a public school applicant or employee with a disqualifying criminal offense on his record, while N.J.S.A. 18A:6-4.13 to -4.17 do not. Thus, unlike a public school, a private school does not have to run background checks on prospective employees and may hire a school bus driver even if a criminal history check would reveal that he had been convicted of an offense listed under N.J.S.A. 18A:6-7.1.

And there is nothing in N.J.S.A. 18A:6-4.13 to -4.17 that prohibits a private school that does require background checks of its employment candidates or employees from hiring a candidate or continuing to employ an individual whose criminal history includes an offense listed under N.J.S.A. 18A:6-7.1. N.J.S.A. 18A:6-4.15 simply requires that, after the results of a criminal history search are known, the Commissioner "provide written notification to the chief administrator of the nonpublic school, which requires the criminal history record check as a condition of employment, of his determination as to whether the candidate *would be qualified or disqualified for employment in the public schools*." (Emphasis added).

Thus, the Commissioner's powers and responsibilities with respect to background checks of nonpublic school employment candidates and employees is limited to a determination of whether such persons could work in a public school, not whether such person may work in a private school.[5] That decision is left to the head of a private school, who may choose to employ an individual even if he or she "would be . . . disqualified for employment in the public schools" due to a criminal history that includes a disqualifying offense under N.J.S.A. 18A:6-7.1. And, in the case of a private school bus driver, N.J.S.A. 18A:6-4.13 to -4.17 do not require or direct the Commissioner to notify the MVC to revoke the license of an applicant or employee with a disqualifying criminal offense on his or her record.

Legislature's intent to refrain from requiring permanent disqualification from private school employment for offenses that would disqualify a person from public school employment.

[5] These provisions may also apply to employees pursuant to N.J.S.A. 18A:6-4.15, which states that "[f]ollowing qualification for employment pursuant to this section, the State Bureau of Identification shall immediately forward to the Commissioner of Education any information which the bureau receives on a charge pending against an employee of the nonpublic school which requires a criminal history record check as a condition of employment" and that "[i]f the charge is for one of the crimes or offenses enumerated in section 1 of P.L. 1986, c.116 (C.18A:6-7.1), the commissioner shall notify the chief administrator of the nonpublic school."

The motor vehicle laws implicated by the education laws regarding criminal history checks of school bus drivers further supports the conclusion that public school bus drivers and private school bus drivers are treated differently with respect to permanent employment disqualification and license revocation. N.J.S.A. 39:3-10.1 provides that "any person applying for a special license and any person who is the holder of a special license . . . for the transporting of children to and from schools, pursuant to N.J.S.18A:39-1 et seq., shall comply with the provisions of . . . [N.J.S.A. 18A:39-19.1]" and "[n]otwithstanding the provisions of any law to the contrary, the chief administrator shall, upon notice of disqualification from the Commissioner of Education pursuant to . . . [N.J.S.A. 18A:39-19.1], immediately revoke the special license granted under authority of this section without the necessity of a further hearing." That is, N.J.S.A. 39:3-10.1 specifically references N.J.S.A. 18A:39-19.1, which only applies to public school bus drivers, and not N.J.S.A. 18A:6-4.13 to -4.17, which governs private school bus drivers. Thus, by its terms, N.J.S.A. 39:3-10.1 only applies to public school bus drivers, and the Commissioner is only required to notify the MVC, and the MVC shall only revoke a school bus driver's license, in the event the driver has a disqualifying criminal offense and applies for a job with a public school or the driver commits a disqualifying offense while employed by a public school.

The motor vehicle regulation implementing N.J.S.A. 39:3-10.1 also distinguishes between public and private school bus drivers. Under N.J.A.C. 13:20-30.14(b), "[a] school bus driver shall submit to a criminal history record check at the time of his or her initial application and any renewal application for a Commercial Driver License with School Bus Endorsement authorizing the driver to operate a school bus by providing to the Department of Education his or her name, address, and fingerprints[.]"

In contrast, under N.J.A.C. 13:20-30.14(c), "[a] school bus driver who provides services only to a nonpublic school shall not be required to undergo a criminal history record check through the Department of Education pursuant to N.J.S.A. 18A:6-4.13 provided that the chief administrator of the nonpublic school provides written documentation indicating that the school bus driver is not required to undergo a criminal history record check as a condition of employment or service under contract." And while, regardless of the education laws, both public and private school bus drivers must

undergo criminal record checks through the MVC, N.J.A.C. 13:20-30.14(d), the standards for revocation under the motor vehicle laws and the education laws are different.

In this regard, while N.J.S.A. 39:3-10.1 provides that "the chief administrator *shall*, upon notice of disqualification from the Commissioner of Education pursuant to [N.J.S.A. 18A:39-19.1], immediately revoke the special license . . . without the necessity of a further hearing," the same provision leaves the chief administrator with discretion in all other instances, such that "[t]he chief administrator *may* suspend or revoke a license granted under authority of this section for a violation of any of the provisions of this subtitle, or on other reasonable grounds, or where, in the chief administrator's opinion, the licensee is either physically or morally unfit to retain the same."[6] (Emphases added). The inference here is that the Chief Administrator must revoke a license pursuant to N.J.S.A. 18A:39-19.1, but that, in the absence of any reference to N.J.S.A. 18A:6-4.13 to -4.17, he or she does not necessarily have to revoke the license of a private school bus driver who would be disqualified from public school employment. And again, there is nothing in N.J.S.A. 18A:6-4.13 to -4.17 that requires or directs the Commissioner to notify the MVC of a disqualifying offense or that requires the MVC to revoke a license.

Based on the foregoing analysis of the school and motor vehicle laws governing school bus drivers, and because there are no genuine issues of material fact, Baron is entitled to summary decision because the DOE improperly determined that, under N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1, Baron is permanently disqualified from working as a school bus driver for a private school due to his second-degree felony convictions, and the DOE should not have, under N.J.S.A. 18A:39-19.1 and N.J.S.A. 39:3-10.1, notified the MVC to revoke Baron's school bus driver credentials.

In 1989, the Legislature decided to disparately treat public school bus drivers and private school bus drivers with respect to criminal background checks and the employment and licensure consequences for those drivers whose criminal histories

[6] See also N.J.A.C. 13:21-14.5 for revocation and suspension standards for passenger endorsements.

include any offenses listed under N.J.S.A. 18A:6-7.1. Through N.J.S.A. 18A:39-19.1, the Legislature provided for mandatory criminal background checks, and for employment disqualification and license revocation, for *public* school bus drivers convicted of any of the criminal offenses listed under N.J.S.A. 18A:6-7.1; through N.J.S.A. 18A:6-4.13 to -4.17, the Legislature provided for optional criminal background checks, but no mandatory employment disqualification and license revocation, for *private* school bus drivers convicted of any of the criminal offenses listed under N.J.S.A. 18A:6-7.1.

Baron's appeal arises from DOE's determination that, pursuant to N.J.S.A. 18A:39-19.1, he is "permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education, or with a contracted service provider under contract with said school or educational facility," and his school bus driver credentials had to be revoked.

As already discussed, N.J.S.A. 18:6-4.13 to -4.17, not N.J.S.A. 18A:39-19.1, governs private school bus drivers such as Baron, and those provisions do not authorize the Commissioner or DOE to permanently disqualify Baron from private school employment or advise the MVC to revoke his license. However, it is also important to note that the DOE's determination letter suffers from another contradiction. Baron does not dispute that he is permanently disqualified from working for "any educational institution under the supervision of the Department of Education." Instead, the problem with the DOE's determination is that THA is not under the supervision of the DOE.

Under N.J.S.A. 18A:4-23, "[t]he commissioner shall have supervision of all schools of the state receiving support or aid from state appropriations, except institutions of higher education[.]" Ms. Golan explained to the DOE that, as a private school that does not receive support from state appropriations, THA is not under the supervision of the DOE. Moreover, there is nothing in N.J.S.A. 18A:6-4.13 to -4.17 that suggests that a private school that avails itself of the DOE's background check services consequently becomes an educational institution over which the Commissioner has supervision and cedes its hiring or firing discretion.

Instead, in light of the above discussion, summary decision in favor of Baron is appropriate, and I **CONCLUDE** that the DOE should notify the MVC to restore Baron's school bus driver credentials so that he may resume his employment as a private school bus driver.[7]

Even if N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1 apply to private school bus drivers, such that Baron's criminal history disqualifies him from employment as a private school bus driver, Baron received a certificate removing the bar from his employment as a school bus driver. Assuming for argument's sake that, due to his criminal record, N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1 require the Commissioner to permanently disqualify Baron from employment as a school bus driver for both public schools and private schools and to notify the MVC to revoke his school bus driver credentials, Baron has, pursuant to the RCOA, received a certificate that removes the bar to his employment as a school bus driver under N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1. Specifically, on January 2, 2020, Ernest M. Caposela, A.J.S.C., and Joseph Rosa, J.S.C., of the Superior Court of New Jersey Intensive Supervision Program, issued Baron a certificate that, under N.J.S.A. 2A:168A-7, is presumptive evidence of his rehabilitation and relieves him of "any and all disabilities, forfeitures and/or bars that would impede [his] ability to operate a school bus for employment purposes."

Although the Commissioner held in In re Krupp, EDU 5196-03, Initial Decision (May 10, 2004), adopted with modification, Comm'r (June 24, 2004), affirmed, State Bd. of Educ. (October 6, 2004), https://njlaw.rutgers.edu/collections/oal, that the RCOA does not apply to N.J.S.A. 18A:6-7.1, the RCOA was amended after that 2004 decision. Now, under N.J.S.A. 2A:168A-7, which became effective in 2008, and "[n]otwithstanding any law to the contrary, a certificate may be issued in accordance with the provisions of this act [C.2A:168A-7 et seq.] that suspends certain disabilities, forfeitures or bars to

[7] Importantly, there is no indication that the MVC would have independently revoked Baron's credentials. Instead, the facts of this case reveal that the MVC originally licensed Baron as a school bus driver in 2012, and renewed his credentials in 2013 and 2017, and that prior to each instance, the MVC ran a criminal history check on him in accordance with N.J.S.A. 39:3-10.1. Thus, even though the MVC was aware of his criminal history, the agency nonetheless granted him a school bus driver license, and twice renewed his license. And as Ms. Golan told the DOE, "it is my intention to retain Mr. Baron as an employee of THA" despite his criminal history.

employment or professional licensure or certification that apply to persons convicted of criminal offenses." N.J.S.A. 2A:168-7(a).

The law further provides that "[a] certificate issued pursuant to this act shall have the effect of relieving disabilities, forfeitures or bars" to, for example, "public employment" and "qualification for a license or certification to engage in the practice of a profession, occupation or business," and defines "public employment" as "employment by a State, county, or municipal agency, but shall not include elected office, or employment in law enforcement, corrections, the judiciary, in a position related to homeland security or emergency management, or any position that has access to sensitive information that could threaten the public health, welfare, or safety." N.J.S.A. 2A:168A-7(b) and (c).

Relevant to this matter, the Legislature specifically excluded from the definition of "public employment" certain occupations, but not others. Critically, a certificate issued pursuant to N.J.S.A. 2A:168A-7 cannot relieve a convicted offender of any bar to "employment in law enforcement, corrections, the judiciary, in a position related to homeland security or emergency management, or any position that has access to sensitive information that could threaten the public health, welfare, or safety," but there is no similar restriction on pursuing employment in the public schools. And, with respect to Baron's employment as a school bus driver, it is doubtful that such a position could be considered a "position that has access to sensitive information that could threaten the public health, welfare, or safety."

The Legislature is presumed to be cognizant of its prior enactments when passing new laws, Mahwah v. Bergen Cnty. Bd. of Taxation, 98 N.J. 268, 279 (1985), such that, in this case, the Legislature was aware of the permanent disqualification and license revocation requirements under N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:39-19.1 when N.J.S.A. 2A:168A-7 became law. While as the Commissioner pointed out in Krupp, N.J.S.A. 18A:6-7.1 allowed for evidence of rehabilitation until 1998, at which point disqualification became permanent regardless of any potential showing of rehabilitation, it appears that, through N.J.S.A. 2A:168A-7, the Legislature reopened the doors to employment in the public schools for certain rehabilitated offenders,

notwithstanding any law to the contrary, including N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:39-19.1.

Certainly, there is an incongruity to a discussion about Baron's disqualification from public school employment as a school bus driver and the subsequent removal of his bar from such employment in the public schools when Baron, in fact, does not seek employment in the public schools, and instead seeks to resume his employment as a school bus driver for a private school.[8] However, because the DOE determined that Baron is "permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education, or with a contracted service provider under contract with said school or educational facility," and notified the MVC to revoke his license, it is important to note that, even if the DOE correctly asserts that N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1 applies to a private school bus driver like Baron, any impediments to his employment as a school bus driver, based solely on his criminal history, have been removed pursuant to N.J.S.A. 2A:168A-7.

Therefore, **I FIND AS FACT** that there are no genuine issues of material fact requiring a hearing. **I CONCLUDE** that Baron's motion for summary decision is hereby **GRANTED**. **I FURTHER CONCLUDE** that the DOE's motion for summary decision is hereby **DENIED**.

As such, **I CONCLUDE** that petitioner is entitled to summary decision, it is hereby **ORDERED** that the petitioner's request for summary decision be **GRANTED**. Having **CONCLUDED** that respondent is not entitled to the requested summary decision, it is hereby **ORDERED** that the respondent's request for summary decision be **DENIED**.

[8] There is also a certain irony to this situation because the N.J.S.A. 2A:168A-7 certificate Baron obtained is inapplicable to private employment and "[a] private employer may, in its sole and complete discretion, consider a certificate issued under this statute in making employment decisions," N.J.S.A. 2A:168A-12, and yet, even before Baron obtained the certificate, THA—a private employer—exercised its discretion to employ Baron despite his criminal history, and wishes to continue to employ Baron as its bus driver despite the DOE's insistence that he is disqualified.

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

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

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

January 29, 2020
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/29/2020

Date Mailed to Parties: 1/29/2020

mph

New Jersey Commissioner of Education

Final Decision

Bergen Center for Child Development,

Petitioner,

v.

New Jersey Department of Education,
Office of Fiscal Accountability and Compliance,

Respondent.

Synopsis

Petitioner Bergen Center for Child Development (Bergen Center) – an approved private school for students with disabilities (APSSD) – challenged the action of respondent, New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC), disallowing a portion of the compensation paid to School Accounting Professionals (SAP) during the 2015-2016 school year. OFAC determined that Bergen Center had retained the services of Mary Bawarski (Bawarski), a certified public accountant affiliated with SAP, under the unrecognized administrative position of "School Accountant," and therefore the maximum salary for the title is restricted in accordance with *N.J.A.C.* 6A:23A-18.6(a)(19). OFAC found that the maximum allowable salary paid to SAP was exceeded by $37,594.43; therefore, the allowable amount was $21,875.57. The matter was heard at the Office of Administrative Law on May 15, 2019 and June 4, 2019.

The ALJ found, *inter alia,* that: *N.J.A.C.* 6A:23-18.3(q) is inapplicable to the business relationship between SAP and Bergen Center; Bawarski is not an employee of Bergen Center, nor did she receive a "salary" from Bergen Center; as such, the "maximum salary" limitation of the regulation is not applicable; there is no other basis contained in *N.J.A.C.* 6A:23-18.6 upon which to disallow the costs; accordingly, OFAC improperly applied the regulation to disallow a portion of the funds paid to SAP. The ALJ concluded that the compensation paid to SAP by Bergen Center is an allowable cost and should be included in the tuition calculation for the 2015-2016 school year. The ALJ ordered the Department to restore the disallowed funds that are the subject of the within appeal.

Upon a comprehensive review of the record, the Commissioner, *inter alia,* concurred with the ALJ's comprehensive analysis of why *N.J.A.C.* 6A:23-18.3(q) is inapplicable to the relationship between SAP and Bergen Center, and with the ALJ's conclusion that OFAC improperly applied *N.J.A.C.* 6A:23-18.3(q) to disallow certain costs that Bergen Center paid to SAP. Accordingly, the Commissioner concluded that the expenses associated with the services provided to Bergen Center by SAP are allowable costs, and the costs shall be included in the tuition rate for the 2015-2016 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.

March 2, 2020

OAL Dkt. No. EDU 12485-18
Agency Dkt. No. 152-6/18

New Jersey Commissioner of Education

Final Decision

Bergen Center for Child Development,

Petitioner,

v.

New Jersey State Department of Education, Office of Fiscal Accountability and Compliance,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Department of Education, Office of Fiscal Accountability and Compliance (OFAC), and the Bergen Center for Child Development (Bergen Center), as well as Bergen Center's reply to OFAC's exceptions.

In this matter, petitioner Bergen Center – an approved private school for students with disabilities (APSSDs) – challenges OFAC's determination disallowing a portion of the compensation paid to School Accounting Professionals (SAP) during the 2015-2016 school year. As part of the routine oversight of APSSDs, OFAC reviewed Bergen Center's business services and tuition charges for the period from July 1, 2015 through June 30, 2016. OFAC found that Bergen Center paid fees to SAP for the services of Mary Bawarski – a certified public accountant – in the amount of $59,470.00, billed at an hourly rate of $190.00 per hour. OFAC further determined that "School Accountant" was an unrecognized administrative position and as

such the maximum salary for the title is restricted in accordance with *N.J.A.C.* 6A:23A-18.6(a)(9).[1] Ultimately, OFAC found that the maximum allowable salary paid to SAP was exceeded by $37,594.43; therefore, the allowable amount was $21,875.57.[2]

Following a hearing at the OAL, the Administrative Law Judge (ALJ) found that the compensation Bergen Center paid to SAP is an allowable cost and should be included in the tuition calculation for the 2015-2016 school year. In so doing, the ALJ determined that *N.J.A.C.* 6A:23-18.3(q) is inapplicable to the business relationship between SAP and Bergen Center. The ALJ stressed that Bawarski is not an employee of Bergen Center nor did she receive a "salary" from Bergen Center; as such, the "maximum salary" limitation of the regulation is inapplicable. The ALJ also concluded that there is no other basis contained in *N.J.A.C.* 6A:23A-18.6 upon which to disallow the costs. Therefore, the ALJ found that OFAC improperly applied the regulation to disallow a portion of the money paid to SAP.

In its exceptions, OFAC reiterated the substance of its post-hearing submission at the OAL, recasting the arguments therein to support its contention that the Initial Decision should be rejected. Although the ALJ considered all of the relevant facts, she erroneously found that OFAC's decision to disallow certain costs paid to SAP was arbitrary, capricious and unreasonable. OFAC emphasizes that its decision to disallow certain costs was based strictly on the plain meaning of the mandating statutes and regulations. In fact, rather than completely disallowing all fees associated with Bawarski's unrecognized position, OFAC took further steps to determine if the unrecognized position could fall under an exception to the mandating regulation. Despite any opinion that OFAC may hold with respect to Bergen Center's business decisions, the record is clear that its findings were in full accord with the statutory mandates and regulatory scheme.

---

[1] OFAC relied on various regulations which were re-codified, but not in any way material to this controversy. The Commissioner cites to the current regulations in this decision.

[2] The specific details regarding OFAC's decision and the calculations are outlined in the Initial Decision.

Moreover, the ALJ erred in applying the regulations to the fees associated with Bawarski because she "was not an employee at Bergen Center." Initial Decision at 6. Essentially, the ALJ concluded that because Bawarski was a consultant rather than an employee with a fixed salary, the fees associated with her services were not subject to the regulations. In reaching that conclusion, the ALJ erred in her analysis of the plain reading of the regulations and failed to look at the overall intent of the regulations. The regulations cover all costs that are included in the tuition rates that APSSDs may charge sending districts. *N.J.A.C.* 6A:23A-18.6 Nowhere in the regulations is it stated that they are inapplicable to fees associated with consultants and a conclusion to the contrary would allow APSSDs to skirt the regulations by hiring consultants rather than employees. OFAC reasonably determined that Bawarski's position was an unrecognized administrative position and that the portion of her fees that exceeded the lowest maximum allowable amount permissible for unrecognized administrative position titles were non-allowable costs. The ALJ's narrow interpretation of the applicable regulations was erroneous and therefore the Initial Decision should be rejected.

In its exceptions, Bergen Center contends that the ALJ appropriately found that the fees paid to SAP were allowable costs; however, the ALJ failed to address all of the issues presented by the petitioner. Bergen Center takes exception to the following legal and factual questions within the Initial Decision: (1) whether OFAC intentionally withheld damning evidence, including evidence supporting the existence of a personal vendetta against Bawarski, warranting an adverse inference; (2) whether OFAC personnel held and acted in furtherance of a personal vendetta, effecting an arbitrary, capricious and unreasonable disallowance of SAP's service fees; (3) whether OFAC substituted its own judgment as to the value of SAP's services, absent formal rule-making; (4) whether OFAC applied a policy limiting APSSDs to exclusive reliance on business office personnel for fiscal oversight and accountability, absent formal rule-making; (5) whether Bergen Center was given a fair and proper internal appeal; and (6) whether OFAC acted

arbitrarily and outside of the rule-making process in creating a pay distinction between auditors and school accountants. Bergen Center outlined why each of the above cited issues should have been addressed by the ALJ, as well as the need for a determination that OFAC personnel had a vendetta against Bawarski and used improper means to disallow all of the costs paid to SAP without formal rule-making. In the absence of an adoption of the Initial Decision, Bergen Center urges the Commissioner to address the issues that were not decided by the ALJ.

In reply to OFAC exceptions, Bergen Center reiterated the positions advanced in its submissions at the OAL, arguing that the ALJ properly determined that OFAC's decision to disallow certain costs that were paid to SAP was arbitrary, capricious and unreasonable. Bergen maintains that the disallowance of certain payments made to SAP was thoroughly contradicted by the ALJ's sound regulatory analysis and the evidence adduced at the hearing, both of which OFAC has failed to rebut. Specifically, OFAC failed to address the ALJ's finding that the plain language of the regulations did not permit application of a salary limit to an outside service provider. Further, OFAC ignored the uncontroverted evidence that is has not interpreted the regulations to apply a maximum salary limitation to all professional service providers.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that OFAC improperly applied *N.J.A.C.* 6A:23A-18.3(q) to disallow certain costs that Bergen Center paid to SAP.[3] In the Initial Decision, the ALJ outlined the applicable provisions and provided a comprehensive analysis as to why *N.J.A.C.* 6A:23A-18.3(q) was inapplicable to the relationship between SAP and Bergen Center. The objections raised in the exceptions filed by OFAC were

[3] It is important to note that when there is a challenge to a finding by OFAC, the Commissioner is not legally mandated to give deference to his staff but instead determines if the finding was legally appropriate. A decision by OFAC is not akin to appellate review of a final agency decision, which is entitled to an arbitrary, capricious or unreasonable standard of review. *See, Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Department of Education, Office of Fiscal Accountability and Compliance*, Commissioner Decision No. 334-14, decided August 14, 2014.

previously made to the ALJ and were clearly considered by her in reaching her decision. The Commissioner is also in accord with the ALJ's declaration regarding the tangential issues raised by Bergen Center during the proceedings at the OAL as well as in its exceptions. As the ALJ succinctly stated, "it is unnecessary to address the arguments raised by Bawarski that she was the victim of a personal vendetta; or the argument raised by counsel that a negative inference should be made because the Department of Education failed to produce certain documents. Nor does it matter that OFAC personnel may have questioned the prudence of using SAP's services as opposed to retaining a business manager." Initial Decision at 12.

Accordingly, the expenses associated with the services provided by SAP are allowable costs and the costs shall be included in the tuition rate for the 2015-2016 school year.

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: 3/2/20
Date of Mailing: 3/3/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12485-18
AGENCY DKT. NO. 152-6/18

BERGEN CENTER FOR CHILD DEVELOPMENT,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,

Respondent.

Vito Gagliardi, Jr., Esq., and **Janelle Edwards-Stewart**, Esq., for petitioner (Porzio, Bromberg and Newman, attorneys)

Kerry Soranno, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: November 26, 2019 Decided: December 5, 2019

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Bergen Center for Child Development, (Bergen Center), an approved private school for students with disabilities (APSSD), challenges the action of the Department of

Education, Office of Fiscal Accountability and Compliance (OFAC), disallowing a portion of the compensation paid to School Accounting Professionals (SAP) during the 2015-2016 school year. [1]

Bergen Center filed a petition of appeal with the Commissioner of Education on June 26, 2018. OFAC filed a Motion to Dismiss in Lieu of an Answer on August 27, 2018, and the contested case was transmitted to the Office of Administrative Law (OAL) on August 29, 2018. Bergen Center opposed the motion; OFAC's moving papers included submissions beyond the pleadings, and at its request, I converted its application to a Motion for Summary Decision. Via Order dated October 31, 2018, the Motion was denied.

The matter proceeded to hearing on May 15, 2019, and June 4, 2019. Post-hearing submissions were filed on October 7, 2019. Although counsel had initially sought leave to file reply submissions, on November 20, 2019, counsel for Bergen Center advised she wished to rest on the submissions previously filed. On November 26, 2019, counsel for OFAC advised that she too would rest on her prior submissions, and the record closed.

FINDINGS OF FACT

Bergen Center has served multiply disabled students in kindergarten through age 21 since 1968. During the 2015-2016 school year, Bergen Center had an enrollment of about fifty students, and employed some seventy staff members. As part of its routine process of overseeing APSSDs, OFAC monitored Bergen Center onsite that year, reviewing the school's business services and tuition charges for the period from July 1, 2015, through June 30, 2016. It summarized its findings in a report dated January 19, 2018. Finding One of that report is the subject of the current appeal:

> The approved private school for students with disabilities (APSSD) paid fees to a consultant which exceeded the associated maximum allowable established by N.J.A.C. 6A:23A-18.2(r). The excess costs

[1] OFAC relied on various regulations which were recodified, but not in any way material to this controversy. N.J.A.C. 6A:23A-8.1 is now N.J.A.C. 6A:23A-8.2; N.J.A.C. 6A:23A-18.2(r) is now N.J.A.C. 6A:23A-18.3(q); N.J.A.C. 6A:23-18.5(a)(9) is now N.J.A.C. 6A:23-18.6(a)(9).

> of $37,594.43 are deemed to be non-allowable in accordance with N.J.A.C. 6A:23A-18.5(a)(9).

The "consultant" at issue is Mary Bawarski, a Certified Public Accountant (CPA) who provided services to Bergen Center via her company, SAP.

Onsite monitor Nicholas Morfogen submitted the data he collected to his manager, Lisa McCormick. Upon review, McCormick noted an expenditure of $190 per hour for SAP's services. She asked for copies of invoices so that she could delve further, and she reviewed the contract between Bergen Center and SAP. It revealed that Bergen Center had retained Bawarski's services as "School Accountant" for the 2015-2016 school year. It is uncontroverted, and I **FIND**, that School Accountant is not a title that appears on the list of recognized position titles issued annually by the Department of Education.

McCormick explained that the fees associated with an unrecognized title are allowable only under two exceptions. Special approval can be obtained from the Executive County Superintendent. Or the APSSD can use an unrecognized title, but is then subject to the lowest maximum allowable salary in the County in which the APSSD is located. The regulations do not preclude APSSDs from hiring or engaging the services of anyone in a position that does not meet these requirements, but the associated fees are deemed non-allowable. It is uncontroverted, and I **FIND,** that Bergen Center did not receive special County approval for the unrecognized title of School Accountant.

But before disallowing all the fees attributable to Bawarski's work for Bergen Center, McCormick wished to consider whether the position of School Accountant could be viewed as an unrecognized administrative position title, and thus fall under the second exception. She consulted with Division of Finance Supervising Auditor Elise Sadler-Williams. Per Sadler-Williams, in order to determine if a position is an unrecognized administrative position, the Department of Education reviews the functions of the position in conjunction with the Chart of Accounts. This is a collection of accounts created by the Department that APSSDs are required to use to classify and record their expenses. Accounting services are recorded under account number 290. Department personnel consulted Bergen Center's annual independent audited financial statements to determine what function account 290 was classified under; all "290" accounts were classified as

administrative under column number five. It was on this basis that McCormick and Sadler-Williams determined that School Accountant was an unrecognized administrative position.

The lowest maximum allowable salary for Bergen County was $127,193.00 in 2015-2016; that was the salary attributable to a vocational teacher.[2] McCormick did some simple mathematical computations to determine an hourly rate based on that salary; her calculations yielded $69.89 per hour. Applying this rate to the work performed by Bawarski, McCormick determined that of the $59,470 SAP billed at the rate of $190 per hour, the maximum allowable amount was exceeded by $37,594.43. The amount allowable was thus $21,875.57. Both Sadler-Williams and McCormick urged that in reaching this determination they relied exclusively on the applicable regulations. But their testimony left the impression that value judgments about the approach Bergen Center used to operate its business office may have colored their decision-making. They appeared to strongly disagree with Bawarski's contention that her services were cost effective. And the arguments of their counsel in her post-hearing submission belie any contention that OFAC personnel made no judgments about the usefulness of SAP's services.

One of the services provided by SAP was the creation of compilation reports. These are management tools that permit analysis of the variance between budgeted and actual costs and include a balance sheet that may be required by banks. Compilation reports also include a percentage schedule that allow the Board of Trustees to monitor, in real time, its compliance with the spending percentages established by the Department of Education. Counsel for OFAC argued at length that "nothing in the testimony provided indicates that [Bergen Center] had a need for ... compilation reports," noting that rather, they were "a preference by the President of the Board of Directors." And while Bawarski urged that using her services efficiently met the fiscal needs of Bergen Center, OFAC replied that this arrangement was not cost effective, asserting that a business manager would work at a lower hourly rate. I am thus hard pressed to accept that judgments about

[2] It would seem to me that McCormick should have compared Bawarski's compensation to that paid to an administrator in Bergen County, rather than a teacher. This was never clarified by the record, but my concern is rendered unimportant by my ultimate ruling below.

Bergen Center's business model factored not at all into OFAC's thinking when it disallowed the fees at issue.

Bawarski has been an accountant for about forty years. She started her own firm in or about 1985, and specializes in accounting work for private schools. Her company provides services to some thirty private schools and includes four employees. SAP reviews and adjusts books, to include a monthly review of the general ledger, and assets, liabilities, revenues and expenses. Bawarski's firm verifies and reconciles financial accounts and ensures that items are in the appropriate accounts. She described this as "taking an outside look at the internal operations and performing tasks during the year that help with the transparency for management." SAP personnel prepare schedules, train staff, and on occasion review auditor's reports. Bawarski explained that the Department has not permitted the School Auditor and School Accountant to perform the same tasks since the early 1990's; for this reason she refers to herself as the School Accountant.

The relationship between Bergen Center and SAP began during the 2006-2007 school year. A prior CPA had left abruptly, and SAP assisted by connecting Bergen Center with an outside payroll company and creating a new set of books. Thereafter, the services provided by SAP evolved and changed based on need. SAP supported Bergen Center employees and supplemented their work effort, delivering services that a business manager could not perform; for example, preparation of compilation reports and implementation of internal controls. Bawarski and Bergen Center entered into a letter agreement dated July 1, 2015, that confirmed Bawarski's "engagement as the School Accountant and for the preparation of quarterly financial statements of The School for the year ended June 30, 2016." Bawarski indicated in the agreement that

> I expect the total fee for 2015-2016 to approximate $50,000. Should I anticipate an amount in excess of my estimate, I will advise you immediately. I will bill my fee for my services for the fiscal year ended June 30, 2016 at the rate of $190.00 per hour.

The letter agreement was signed by both parties. SAP's services were relied upon for a range of functions during the 2015-2016 school year, including facilitating Quick Book

entries, preparing quarterly financial reports, preparing schedules, preparing a set of books, interfacing with school auditors, and conducting trainings.

But Bawarski stressed that SAP did not duplicate the work effort of either Bergen Center employees, or would-be employees. She explained that N.J.A.C. 6A:23A-18.2 outlines roughly ten business manager functions; SAP performed "approximately one and a half" of these functions. Indeed, N.J.A.C. 6A:23A-18.2 provides that a business manager is an individual "whose job function includes a majority of the following: financial budget planning and administration, insurance/risk administration, purchasing, financial accounting and reporting, facility planning, construction and maintenance, personnel administration, administration of transportation and food services, and data processing."[3] It is thus clear that Bawarski correctly indicated that she performed very little of what a business manager does; the financial and accounting area of this job's responsibilities were the only area in which she assisted Bergen Center. I **FIND** that Bawarski was not functioning in the role of the business manager for Bergen Center. The parties have agreed, and I further **FIND** that she was likewise not engaged as an Independent Auditor for the 2015-2016 school year.

Bawarski primarily performed her work offsite during the 2015-2016 school year; estimating that her staff appeared onsite not more that 15% of the time. When SAP staff did work at the school facility, there was no office space designated for their use. They were not required to sign in and out like Bergen Center employees. They did not receive salary, benefits, W-2's or a formal employment contract. SAP professionals did not receive any training from Bergen Center staff, nor did that staff supervise or direct Bawarski's work effort, or that of her SAP team. Payment checks were not made out to Bawarski personally, but rather to SAP. Payment was made monthly or quarterly, rather than weekly or bi-weekly as is typical with payroll. I **FIND** that Bawarski was not an employee of Bergen Center.

Bawarski was familiar with the Chart of Accounts discussed by McCormick and Sadler-Williams. Bawarski explained that the salaries of business office staff, such as the school business administrator, business manager, assistant business manager,

[3] N.J.A.C. 6A:23A-18.1 included identical language.

accountant, bookkeepers and support staff are reflected in line 260. Line 263 includes "purchased professional services," which is described as "expenditures for purchased professional services other than professional-educational services." SAP's services were always charged to this latter account; with no disallowances having been made by the Department of Education in over 35 years of providing services to dozens of APSSDs. [4] Bawarski understood the two payment categories to differentiate between individuals who worked directly with children (salaried employees) and those who provided non-educational services (paid via a service fee).

Bawarski stressed that she was sought after by the Department of Education and had drafted a manual for private school accounting that was approved by representatives of the Division of Finance. She described her relationship with the Department of Education as one of mutual respect when Jim Verner was the supervisor of the Finance Section. She likewise had a good relationship with the OFAC monitors, to include Morfogen. Bawarski indicated that Morfogen enjoyed working with her schools because their books were in order. Bawarski noticed a shift in the attitude of the Finance Section's staff once Verner retired. And she felt that resentment of her work was a motivator in the OFAC decision to disallow her fees at Bergen Center. OFAC of course disagrees. As will be more fully discussed below, the clear regulatory language answers the question raised by this appeal, thus obviating the need to resolve this factual dispute.

CONCLUSIONS OF LAW

Bergen Center is approved to receive public school special needs students pursuant to N.J.S.A. 18A:46-15. As such, it must comply with complex statutory and regulatory provisions which govern the tuition it may charge. N.J.S.A. 18A:46-21 states that Bergen Center may determine a tuition rate to be paid by its sending boards of education, "but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." The statute recognizes that tuition is paid to schools like Bergen Center with public funds, and that these funds are utilized to educate public school students with

[4] Lines 260 through 269 include a variety of costs attributable to account 290. Importantly, both Bawarski and McCormick agreed that payments to SAP were accounted for in line 263.

multifaceted needs that cannot be met within their home school districts. Council of Private Sch. for Children with Special Needs v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985). Accordingly, the clear intent of the statute is that the tuition charged be fair and reasonably related to the educational services actually provided by the private school. Regulations promulgated by the Department are designed to implement this statutory intent. N.J.A.C. 6A:23A-18.1 to -18.16. The Department of Education, through OFAC, is responsible for monitoring APSSDs to ensure that the tuition rates they charge sending districts comply with these regulatory mandates. As part of this obligation, OFAC conducts periodic onsite fiscal monitoring of APSSDs. N.J.A.C. 6A:23A-18.13.

Bergen Center bears the burden of demonstrating that the Department's disallowance of certain expenditures in its calculation of actual cost per pupil was arbitrary, capricious or unreasonable. Titusville Acad. v. N.J. Dep't of Educ., EDU 00651-06, Initial Decision (May 21, 2007), adopted, Comm'r (July 6, 2007), <http://njlaw.rutgers.edu/collections/oal/>; Catholic Family and Cmty. Servs. v. N.J. Dep't of Educ., EDU 01051-01, Initial Decision (January 14, 2003), adopted, Comm'r (March 3, 2003), adopted, State Bd. (July 2, 2003), <http://www.nj.gov/education/legal/>. I **CONCLUDE** that Bergen Center has met its burden.

The amount of tuition that an APSSD may charge is limited by regulation as follows:

> The board of directors of an APSSD located in New Jersey shall determine the final tuition rate charged to be an amount less than or equal to the certified actual cost per student as determined by an independent school auditor. The board of directors shall identify the certified actual cost per student and the final tuition rate charged in the audited financial statements submitted to the Department pursuant to N.J.A.C. 6A:23A-18.10.
>
> [N.J.A.C. 6A:23A-18.3(a)].[5]

The regulation outlines the tuition rate procedure at length, making it clear that tuition should include expenditures needed for student instruction. Costs must be "reasonable;"

[5] At the time the facts pertinent to this matter arose, N.J.A.C. 6A;23A-18.2(a) contained almost identical language; the requirement that the auditor certify the actual cost per student was added upon recodification.

a term defined by the regulation as "ordinary and necessary and not in excess of the cost that would be incurred by an ordinarily prudent person in the administration of public funds." N.J.A.C. 6A:23A-18.3(a)(1)(iv). A separate regulation outlines at length those "costs that are not allowable in the calculation of the certified actual cost per student." N.J.A.C. 6A:23A-18.6.[6] In seventy-three paragraphs, this latter regulation sets out with specificity those expenditures that cannot be included in calculating the "per student cost." As Bawarski was not an employee, but rather, a consultant, she persuasively urges that the moneys paid to her company were akin to moneys paid to other professional service providers, such as an attorneys, auditors or architects. I **CONCLUDE** that N.J.A.C. 6A:23A-18.6 nowhere lists such fees as nonallowable costs.[7]

OFAC contends that it properly disallowed the moneys paid to Bawarski, urging that the payments made to SAP ran afoul of N.J.A.C. 6A:23A-18.3(q), which requires an approved private school of the disabled to use

> the recognized position title list published annually by the Commissioner...to employ staff whose position requires certification in accordance with N.J.A.C. 6A:9B or a bachelor's or master's degree, pursuant to N.J.A.C. 6A:23A-18.2. An APSSD shall hire only staff or consultants in job titles that require certification or a bachelor's or master's degree if the titles are included on the recognized job titles list, or if such titles are unrecognized job titles that are approved annually by an executive county superintendent in accordance with N.J.A.C. 6A:9B-5.5. The APSSD may use unrecognized administrative job titles, but maximum salaries for the titles are restricted in accordance with N.J.A.C. 6A:23A-18.6(a)(9).[8]

See also: N.J.A.C. 6A:23A-18.6(a)(8) and (a)(9). I disagree. It is well-established that an administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). When interpreting a

[6] During the school year at issue, the regulation was N.J.A.C. 6A:23A-18.5. It contained fewer listed exclusions, but again, not any additions or other changes pertinent to this controversy.

[7] N.J.A.C. 6A:23A-18.6(a)(11) does disallow such costs, but only when attributable to a "frivolous challenge to a State audit or financial review."

[8] N.J.A.C. 6A: 23A-18.2(r) read a bit differently as follows: "An approved private school for students with disabilities shall employ staff pursuant to the list of recognized job titles in accordance with N.J.A.C.6A:9B that require certification and N.J.A.C. 6A:23A-18.1 that require a bachelor's degree..." Again, the change in language is not substantive for purposes of this controversy.

statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220, 230 (1959). And while an agency's interpretation of its own regulations is entitled to deference. Matturri v. Bd. of Tr. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002), the agency's action here is simply inconsistent with the plain regulatory language. This can be best demonstrated by analyzing the regulation in parts as follows:

1. *The requirement to use "the recognized position title list published annually by the Commissioner…to employ staff whose position requires certification in accordance with N.J.A.C. 6A:9B or a bachelor's or master's degree, pursuant to N.J.A.C. 6A:23A-18.2."*

This part of the regulation does not apply to the services supplied by Bawarski via SAP. She was not employed as a member of Bergen Center's "staff." Nor did her position "[require] certification in accordance with N.J.A.C. 6A:9B." This latter code provision addresses the requirements for certification for educators, providing that "the licensure system shall function along a continuum of rigorous pre-professional preparation, certification, and professional development to better prepare educators to support improved student achievement of the New Jersey Student Learning Standards." N.J.A.C. 6A:9B-1.2. Bawarski was not a certificated educator, nor did she provide pedagogical or other educational services to Bergen Center. Bawarski's position likewise did not require a bachelor's or master's degree, pursuant to N.J.A.C. 6A:23A-18.2. A review of N.J.A.C. 6A:23A-18.2 reveals that only two positions are noted to require degrees, to include the business manager and director. Bawarski did not serve in either role.

2. *The requirement that "[a]n APSSD shall hire only staff or consultants in job titles that require certification or a bachelor's or master's degree if the titles are included on the recognized job titles list, or if such titles are unrecognized job titles that are approved annually by an executive county superintendent in accordance with N.J.A.C. 6A:9B-5.5."*

With this phrase, the regulation now expands its scope to individuals serving as consultants, like Bawarski. It provides that an APSSD can retain consultants in "job titles

that require certification [or a degree]" if the title is on the approved list, or specially approved by the Executive County Superintendent. But again, as noted above, Bawarski was not retained in a title requiring certification or a degree; hence the requirements of this part of the regulation are inapplicable to her employment arrangement with Bergen Center.

3. *The requirement that "[t]he APSSD may use unrecognized administrative job titles, but maximum salaries for the titles are restricted in accordance with N.J.A.C. 6A:23A-18.6(a)(9)."*

This provision is inapplicable to Bawarski as well. It restricts salary amounts in accordance with N.J.A.C. 6A:23A-18.6(a)(9), a regulation that by its express language applies only to employees, providing that "[a] salary of an employee not covered by (a)6 above in excess of the lowest maximum allowable salary in the same county," is a non-allowable cost. But Bawarski was not an employee of Bergen Center.

Moreover, N.J.A.C. 6A:23A-18.6(a)(9) references N.J.A.C. 6A:23A-18.6(a)(6), which provides that the following is likewise a non-allowable cost:

> The salary of a professional staff member, consultant, or subcontractor, including a member of a management company, who is not certified but is functioning in, or contracted to perform the duties of, a position requiring certification in accordance with N.J.A.C. 6A:9B or bachelor's or master's degree under this subchapter.
>
> [N.J.A.C. 6A:23A-18.6(a)(6)].[9]

As noted earlier, "business manager" is such a position, but Bawarski did not function in the role of the business manager. Nor did she perform the duties of "a position requiring certification in accordance with N.J.A.C. 6A:9B."

[9] After recodification, the phrase "or contract to perform the duties of" was added. See the original version at N.J.A.C. 6A:23A-18.5. The original version referenced only a bachelor's degree, "master's degree" was added after recodification.

And Bawarski did not receive a salary. The "maximum salary" limitation of the regulation is thus likewise inapplicable. OFAC's attempt to define "salary" to include any form of recompense is unavailing. According to Merriam-Webster.com, salary is "fixed compensation paid regularly for services." This does not describe the arrangement with SAP, which was paid for services rendered via invoice. Likewise, Black's Law Dictionary defines "salary" as a "fixed periodical compensation to be paid for services rendered; a stated compensation, amounting to so much by the year, month, or other fixed period..."[10]

In summary, the administrative code language relied upon by OFAC simply does not support its action here. N.J.A.C. 6A:23A-18.3(q) is inapplicable to the business relationship between SAP and Bergen Center, and I **CONCLUDE** that OFAC improperly applied the regulation to disallow a portion of the money payed to SAP. And I scoured N.J.A.C. 6A:23A-18.6 for any other basis upon which to disallow these costs. I could find none. N.J.A.C. 6A:23A-18.6(a)(12) does discuss fees paid to a consultant, disallowing such fees if the work is not detailed in a written agreement signed by both parties that describes the anticipated outcome of the project and includes fee information. SAP and Bergen Center were parties to such a contract.[11]

In light of my ruling, it is unnecessary to address the argument raised by Bawarski that she was the victim of a personal vendetta; or the argument raised by counsel that a negative inference should be made because the Department of Education failed to produce certain documents. Nor does it matter that OFAC personnel may have questioned the prudence of using SAP's services as opposed to retaining a business manager. But it should be noted that a decision to disallow the payments to Bawarski based on such value judgments would improperly constitute regulating without formal rulemaking. Indeed, the decision to allow, or disallow certain costs, must be based upon a standard that "is intended to be applied generally and uniformly to all similarly situated persons." N.J.S.A. 52:14B-2(e). In Metromedia v. Div. of Taxation, 97 N.J. 313, 331 (1984) our Supreme Court held that an administrative rule is one that

[10] Black's Law Dictionary Online, https://thelawdictionary.org>salary.

[11] The earlier version of this regulation did not require a contract signed by both parties; again the change is of no moment as both parties signed the letter agreement that retained SAP. The prior version was codified at N.J.A.C. 6A:23-18.5(a)(12).

> (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.

In accordance with this standard, OFAC's feeling that compilation reports were an unneeded expense, should not and could not factor into the decision to disallow moneys paid to Bawarski, absent regulatory guidance. The choice to hire an outside consultant, rather than a business manager, likewise is something that is nowhere expressly noted to be a non-allowable cost in the regulatory scheme. And while the regulations do require that expenditures be those that would be incurred by a reasonably prudent person, N.J.A.C. 6A:23A-18.3(a)(1)(iv), I heard no evidence that would suggest that any of the moneys paid to SAP rose to a level of being inconsistent with that standard. While the Department of Education can extend its regulatory powers to include making compilation reports and school accountant services non-allowable costs, it cannot do so without clear written rules that allow the regulated community to understand the parameters of its local spending authority.

ORDER

Based on the foregoing, together with the record as whole, the relief sought by the petition of appeal is **GRANTED**. The Department of Education is **ORDERED** to restore the disallowed funds that are the subject of this appeal.

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

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

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

December 5, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 5, 2019

Date Mailed to Parties:

sej

APPENDIX

Witnesses

For Petitioner:

Mary Bawarski
Lisa McCormick

For Respondent:

Elise Sadler-Williams

Exhibits

Joint Exhibits:

J-1 Joints Stipulation
J-2 Engagement letter
J-3 OFAC Report
J-4 Bergen Center Financial Statements and Reports
J-5 Appendix O
J-6 Chart of Accounts
J-7 Invoice and Payment Records
J-8 List of recognized position titles
J-9 Letter of Appeal
J-10 Department of Education response

For Petitioner:

P-1 Email
P-2 Quarterly compilation report
P-3 Emails
P-4 Not admitted
P-5 Email
P-6 Letter dated April 22, 2019

For Respondent:

R-1 Admitted as J-2

R-2 Admitted as J-7

R-3 Admitted as J-3

R-4 Admitted as J-4

R-5 Not admitted

R-6 Maximum salaries

R-7 Not admitted

R-8 Chart of Accounts – explanation

State Board of Examiners Dkt No. 1617-214
OAL Dkt. No. EDE 09566-17
Agency Dkt. No. 7-10/19A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Revocation of the Certificates of Robert Klein, State Board of Examiners, New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, September 19, 2019

For the Respondent-Appellant, James J. Uliano, Esq..

For the Petitioner-Respondent State Board of Examiners, Jennifer Hoff, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Robert Klein's appeal of the Order of the State Board of Examiners, dated September 19, 2019, revoking his Teacher of Physical Education Certificate of Eligibility with Advanced Standing, Teacher of Physical Education Certificate, and Teacher of Health and Physical Education Certificates. Following the issuance of an Order to Show Cause by the Board and a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that appellant engaged in conduct unbecoming a teacher and recommended that appellant's certificates be revoked. The ALJ found that appellant unknowingly participated in a videotaped interview in his hotel room while attending the 2015 New Jersey Teachers' Convention in Atlantic City, during which he made comments portraying himself as a participant in drug culture and offering cocaine to the interviewers. The ALJ further found that his comments displayed a disregard of his professional obligations as a health teacher by appearing

to promote the use of controlled dangerous substances, were inconsistent with the conduct of any educational professional, and constitute conduct unbecoming a teacher. Thereafter, the Board adopted the Initial Decision of the ALJ and revoked appellant's teaching certificates.

On appeal, appellant maintains that he was not criminally charged for any of his actions, there were no drugs present in the video, and his conduct did not involve students or other members of the school community. He argues that he was duped by Project Veritas and that the "shock video" they created to embarrass him would not exist if the school district had not allowed a Project Veritas member into the school. He contends that his comments were made in private and were hyperbole for dramatic and/or comedic effect. For these reasons, he argues this his conduct was not unbecoming and, if it was, suspension would be the appropriate penalty.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that the revocation of appellant's certificates was the appropriate penalty. Appellant does not dispute that he made comments that appear to promote drug use and evasion of drug detection. While appellant characterizes his comments as exaggerations made to impress his companions, as the ALJ found and the Board affirmed, these arguments are attempts to rationalize his actions after the fact, and they do not negate the extremely poor judgment he

demonstrated in making the comments. Moreover, the actions of Project Veritas in making the comments public are irrelevant, as a private exchange that included the same comments would be no less unbecoming conduct.

There is also nothing in the record to suggest that the Board's decision to revoke appellant's certificates – based on the nature of the unbecoming conduct proven during the hearing at the OAL – was arbitrary, capricious or unreasonable. Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/2/20
Date of Mailing: 3/3/20

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

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
ROBERT KLEIN	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1617-214

At its meeting of April 6, 2017, the State Board of Examiners (Board) reviewed information provided by the Howell Public School District (Howell) regarding Robert Klein. Howell reported that Klein resigned from his position in the district, effective December 31, 2016, following allegations that, at the 2015 New Jersey Education Association Conference in Atlantic City, he invited undercover journalists to his room and was filmed offering cocaine, describing how he keeps cocaine in his home and how he avoids being caught. In the video, which was posted on multiple news and social media sites worldwide, Klein can be heard making the following statements: "If you want blow you can have a bump. You can have whatever you want;" "Dude, if you want some I'll give you a taste, don't be embarrassed;" "Have some;" "You come to my home at night, you come to my room now. I have booze, I have water, I have blow at the house, whatever it is, whatever anybody wants, I have it there;" "Yes I'm a good host and I have this s*** at my house when you come;" "Like I work with the police in the school district with the drug dogs and they teach us, and they teach our kids how the drug dogs sniff out drugs;" "We're not putting drugs in my car. Blow-different. You put it in your pocket, it's nothing;" "Blow, people mix it with different things so it has different scents."

Klein is the holder of a Teacher of Physical Education Certificate of Eligibility With Advanced Standing, issued in December 1994, a Teacher of Physical Education certificate, issued in January 1999 and a Teacher of Health and Physical Education certificate, issued in June 2000. After reviewing the above information, at its May 12, 2017 meeting, the Board voted to issue Klein an Order to Show Cause as to why his certificate should not be revoked.

The Board sent Klein the Order to Show Cause by regular and certified mail on May 15, 2017. The Order provided that Klein must file an Answer within 30 days. Klein responded on June 12, 2017. In his Answer, Klein admitted to attending the 2015 NJEA Convention in Atlantic City, but denied offering

cocaine to the journalists. (Answer ¶3). He stated that the people he met and brought up to his hotel room began discussing drug use and that any comments Klein made, which was heard on the video, were in response to statements made by the male who implied he had some in his possession. (Answer ¶ 6). Klein stated that there were never any drugs in his hotel room and that he was "joking around" about having drugs at his house. did not receive a reply to his "numerous attempts to meet with authorized personnel and obtain documentation of credibility and completion of professional educational course work." (Answer, ¶ 6).

Since there were material facts in dispute, on June 30, 2017, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Administrative Law Judge (ALJ) Joseph A. Ascione heard the matter on July 25, 2018. The record closed on January 8, 2019 and ALJ Ascione issued an Initial Decision on May 21, 2019. *In the Matter of the Certificate(s) of Robert Klein*, Dkt. No. EDE 09566-17 (Initial Decision, May 21, 2019).

The Board's witness was Mr. Joseph J. Isola, Howell Superintendent. Klein testified on his own behalf. (Initial Decision, slip op. at 11). ALJ Ascione found that Klein attended the November, 2015 NJEA Convention and unknowingly participated in a videotaped interview at his hotel room during the convention. *Id.* at 5. Klein's statements made during the interview portray him as aware of, and a participant in, drug culture. *Id.* at 6. Moreover, ALJ Ascione found that Klein's statements during the interview appear to promote the use of controlled dangerous substances and that Klein's statements are inconsistent with the conduct of any educational professional. *Ibid.*

In his testimony, Klein acknowledged his poor judgment and stated that his motivation was the pursuit of a romantic opportunity. *Id.* at 4. Although ALJ Ascione finds Klein to be credible, he found that his admission and statements were self-serving in an attempt to rationalize what he had done/said. *Ibid.*

After reviewing the testimony and the record, ALJ Ascione found that it is "Klein's blatant lack of judgment which provides the exclusive basis for this tribunal's determination that the actions are 'conduct unbecoming a teacher' and provide more than 'just cause' for the Examiners determination to terminate Klein's certificates." *Id.* at 7.

In assessing the appropriate penalty, ALJ Ascione acknowledged that Klein had no disciplinary history, but that lack of prior discipline did not impact the determination because his actions clearly demonstrate conduct unacceptable by any teacher. The suggestion that he had drugs available is "an anthemia to a prior educator" and is the basis for the revocation of certificates. *Ibid.* ALJ Ascione therefore ordered that Klein's certificates should be revoked. *Ibid.*

On June 3, 2019, Klein submitted exceptions. Klein argued that the statements made in the video were hyperbole and made for dramatic effect. Respondent acknowledges that the statement were "utterly ridiculous" but that since there was laughter in the background it was clear that Klein's statement were made for comedic effect. (Exceptions at p. 2). Further, Klein argues that ALJ Ascione failed to consider the circumstances and selected the most severe sanction possible. *Id.* Klein contrasts the facts of this case with another case wherein an ALJ found revocation to be too severe a penalty. *Id.*

In its reply exceptions, the Deputy Attorney General (DAG) assigned to the case argued that Klein presents no basis upon which to reject ALJ Ascione's initial decision. (Reply Exceptions at p. 2). The DAG argues that ALJ Ascione made a credibility determination, finding that Klein was not credible and that he offered only self-serving statements to rationalize his actions. *Id.* at p. 5, 6. Moreover, Klein's conduct demonstrated an extreme lapse in judgment in which he failed to think about his words or actions. Such conduct cannot be tolerated from an educator. *Id.* at p. 8.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of August 1, 2019, the Board reviewed the Initial Decision. After full and fair consideration of the Initial Decision the Board voted to adopt it in its entirety.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings.

As noted above, after assessing the evidence and credibility of the witnesses, ALJ Ascione concluded that Klein unknowingly participated in a videotaped interview at his hotel room wherein he offered controlled substances to others, indicated he knew about drug culture, and promoted the use of controlled substances. Although Klein tries to rationalize and excuse the statements he made, his conduct indicates a serious lapse in judgment and convinced the ALJ that revocation was warranted here. After reviewing the entire record, the Board agrees with the ALJ's assessment regarding both the nature of Klein's conduct and the penalty to be assessed.

Accordingly, on August 1, 2019, the Board voted to adopt the Initial Decision and ordered the revocation of Klein's certificate. On this 19th day of September, 2019, the Board formally adopted its written decision to adopt the Initial Decision and it is therefore ORDERED that Robert Klein's Teacher of Physical Education Certificate of Eligibility With Advanced Standing, Teacher of Physical Education Certificate, and Teacher of Health and Physical Education Certificate is hereby revoked, effective immediately. It is further ordered that Klein return his certificate to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Acting Secretary
State Board of Examiners

Date of Mailing: 9/24/2019
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDE 09566-17
AGENCY DKT. NO. 1617-214

IN THE MATTER OF THE CERTIFICATE(S) OF ROBERT KLEIN.

James M. Esposito, Deputy Attorney General, for New Jersey State Board of Examiners, petitioner (Gurbir S. Grewal, Attorney General of the State of New Jersey, attorney)

James J. Uliano, Esq., for Robert Klein, respondent (Chamlin, Rosen, Uliano & Witherington, attorneys)

Record Closed: January 8, 2019 Decided: May 21, 2019

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves an Order to Show Cause (OSC) issued by petitioner State Board of Examiners, New Jersey Department of Education (the Examiners) against the respondent Robert Klein (Klein), a middle school physical education teacher. As reflected in that OSC, the respondent settled prior to the Hopewell Township (District) filing of tenure charges, by voluntarily resigning. The bizarre incident which lead to the resignation, relates to a November 2015 interview which published on June 15, 2016. The situs of the interview

is Klein's Borgata hotel room during the New Jersey Teachers' Convention. The Examiners found just cause for consideration of the revocation of respondent's certificates based upon Klein's conduct. The Examiners ordered that respondent show cause as to why his Health and Physical Education Certificate of Eligibility with Advanced Standing (12/94), Teacher of Physical Education (1/99) and Teacher of Health and Physical Education (6/00) should not be revoked. On or about June 12, 2017, respondent, through his counsel, filed an Answer to the OSC, and the Examiners transmitted the matter to the Office of Administrative Law (OAL) on June 30, 2017, for determination as a contested case, N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The OAL conducted a hearing on July 25, 2018. The parties requested the opportunity to submit the transcript, closing summation and brief the law. The record closed January 8, 2019. The Acting Director granted an extensions of time to file the Initial Decision on February 19, 2019 and April 5, 2019.

TESTIMONY

Joseph J. Isola (Isola)

Isola is the superintendent of schools for the Howell Township Board of Education. He has served in this position for the last four years. He holds a Bachelor's degree and a Masters' degree in Special Education, and a Professional Diploma in School Administration and Leadership. He testified he prepared with counsel the tenure charges (Exhibit P-1) against Robert Klein for an incident at the New Jersey Teachers' Convention in November 2015. The tenure charges resolved by a settlement stipulation between the District and Klein providing for his resignation (Exhibit P-2). He described the video he watched (Exhibit P-3) is an eight and a half minute portrayal of Klein discussing with two other individuals, not identified, drug use and the transportation of drugs. Klein's also boasted of his intimate knowledge, to avoid drug detection by law enforcement agencies, due to his work as a health teacher working closely with the police department. See, T 16:16-17:18.

Isola's discussion with Klein resulted in Klein admitting his unknowing participation in the video, and that his actions were motivated to impress the woman interviewer. See, T 18:15-19:10.

Robert Klein (Klein)

Klein acknowledged attending the November 2015 New Jersey Teachers' Convention in Atlantic City (T 61:17-62:10). During the convention he met a woman claiming to be Laura Elizabeth of New Star Learning Group, an alleged textbook salesperson. He talked with her for a time, then advised her he was on the textbook committee, and was going out that evening, inviting her to come. He was suspicious because she had no convention credentials and professed to have no display booth. They exchanged cell phone numbers and parted (T 62:24-64:14). Later that evening, they met at Klein's hotel, the Borgata. A man by the name of Cory accompanied Ms. Elizabeth. Klein claimed to want to change his shirt and the two allegedly invited themselves up to his room. On the elevator up he claims Laura and Cory started talking about partying, drinking and drugs. Klein testified he sensed they enjoyed drugs and started to "show off" and was "boisterous" about drugs, at no time did he participate in or provide them with drugs (T 65:18-66:20). They eventually left the room and the three went to a bar/dance club on the boardwalk. Klein mentioning that he paid for the cab, the $40 entrance fee for all three of them and drinks (T 72:15-24). He did not see Ms. Elizabeth again though he kept in contact with her for a few months.

The District requested Klein to prepare a drug awareness presentation. Klein did so and at the presentation on April 20, 2016, he unexpectedly received an award for Drug Awareness Education. Then in June 2016, he became aware of the November 2015 video tape and after discussions with Isola, received tenure charges and resigned his position by early July 2016. He denies he was aware of the taping of the video and had no participation in the publication of the video.

The Video

Exhibit P-3 is the video of Klein's interview with Ms. Elizabeth and Cory in Klein's Borgata hotel room. It portrays Klein as bragging about his ability to obtain marijuana and cocaine and his reluctance to transport marijuana due to detection by police dogs. The interview portrayed his lack of reticence regarding cocaine, as the dogs are not as sensitive to that smell. He portrayed his knowledge of police dogs and how to avoid detection. He discusses his reticence to travel with drugs by air. He talks about his availability of drugs at home, where they can be delivered to the door, and his prowess in being a good host having it available to guests who visit. There are no exposed drugs in the video.

FACTUAL DISCUSSION

On June 16, 2015, representatives of Project Veritas, conducted an interview of Klein at the New Jersey Teachers' Convention. The interviewers, Ms. Elizabeth and Cory represented themselves as engaged by New Star Learning, text book salespersons. Months subsequent to that interview, Klein received an unexpected drug awareness award from New Star Learning. This, however, was all part of an anticipated journalistic sting. The video interview from Klein's Borgata hotel room was internet published on June 15, 2016. It was picked up on national network broadcasts. It embarrassed and exposed Klein and the District to public ridicule.

The knowledge of the interview and publication lead to the commencement of tenure charges against Klein by the District. The charges were resolved by a resignation. See, P-2.

The within OSC to revoke the teaching licenses of Klein ensued. Isola testimony is credible and confirms the facts which occurred subsequent to the publication of the interview and following tenure proceeding.

Klein's testimony is believable that the events transpired. He acknowledges his extremely poor judgment, and his motivation pursuit of a romantic opportunity. No evidence was produced that a crime had been committed. Klein's credibility, other than his admission that he was the interviewee, are self-serving statements attempting to

rationalize his actions after the fact. The motivation has nothing to do with his blatant exercise of bad judgment. He attempts to exonerate himself by professing a limited knowledge of the drug culture and his professed innocence. This also lacks credibility. But that lack of credibility has no significance to the findings below and the findings below are limited to Klein's exercise of extremely poor judgment. This tribunal also ignores the expansive national coverage of the interview. Klein is not responsible for the subsequent actions of Project Veritas. Nor is he responsible for the District allowing a company to come and tape a drug awareness program and provide Klein an award. In the absence of the existence of the videotaped interview, Klein's actions would be an exchange of word between three people but no less unbecoming conduct. Klein's poor judgment would not be public. Project Veritas' distribution of the tape made Isola and the public aware of Klein's poor judgment.

FINDINGS OF FACT

Based on the documentary evidence, the testimony presented, and having had an opportunity to observe the witnesses and to assess their credibility, **I FIND** the following **FACTS:**

1. Klein possesses the following teaching certifications: Teacher of Health and Physical Education Certificate, with a Certificate of Eligibility with Advanced Standing (CEAS) in Health and Physical Education (12/94); Teacher of Physical Education (1/99) and Teacher of Health and Physical Education (6/00).

2. In November 2015, Klein attended the New Jersey Teachers' Convention in Atlantic City.

3. In November 2015, he unknowingly participated in a videotaped interview at his Borgata hotel room during the convention.

4. Klein's discussions during the interview portrays himself as aware of and a participant in the drug culture. He states he is a good host providing guests at his home with the availability of marijuana and/or cocaine.

5. Klein's conduct offers cocaine to the interviewers.

6. There is no evidence that Kline had cocaine or marijuana with him at the Borgata.

7. Klein's discussions during the interview display a disregard of his professional obligations as a health teacher by appearing to promote the use of marijuana and cocaine, controlled dangerous substances.

8. Klein's discussions during the interview are inconsistent with the conduct of any educational professional. The actions are subject to severe criticism as he is an educational professional who teaches health sciences.

9. Klein's conduct constitutes conduct unbecome a teacher.

10. Klein's conduct constitutes just cause to revoke his teaching certificates.

11. Klein's prior performance is not addressed by the Examiners other than the incident of November 2015.

LEGAL DISCUSSION

The State Board of Examiners may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. N.J.A.C. 6:11-3 .4. "Teachers . . . are professional employees to whom the people have entrusted the care and custody of . . . school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." Tenure of Sammons, 1972 S.L.D. 302, 321.

The NJEA Teachers' Convention provides, according to their informational webpage, "More than 300 professional development seminars, workshops, and programs designed to help teachers and educational support professionals hone their skills and stay current in their subject areas and chosen fields." The school districts in the State of New Jersey are closed on the dates of the convention. Teachers' and educational professional attend as continuing professional self- improvement. What occurred here fails to reach that lofty goal! Rather the discussions held by Klein, regardless of publication, reflect a severe lack of judgment. If it had not been videotaped, at best would be the word of Ms. Elizabeth and Cor, against Klein's word as to what happened. If it had not been videotaped, arguably proof of what transpired would have been more difficult to prove. There is no question that Project Veritas duped Klein.

However, it is Klein's blatant lack of judgment which provides the exclusive basis for this tribunal's determination that the actions are "conduct unbecoming a teacher" and provide more than "just cause" for the Examiners determination to terminate Klein's certificates.

The Examiners provided no additional evidence of Klein's prior disciples and if any prior disciplines exist, they in no way affect the determinations herein. The actions of Klein in November 2015 are sufficient to provide by a preponderance of the evidence he violated conduct unbecoming a teacher. The fact that he is a middle school health and physical education teacher, exacerbates this tribunal's view of his conduct. The actions on November 2015, clearly demonstrates conduct that is not acceptable by any teacher. Just the suggestion that Klein has drugs available by itself, is an anthemia to a proper educator and is conduct unbecoming, or just cause for a revocation of the certificates. Unfitness to hold a position in a school system may be shown by one incident if sufficiently flagrant. Redcay v. State Bd. Of Educ., 130 N.J.L. 369, 371 (1943).

"Conduct unbecoming a public employee" has been described as any conduct which adversely affects the morale or efficiency of a department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140–42 (App. Div. 1960); cf. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965),

certif. denied, 47 N.J. 80 (1966). This tribunal clearly holds that Klein's conduct destroys respect for the educational system.

The State Board of Examiners is authorized by N.J.S.A. 18A:6-38 to revoke certificates issued by it to teachers pursuant to rules and regulations prescribed by the State Board. These regulations are found at N.J.A.C. 6A:9-17.5 through 17.8. The Examiners are authorized to revoke or suspend on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher of other just cause. N.J.A.C. 6A:9-17.5. Generally, proceedings to consider revocation are initiated by the issuance by the Examiners of an order to show cause. N.J.A.C. 6A:9-17.6(a). The Examiners bear the burden of proving their claims by a preponderance of the competent and credible evidence. N.J.S.A. 52:14B-10(a), (c); N.J.A.C. 1:1-15.5; In re Polk, 90 N.J. 550, 566-69 (1982); In re Kerlin, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977); see also Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Papadaniil, EDE 8821-00, Initial Decision (March 13, 2002), adopted, Exam'rs (May 9, 2002) (citations omitted), <http://njlaw.rutgers.edu/collections/oal/>. It has been held that "[e]vidence is found to 'preponderate' if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis . . . is true." State Bd. of Exam'rs v. Ferreira, EDE 3390-04, Initial Decision (July 5, 2005), adopted, Exam'rs (Sept. 22, 2005), aff'd, State Bd. of Educ. (April 5, 2006), <http://njlaw.rutgers.edu/collections/oal/>.

CONCLUSION

Based on all of the foregoing, I **CONCLUDE** that the Examiners have met their burden of proof that respondent's actions constitute conduct unbecoming and just cause to warrant the revocation of Klein's Teacher of Health and Physical Education Certificate, with a Certificate of Eligibility with Advanced Standing (CEAS) in Health and Physical Education (12/94), Teacher of Physical Education (1/99) and Teacher of Health and Physical Education (6/00).

ORDER

I hereby **ORDER** that the Examiners's petition to revoke the respondent's Teacher of Health and Physical Education Certificate, with a Certificate of Eligibility with Advanced

Standing (CEAS) in Health and Physical Education (12/94), Teacher of Physical Education (1/99) and Teacher of Health and Physical Education (6/00) certificates is **GRANTED** in all respects.

I hereby **FILE** my initial decision with the **STATE BOARD OF EXAMINERS** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE BOARD OF EXAMINERS**, which by law is authorized to make a final decision in this matter. If the State Board of Examiners does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE STATE BOARD OF EXAMINERS, 100 Riverview Plaza, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 21, 2019
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

Joseph J. Isola, Superintendent of Schools, Howell Township

For Respondent:

Robert Klein, respondent

LIST OF EXHIBITS

For Petitioner:

P-1 Certificate of Tenure Charges

P-2 Supporting Documents for Tenure Charges

P-3 Video of Interview of Klein at Borgata

For Respondent:

R-1 Respondent's presentation to answer Order to Show Cause including Exhibits A to E of web sites addressed to Veritas web activities. (Accepted to complete the record for final review-Statements of respondent are admissions, web sites are background articles having insignificant bearing on the factual findings herein).

State Board of Examiners Dkt No. 1112-212
OAL Dkt. No. EDE 10823-12
Agency Dkt. No. 6-10/19A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Certificates of Craig Forte, State Board of Examiners, New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, September 19, 2019

For the Respondent-Appellant, Samuel Wenocur, Esq.

For the Petitioner-Respondent State Board of Examiners, Geoffrey Stark, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Craig Forte's appeal of the Order of the State Board of Examiners, dated September 19, 2019, suspending his Teacher of Elementary School Certificate of Eligibility with Advanced Standing, Teacher of Students with Disabilities Certificate of Eligibility, Teacher of Elementary School Certificate, and Teacher of Students with Disabilities Certificate for a period of one year. Following the issuance of an Order to Show Cause by the Board and a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that appellant engaged in conduct unbecoming a teacher and recommended that appellant's certificates be suspended for a period of six months. The ALJ found that petitioner, a middle school special education teacher, breached security protocols when administering the Alternate Proficiency Assessment (APA) because there were too many instances of similar or verbatim responses to open-ended questions across the student portfolios and writing tasks. Thereafter,

the Board adopted the Initial Decision of the ALJ and increased the penalty to a one year-suspension of appellant's teaching certificates, finding that appellant's unbecoming conduct was more than a technical oversight and directly impacted the security of the test, such that a longer suspension was warranted.

On appeal, appellant maintains that he used the discrete trial intervention (DTI) method of instruction, an accepted method of instruction for students with autism, and that DTI can result in students memorizing model essays and generalizing them in their assessment responses. Appellant argues that the similarity in the responses results from his method of instruction rather than any inappropriate prompts by him and notes that there was no firsthand testimony that he engaged in any wrongdoing. Appellant further asserts that the APA guidelines do not prohibit the use of DTI and reading them to do so inappropriately subjects him to a rule that is unclear and vague. Finally, appellant argues that a one-year suspension is excessive, citing to his performance in the eight years since the incidents at issue.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that a one-year suspension of appellant's certificates was the appropriate penalty. The ALJ found Elizabeth Celentano of the Department of Education's Office of Assessments to be credible when she testified that it was not possible for so many students to have the same

answers without assistance, and further found appellant not credible when he testified that he did not notice the similarity among the responses, or between the responses and his own model essay – which he had been using for six years. The Board appropriately adopted these credibility findings. Moreover, appellant's arguments regarding his method of instruction are unpersuasive. The issue before the Board was not how the appellant instructed his students; rather, the Board considered whether the appellant engaged in unbecoming conduct when he allowed nearly identical responses on student submissions for the APA assessment. It is axiomatic that assessments must be completed independently and that students cannot merely recite responses written by the teacher, which would demonstrate only their ability to memorize a response and not the underlying skill that the assessment was designed to measure.

There is also nothing in the record to suggest that the Board's decision to suspend appellant's certificates for one year – based on the nature of the unbecoming conduct proven during the hearing at the OAL – was arbitrary, capricious or unreasonable. Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/2/20
Date of Mailing: 3/3/20

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

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
CRAIG A. FORTE	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1112-212

At its meeting of June 25, 2012, the State Board of Examiners (Board) reviewed information it had received regarding Craig A. Forte. The Office of Fiscal Accountability and Compliance (OFAC) forwarded its March 23, 2012 report titled "East Orange School District – APA Security Breach" to the State Board of Examiners (Board). OFAC was asked to investigate the Cicely Tyson Middle School (Tyson School) by the Office of Assessments due to an evaluation completed by Pearson, the company that scores the APA, disclosing similarities in Language Arts Literacy (LAL) writing tasks across multiple student portfolios at the school. The LAL assessments were administered by special education teacher, Forte.

In the report, which is incorporated herein by reference, OFAC concluded that Forte breached security protocol when administering the APA because there were too many instances of similar or verbatim Language Arts Literacy responses across 22 student portfolios and four writing tasks. Forte was the only teacher responsible for the student portfolios in question.

Forte currently holds a Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Teacher of Students With Disabilities Certificate of Eligibility and Teacher of Elementary School, and Teacher of Students With Disabilities certificates. After reviewing the above information, at its June 21, 2012 meeting, the Board voted to issue an Order to Show Cause (OSC) to Forte as to why his certificates should not be revoked.

The Board sent Forte the OSC by regular and certified mail on July 25, 2012. The OSC provided that Forte must file an Answer within 30 days. Forte responded on July 23, 2012. In his

Answer, Forte denied all the allegations from the OFAC report, indicating that he never received a copy of the report, but acknowledges receipt of the Order to Show Cause. (Answer, ¶¶ 2-5).

Since there were material facts in dispute, on August 10, 2012, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. On June 25, 2019, Administrative Law Judge (ALJ) Leslie Z. Celentano issued an Initial Decision in the case. *In the Matter of the Certificates of Craig Forte*, Dkt. No. EDE 10823-12 (Initial Decision, June 25, 2019).

After reviewing the record, ALJ Celentano found that Forte's conduct had a "tangible impact upon the administration of the 2010-2011 APA." (Initial Decision, slip op. at 21.) After noting that Forte received training on how the test should be administered, the ALJ noted Forte's testimony that he did not notice that "numerous students produced nearly identical or identical essays strains credulity." Ibid. ALJ Celentano stated that Forte's conduct was similar to that which had been found previously to constitute "unbecoming conduct" and for which a revocations and suspension were imposed and, therefore, a suspension was appropriate here. Ibid. Specifically, ALJ Celentano stated that "[t]he results achieved by the students would not be possible without substantive assistance." Ibid.

The ALJ further opined that Forte's conduct is distinguishable from the facts of cases where certificates were revoked for test breaches. Specifically, the ALJ indicated that Forte's conduct did not result in a re-administration of the testing. Balancing the above, the ALJ determined that a suspension of six (6) months was appropriate. Id. at 19. The Deputy Attorney General (DAG or Deputy) representing the Board filed Exceptions and Forte filed reply exceptions.

In the Exceptions, the DAG argues that the length of the suspension is not a sufficient penalty for the unbecoming conduct. Specifically, the ALJ found that Forte's conduct was "somewhat distinguishable from the facts supporting the harsher penalties given in Mascuch and Radzik." (Exceptions, p. 2). The only factor used to distinguish the cases was that there was no re-administration of the test. However, reliance upon re-administration as a factor is misplaced. Ibid. The DAG indicates that there is nothing in the record regarding the possibility of re-administration such that it should be used as a basis for weighing the severity of the penalty.

The DAG further argued that there are other facts which lean towards revocation. Specifically, Forte's testimony was "inherently unbelievable" and "strained credulity." (Exceptions, p. 3). Despite using the same sample essays, Forte claimed to not recognize the words of the samples when the students submitted identical copies. Additionally, Forte claimed that he did not notice the identical essays. The DAG states that "[t]here is no reasonable, innocuous explanation for having a dozen or more students hand in identical work on a State assessment." Ibid.

In his Reply Exceptions Forte argued that the cases cited by the DAG to support revocation are distinguishable from the facts in this case. (Reply Exceptions, p. 1). Specifically, Forte was using an acknowledged method of instructing students with autism – discrete trial instruction (DTI). (Reply Exceptions, p. 2). This intervention method was not prohibited in the training materials for testing and thus Forte did not engage in a knowing defiance of testing procedure. Id.

Forte also filed his own Exceptions (noted as Forte Exceptions). Forte argued hat the ALJ failed to properly consider the discrete trial instruction method he used with the autistic students. (Forte Exceptions, p. 3). Forte presented an expert clinical psychologist and Board certified behavior analyst, Dr. Lisa Spano, to support his contention that the teaching model Forte used

during the instructional period of the APA was similar to the DTI method. Ibid. Dr. Spano testified that the student's responses lacked variety and creativity which "one would generally expect from individuals with autism." Ibid.

Forte further argues that the APA Procedure Manual or Elizabeth Celentano's PowerPoint presentation does not specifically prohibit the use of the DTI method such that it would be considered a breach of the APA. (Forte Exceptions, p. 6). Moreover, Forte argued that Celentano's testimony indicates she has no experience with autistic children and therefore her testimony lacks probative value. (Forte Exceptions, p. 8). Forte also goes to great lengths to specifically compare the differences in the APA samples. Those comparisons are noted by the Board in its review of this initial decision. (Forte Exceptions, p.10-19).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of August 1, 2019, the Board reviewed the Initial Decision, both Exceptions and Reply Exceptions. After full and fair consideration of the Decision and submissions, the Board voted to adopt the Initial Decision, but modify the penalty in this matter.

The ultimate issue in this matter is the nature and degree of assistance Forte provided to her students during the assessment. As noted above, ALJ Celentano found that Forte breached testing protocols during the exam but determined that a six-month suspension of his certificates was appropriate given the mitigation he presented. After reviewing the entire record, the Board agrees with the ALJ's assessment regarding Forte's unbecoming conduct but disagrees with the appropriate resultant penalty. Forte's conduct was more than a mere technical oversight and his conduct directly impacted the security of the test, as indicated by ALJ Celentano in the initial decision. The ALJ noted that the results achieved by the student would not have been possible without substantive assistance.

The Board has found unbecoming conduct where the certificate holder breached a rule or regulation governing standardized test security. The penalty for such conduct has ranged from a two-month suspension to revocation. See I/M/O the Licenses of Mark Jacob, Dkt. No. 398-06/96-126 (November 20, 1997) (suspending certificates for two months where teacher duplicated portions on the HSPA); I/M/O the Certificates of Nelson Evans, Dkt. No. 1112-111 (December 6, 2013) (suspending certificates for one year where teacher helped at least one student during the administration of the NJASK and conducted a review prior to the test); I/M/O the Certificates of William Mascuch, Dkt. No. 0607-134 (January 17, 2008) (revoking certificates where teacher read aloud the test questions on the NJASK, allowed extra time and provided one student an answer).

The Board agrees that Forte's conduct does not warrant a revocation as in Mascuch above. However, given that the ALJ found Forte's conduct to be more than a technical oversight, but rather a direct impact to the security of the test, the Board believes that this matter requires a lengthier suspension. A one year suspension is consistent with the decision in I/M/O the Certificates of Nelson Evans, Dkt. No. 1112-111 (December 6, 2013) wherein Evans directly impacted the test by helping at least one student during the test and conducting a review prior to the test. Accordingly, a more fitting penalty in this matter is a one-year suspension of his certificates.

Accordingly, on August 1, 2019, the Board voted to adopt the Initial Decision and ordered a one-year suspension of Forte's certificates. On this 19th day of September 2019, the Board formally adopted its written decision to adopt the Initial Decision in this matter and it is therefore ORDERED that Craig Forte's Teacher of Elementary School Certificate of Eligibility with Advanced Standing, Teacher of Students with Disabilities Certificate of Eligibility, Teacher of Elementary School Certificate, and Teacher of Students with Disabilities certificates are hereby

SUSPENDED for a period of one year, effective immediately. It is further ordered that Forte return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Acting Secretary
State Board of Examiners

Date of Mailing: 9/24/2019
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDE 10823-12
AGENCY DKT. NO. 1112-212

IN THE MATTER OF THE CERTIFICATES OF CRAIG FORTE.

Geoffrey Stark, Deputy Attorney General, for petitioner State Board of Examiners (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Sheldon H. Pincus, Esq., for respondent Craig Forte (Bucceri & Pincus, attorneys)

Record Closed: June 13, 2019 Decided: June 25, 2019

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case was commenced by Order to Show Cause (OSC) issued by the New Jersey Department of Education (DOE), State Board of Examiners (Board). The OSC directs respondent Craig Forte (Forte) to show cause why the certificates and credentials he holds should not be revoked.

On June 25, 2012, the Board issued the OSC to Forte, which stems from the Board's receipt of a report by the DOE, Office of Fiscal Accountability and Compliance

(OFAC), concerning an investigation of a reported security breach during the 2010–2011 administration of the New Jersey Alternate Proficiency Assessment (APA) in the East Orange School District. The investigation followed the discovery of many instances of verbatim responses across twenty-two student portfolios and four writing tasks. At the time of the 2010 APA test, Forte was the administrator of the language arts portion of the testing.

As reflected in the OSC issued to Forte, the OFAC reported that he

> breached security protocol when administering the APA because there were too many instances of similar or verbatim language arts literacy responses across 22 student portfolios and four writing tasks.

The OSC also reflects that OFAC investigators determined that respondent was the only teacher responsible for the portfolios in question. The OSC memorialized the Board's finding that respondent's "inappropriate conduct" as outlined in the March 2012 OFAC report provides "just cause for consideration of the revocation of his certificates." It also directs respondent to show cause why all certificates and credentials held by him should not be revoked.

Respondent filed an answer to the OSC and the Board transmitted the matter to the Office of Administrative Law (OAL), where it was filed for determination as a contested case on August 10, 2012. The matter was scheduled for hearing and adjourned multiple times for discovery issues; issues related to illnesses; witness unavailability; unavailability of experts, including the withdrawal of Forte's original expert and a search for a replacement; and the assignment and reassignment of multiple deputy attorneys general. The parties also requested additional time for the preparation of voluminous joint-exhibit binders and for multiple discovery motions. Several prehearing telephone conferences were held and an Order on Motion to Compel Discovery was entered on February 1, 2013. The matter was commenced on January 22, 2016, and continued on April 20, 2016. The parties were unavailable on multiple dates throughout 2017 and 2018, and the final day of hearing was January 25, 2019. At the conclusion of the hearing, the parties requested the opportunity to submit briefs in

support of their respective positions, and following receipt of the briefs and all exhibits, the record closed.

FACTUAL DISCUSSION AND SUMMARY OF TESTIMONY

At the hearing the Board offered the testimony of Elizabeth Celentano, and respondent offered Lisa Spano and also testified on his own behalf. The parties also entered into a Joint Stipulation of Facts (J-1) as follows:

1. Craig Forte is the holder of a teacher of elementary school certificate of eligibility with advanced standing issued March 2004.

2. Mr. Forte is the holder of a teacher of students with disabilities certificate of eligibility issued October 2006.

3. Mr. Forte is the holder of a teacher of elementary school certificate issued September 2008.

4. Mr. Forte is the holder of a teacher of students with disabilities certificate issued September 2008.

5. In the 2010–2011 school year, Mr. Forte was a special-education teacher at Cicely Tyson middle school in East Orange, New Jersey.

6. Mr. Forte administered the 2010–2011 language arts/literacy (LAL) Alternate Proficiency Assessments (APA) for the students in his classroom and the classroom of Patrice Thompson.

7. Prior to administering the APA in the 2010–2011 school year, Mr. Forte reviewed all of the training modules for the APA available on the New Jersey Department of Education website.

8. Mr. Forte's review of the training modules was prior to his administration of the 2010–2011 LAL APA for his students and Ms. Thompson's students.

9. None of the students for whom Mr. Forte administered the 2010–2011 LAL APA required scribing.

10. None of the students for whom Mr. Forte administered 2010–2011 LAL APA required prompts.

11. None of the students for whom Mr. Forte administered the 2010–2011 LAL APA required physical prompts.

12. On June 2011, representatives from the New Jersey Department of Education interviewed Mr. Forte.

Elizabeth Celentano

Ms. Celentano testified that she is employed by the New Jersey Department of Education (DOE or Department), in the Office of Assessments. She serves as an educational program development specialist for all alternative assessments. She has held this position since 2011, and previously worked on the general assessment for grades four and five for all subject areas since 1995.

Ms. Celentano has a bachelor's degree in elementary education and is a certified teacher of K–8. She also has a master's in educational psychology in the area of psychometrics (educational statistics and measurement), and a master's in educational statistics.

Prior to working for the Department, Ms. Celentano was a social scientist with the Division of Human Services working on a statistical-analysis project for approximately six months. Prior to that position she was employed in Pennsylvania working with domestic-violence and sexual-assault victims and on designing and delivering school curriculum for child-abuse prevention. She also did outreach programs for colleges,

designing their curriculum. In that position she worked directly with teachers and school psychologists. Prior to that position she worked with Educational Testing Service as a statistical associate doing statistical analysis and assessment work for teacher exams. Prior to that she worked with the Department of Personnel, now known as Civil Service, doing statistical analysis as a project specialist working with subject-matter experts. She directed the activities of and conducted statewide subject-matter-expert panels.

In her current position in educational assessment, she works with subject-matter-expert panels four times a year to determine, along with educators and teachers, what is appropriate to be tested.

Before the Department of Personnel position, Ms. Celentano was an elementary-school teacher and taught special education in high school, as well. She also taught first grade and fourth grade, and did tutoring. Prior to that she worked for the College of New Jersey in the child study behavior group as a research assistant, performing data collection and analysis and producing reports related to students with autism and/or savants. She has done presentations for the State Board of Education; to principals and supervisors conferences; to State administrators of tests; and to the New Jersey Education Association.

In 2010 to 2011, the APA was the method used by teachers to assess students with the most significant cognitive disabilities, allowing them to take instruction in class and build a portfolio of work for them. This allowed teachers to fashion their own tests and prepare a binder. The design of the APA began in 1999, and the first year it was scored was 2001, when she came on. She came in to help manage and review the process to determine how the scoring would be implemented and what the design should be.

In her current position Ms. Celentano is in charge fully of the test design, test delivery, training the administrators and teachers, preparing the PowerPoints, overseeing the scoring and the teachers scoring. She also deals with the vendor, and does the statistical analysis of all scores, eventually meeting with teachers over the summer to advise what was gleaned in the scoring process and to determine what the

testing revealed and whether any changes are needed to the design. Rotating groups of experts are brought in to offer their opinions, as well.[1]

In identifying security breaches, most binders are reviewed at scoring centers out of state. If something is noted that seems out of order, she is notified, and then has others who assist in reviewing the materials. Examples of test security breaches would include not following the directions given, not having a name or date on everyone's work, or if whiteout was used. All these things would be considered errors and security breaches. Once there is a determination that there is a significant breach, the information is sent to Office of Fiscal Accountability and Compliance for an investigation. The purpose of the APA, pursuant to the federal guidelines, is that every student be assessed regardless of intellectual ability. Schools and districts are held accountable for program performance and student performance, and some students taking the APA also take the NJ ASK if they have strength in other areas, but very few take both assessments.

Ms. Celentano testified that she has been involved with hundreds of breaches over the years, likely exceeding 400, and that four or five of those have gone to OFAC. The district test coordinator is notified in late August to make sure teachers receive the training they need in order to do the assessment. There is a step-by-step process which demonstrates how to score, including if a student did a test with or without prompting. Instructions are also posted online to train teachers and the modules are up all year for teachers to review.

The teacher training module (P-2) on page four explains what the APA is. Page five is a reminder of the purpose of the APA, that it is a part of the accountability system and not just a New Jersey requirement. Page six explains the participation guidelines for the alternate assessment.

[1] The Board offered Ms. Celentano as an expert in the Alternate Proficiency Assessment (APA). After initially reserving and following arguments of counsel, the witness is deemed qualified to testify as an expert witness.

An example of a completed copy of participation guidelines appears in Exhibit J-5, page three (NJDOE 324), which reflects the four main questions that address the student's cognitive disability. All four questions would have to be answered in the affirmative for a student to be allowed to take the assessment. If any question cannot be answered in the affirmative, then the student has to take the general assessment, which the federal government indicates is about 1 percent of the total population, and so a very small number of students have the most significant cognitive disabilities. The students are typically those that need repeated and intensive instruction with lots of support modifications and the use of pictures, objects, and prompting to get to the answer. Sometimes gesturing and physical prompting is required, meaning the student is being shown what the answer is.

To determine whether a student is eligible to take the APA, an IEP team needs to look at the general assessment test (P-2 at 9). For example, some autistic children take the general assessment for math and the alternate assessment for language arts.

The second module regarding the APA test (P-3) explains the format of the test and the test design. The entry cover sheet indicates what is being tested, and there is one cover sheet per entry. The APA itself is based upon instruction throughout the year. The first period of collection of information ends on November 12, and a teacher can put something in a binder anytime or replace something that they had put in earlier. They are pulling materials from instruction happening throughout the year. The teacher chooses the activity and the skills based upon their knowledge of the student and what's in the IEP.

There is also a module that outlines common mistakes (P-4).

The outline of what is accepted as evidence for the APA is reflected in module IV (P-5), which includes requirements for contents of the entry, the entry cover sheet, and the evidence requirements. Whether the student answered questions accurately or not has to be documented, as does whether the student answered independently. Items need to be marked accordingly. "V" would indicate a verbal prompt, "G" a gestural prompt, and "M" a module prompt. "P" would indicate a physical prompt; however, the

answer needs to be marked wrong since it was provided to the student. Part five of the module (P-6) is a continuation of Acceptable Evidence.[2] The scoring rules are covered in part six of the module (P-7), and include requiring the correct amount of evidence and the percentage of independent scores.

Module VII (P-8) is the module reminding teachers that they need different instructional activities. Module VIII (P-9) covers independence and what percentage of the time the student was independent or required supports or prompts. Module IX (P-10) is entitled Performance, and on page six address scoring for accuracy. For example, if an indirect prompt was received and the student got the answer right, then the answer is marked correct with the prompt noted. If there is a physical prompt, meaning the student was given the answer, then the answer needs to be marked wrong with a P next to it.

Module X (P-11) concerns steps to developing entries and selecting what would be used. Page two provides the six steps to develop an entry. Page 15 outlines instructional supports that do not work for the APA, such as giving support that basically shows the student what the answer is without showing they understood the skill or concept. That cannot be used to assess the student on the APA.

The remaining module XI (P-12) provides information about teacher instructional resources; module XII (P-13) consists of example entries; and module XIII (P-14) discusses proficiency levels, score reports, and administrative topics.

After the teachers' and school districts' work is done, the portfolios are collected and shipped to the vendor (Pearson Education). Scoring is done at the Pearson site, and about 60 percent of the scorers return annually. Pearson staff are trained on a scoring handbook. Pearson is aware of how to identify breaches in accordance with the brochure. There are identifying features in the handbook, and all are trained to identify a breach.

[2] P-6 in the joint binder has no content other than the cover page.

Ms. Celentano testified that she knows petitioner from interviews regarding the security breach, and as someone who had produced a set of binders that were the subject of a breach investigation. Petitioner's interview was conducted by Joanne Griffith from OFAC, which completed an investigation and report. (J-1.) The final report from OFAC is dated in 2012 because that is when the write-up was concluded. The investigation was commenced after Pearson notified her that there were twenty-two test booklets from the same school that had a large number of answers that were exactly the same. (J-3.) After reviewing the document that reflected the names of two teachers, and interviewing supervisors, administrators, petitioner, and the other teacher, they were able to determine who had done which part of the binders, and that Ms. Thompson, the other teacher, had done only the mathematics entries. Petitioner had done the language arts sections at issue.

One part of the information highlighted was that ten students had identical answers to a question regarding the story "A Christmas Carol." Also, there were thirteen students with the exact same answer to a question regarding the story "Jimmy's Car."[3] There were six students with the same answer to the following story, and six with the same answer to the story after that. There were five identical answers to the story "Superhero Cat," and two identical stories that started out, "My house is big." The significance of identical responses is that it is an indication that the information being received is inaccurate. Identical answers to open-ended questions are "not only improbable, but practically impossible," without an intervening event. Ms. Celentano testified that she has encountered other breaches on a smaller scale where portfolios had the same answers. Assessments have to be based on things not already taught, and need to be done by the student independently or with prompting.

In this case, Ms. Celentano reviewed the actual physical portfolios when they were shipped back to her. She identified this as a clear security breach because it was obvious that the tests had not been independently done. Many cases were identical, and while a few have an extra sentence or one less sentence, many answers were exact replicas of others. The question posed was an open-ended question, and it is not

[3] These thirteen answers were typewritten and identical except for the font size.

possible for all of these students to have identical replies. She also identified the answers to the questions about "A Christmas Carol" as breaches because some were identical and others had very minor differences. She testified that a significant difference in a student's abilities might indicate a breach, such as when students who could barely list or spell words had perfect punctuation and spelling just eight weeks later. The special education office and the district educator said there is no way to make this kind of progress when there are intellectual disabilities, and that the exact or extreme overlap of words in the same order to an open-ended question is clearly a breach.

Ms. Celentano testified as to many of the entries and cover sheets, all of which were marked as written independently and without assistance, yet the comparisons from the students' responses two months earlier was staggering. In many cases, a student who could not formulate a full sentence and could not do what the instructions asked, but merely strung together words, was, two months later, with Thanksgiving and Christmas break in between, writing fully formed paragraphs, transitions, and full sentences; had developed accurate spelling; and had the ability to incorporate complex sentences and emotion in their writing, as well as conflict resolution. In that period of time there had been a mastery of the use of words and proper punctuation, and very well developed stories written.

In reviewing the actual portfolios, Ms. Celentano identified J-5 as a portfolio of a student whose initials are A.R.[4] The barcode identifying the student is the same one on the plastic bag that the test is placed into, so the barcode connects all of the items with the portfolio. In this case the barcode was 761400020. The cover sheet is incomplete because the student's name is missing. In this case the skill that was being tested in this section of the APA is "recognize and understand historical and cultural biases and different points of view." Students were to read the book "A Christmas Carol" and then write a descriptive essay to discuss the cultural and moral biases in Victorian England in 1845 as compared to today. The first collection entry for this student for the same skill appears on the previous page, marked NJDOE 330. Students were asked to write a

[4] The cover sheet reflects the initials as R.A.

descriptive essay about the book "White Fang" discussing cultural and historical biases towards Native Americans in the 1800s. The student's initial evidence in this case has a few words on the left side indicating "1850's Indians nice people. Indians hunt food with . . . "; nothing is written after that, and on the right side under the heading of Today, it is blank. Ms. Celentano then read what the student had written on the next page, NJDOE 331, and noted punctuation, formatting, and content and described those as all different ways to look at whether information is similar or different.

J-6 is the portfolio of another student who met the APA guidelines. On the barcode page the initials appear to be backwards and indicating W.A.; however, on subsequent sheets, the initials are noted to be A.W. The cover sheet is again missing the student's name (NJDOE 379), and the essay regarding the book "A Christmas Carol" appears at NJDOE 382. Comparing page 382 in J-6 to page 331 in J-5, Ms. Celentano noted that the responses are similar but not exactly the same.

Another example of the many comparisons undertaken is of DOE 450 and 452 within J-7, and DOE 550 and DOE 552 within J-9, where the original entry of November 24, 2010, earned a score of "1" and reflected two sentences with words misspelled, some of which made no sense. A second entry two months later reflected a full story, with full sentences and accurate punctuation, and was marked as having been independently done. Other examples among many were DOE 1189 through DOE 1192 within J-21; DOE 486 through DOE 489 within J-8; and DOE 586 through DOE 589 within J-10. DOE 495 within J-8, DOE 595 within J-10, and DOE 1336 within J-24 are all identical, yet were prepared by three different students. Ms. Celentano noted that if DOE 495 is held up to a light with DOE 1336 behind it, everything about them is identical, including the date stamp, which lines up, and the circles around the scores, which also line up. The only way to perfectly match like this would be to photocopy it.

Ms. Celentano testified that she was present for respondent's interview and that he did not offer an explanation as to how responses would be verbatim. She testified that the same essay word-for-word in a large amount of text is an absolute breach. Teachers are not allowed to teach the students answers to questions, and the tests are trying to see if a student learned the skill that the training materials were intended to

teach. She testified that it is not possible to have the same ten identical, elaborate, complex answers in this population, especially with the limitations these students have.

Ms. Celentano testified that she works in educational assessments and evaluation of educational programs, and is in charge of the APA to ensure that those students with cognitive issues are assessed correctly and accurately for schools, parents, teachers, and the federal government. The question becomes whether the student has learned a skill over the time frame that was selected to teach them, and whether they generalize it and demonstrate that skill. The APA does not measure IQ and is not designed to do so. She testified that she has worked for twenty-three years in classrooms with special-education students, observing their instruction and making recommendations. She described discrete trial as focusing students over and over on something and collecting data. Here, there were twenty-two students, and some of the verbatim answers were between students in the same group, and in other cases were from students in different groups. If a paper of a student with significant cognitive deficits had the same exact answers as the paper of another student, the paper could not possibly have been done independently. Multiple students with the exact same answers across multiple groups is not possible. If answers were somewhat similar it could be said to be subjective, but here there were many identical answers, and therefore no subjective elements.

Ms. Celentano testified on redirect that nothing that transpired in the hearing changes the conclusions drawn in the OFAC investigation—that the children did not write these essays independently.

Lisa Spano

Dr. Spano has been a clinical psychologist in private practice since May 2015, providing consulting for parents, teachers, and children with behavior issues. She holds a bachelor's degree in psychology, a master's degree in educational psychology, a master's degree in applied psychology, and a doctorate degree in clinical psychology. She is a board-certified behavior analyst, and can teach children with autism or behavior disorders. She did multiple externships and has provided individual, family,

and couples therapy to adults and children in various departments of hospitals. She was accepted as an expert in clinical psychology and behavior analysis.

Dr. Spano stated that she has never administered the APA test and never been on an expert panel for the Department of Education. She has never been a teacher. Her instruction is in the area of behavior, and includes home-based and preschool settings. The more severe the autism is, the more she is involved in the academics. She has never worked with standardized testing.

Dr. Spano testified that children with autism need to be taught different responses to the same stimuli, and that the teaching strategy uses repetition in order for students to learn, but they also need to be taught to be flexible. Their memories are often very specific. In conducting her review, she researched the methods utilized and heard respondent's explanation of what he did, and reviewed the records. After understanding the description of the class, she determined that it was made up of twenty-two students with high-functioning autism. She found respondent to be very direct and forthright and not evasive. She testified that the essays were used as models during the instructional period, and students repeatedly practiced writing these essays. They then recalled them and generated similar writing passages.

Dr. Spano opined that it would be expected that students' passages would be similar to each other, since students imitated the models used during the instructional period.

On cross-examination, Dr. Spano was asked about item "m." on page two of her report, which lists "Forte analysis of portfolios" as part of her records review. She testified she is "not sure what that is." When asked the difference between "similar" and "variable," she described similar as almost the same, and variable as different ideas and opinions which may not start and end the same way. When asked whether some of the students' essays were exactly the same, she responded that she could not say that she found any identical to another, and that, "there were so many." Dr. Spano testified that respondent told her his students had "high functioning autism" with "mild cognitive impairment," and she understood that those students with mild cognitive impairment

cannot do regular standardized tests, so they take the APA. The New Jersey Alternate Proficiency Assessment Teacher Training (P-2 at 4) indicates that the APA is specifically designed for students with the "most significant cognitive disabilities," and Dr. Spano agreed that this is different from what respondent said about "mild cognitive impairment." She stated, however, that while mild and severe are not the same, the distinction is subjective.[5]

Dr. Spano testified that her experience regarding student memorization is that students do not memorize multiple paragraphs, but often remember all the scenes from a movie, for example, if they have a particular area of interest like dinosaurs or something particular to the student. She has not seen memorization of multiple full paragraphs in her practice and experience. She also testified that she would have expected these students to ask "why not?" when told there would be no help.

Dr. Spano's report (R-4) also indicates on page three in the last paragraph that "records indicate" that respondent did not "advocate dishonesty or cheating" during the assessment, but when asked what records she was referring to, she indicated she got that from his responses to her questions, and quoted what he said, and that was his statement.

Craig Forte

Craig Forte has been with the East Orange School District since 2008, originally teaching the sixth to eighth grades at the middle school. He began in a behavioral class, and then in the 2010–2011 school year was a remedial English teacher at the high school. Prior to working in East Orange he was employed with the West Orange Public Schools. He has a bachelor's degree in psychology and a master's in elementary education, and a student-with-disabilities certification. During the 2010–2011 school year he administered the language arts section of the APA to twenty-two students in the sixth to eighth grades. He described those students as disabled and on the autism spectrum. He testified that there were three levels of students. He

[5] This testimony was not credible.

described level one as those requiring many supports, with some who could not speak; level two as those students requiring fewer supports; and level three as those requiring almost no supports and able to do most things on their own. There were three full-time aides in the class. The aides supported the learning environment and what he was teaching.

The APA is based upon portfolios of students' work. There were two collection periods—the first one to collect the baseline data between September and November, when students were expected to achieve 39 percent mastery, and then a teaching period, after which there would be a second collection period, where students had to achieve 80 percent or higher mastery. There was a language arts portion and a math portion to the test. He administered the language arts portion and Ms. Thompson did the math section. He had both sets of students when administering the language arts portion, and she had both when administering the math portion.

Forte testified that he had online training for administering the test and that he adhered to all the security procedures, assuring that everything was accurate. He testified that he never altered or fabricated any of the portfolios. Prior to receiving the Order to Show Cause no administrator ever suggested he had breached security.

The first collection period was September 1 through November 13, 2010, and the second one was December 14, 2010, through February 28, 2011. The initial activity was to determine how close students could come to an actual essay, and then go from there; for example, teach them how to create paragraphs, and create flow using discrete trials. Once the final activity is given to the students, no help is given. He offered his lesson plans and the essay examples he had written as examples of a good story. The essays were visible to students during the lesson but were not up during the APA testing; however, the final activity was based upon the samples.

Forte testified that he did not see any of the aides offer help to the students. He indicated that materials were selected based upon each student's IEP and the skills they could and could not do. He used the lesson plans (R-1, a–i), to bring scores up to the 80 percent required.

In the case of the "Jimmy's Car" story, that was up on a huge chart in the classroom. The story is dated February 21, 2006, and he used it from year to year as an example of a good story. A repetitious teaching method is what it is utilized because many students do not comprehend how things "flow." Some students were moved away from others and separated, especially if it was thought that one would try and copy another's work.

At some point he met with the State for an hour and was asked about his process and whether he cheated or copied answers. Ms. Griffith and Ms. Celentano both questioned him. When asked how to explain the similarities in the students' essays, he said he responded that the repetitious method is how autistic kids learn, and that he acted ethically and should not have his certificates revoked or suspended.

On cross-examination Forte testified that the scoring on the initial assessments told him how to handle the next assessment. A score of 39 percent is required by the State and is considered to be an acceptable piece of baseline evidence. Each IEP indicated what a student needed to do to prepare to understand the concept they were going for, and the second assessment shows the growth between the initial collection and the final. The work could be done 100 percent independently or not, and if a letter "V" appears it means verbal assistance was needed.

By way of example, Forte testified that student A.R. did the work independently. He agreed that Ms. Celentano said she found significant similarities and identical language across many students' work, but said that was because students reproduced his example. He disagreed that language was verbatim, and indicated that he would have to compare them. He agreed that what student A.R. had written was virtually identical to his sample paragraph (R-2), but when asked whether he recognized it as his essay, Forte responded that he did not, yet he had used that essay for six years at that point, since 2006. He indicated, however, that he did not "note the order of the words," and indicated that he does not compare the essays but grades them randomly, stating, "no, I didn't notice." Forte testified that he did not notice that thirteen students produced nearly identical answers to his own essay. Forte also testified that he did not recall if he

was asked about this in the investigation. When reminded that OFAC said in the report that he had offered no explanation for the number of similar answers, Forte replied that he did not recall the questions, but has no reason to disagree with the report. Forte added that when an autistic student reproduces something they will add something to it, and that they learn by what they hear from others. He testified that he has never been investigated before, but has never had an occasion where more than ten students reproduced an essay, which he indicated happened "just this time."

Respondent's contention that he did not recognize his own essay, and didn't notice that multiple students had produced identical or nearly identical essays, strains credulity. The testimony of petitioner's witness was consistent and credible, and no competent evidence was presented to dispute any of her testimony. Accordingly, I **FIND** and adopt the entirety of the testimony of Ms. Celentano as **FACT**.

LEGAL DISCUSSION AND CONCLUSION

The Board of Examiners is entrusted with the issuance and revocation of certificates to teach pupils in public schools. N.J.S.A. 18A:6-38. Pursuant to N.J.A.C. 6A:9B-4.4, "[t]he Board of Examiners may revoke or suspend the certificate(s) of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher, or other just cause." The Board of Examiners bears the burden of proving its claims against respondent by a preponderance of the competent, credible evidence. See In re Certificate of Papadaniil, EDE 8821-00, Initial Decision (March 13, 2002), adopted, State Bd. of Exam'rs (May 9, 2002), http://njlaw.rutgers.edu/collections/oal/; In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The intendment of the hearing "is to permit [the certificate holder] to demonstrate facts or circumstances that might counter the charges set forth in the Order to Show Cause," State Bd. of Exam'rs v. Brown, 91 N.J.A.R.2d (EDE) 5, 7, and an opportunity to present mitigating circumstances toward the determination regarding what licensing sanction, if any, is appropriate, In re Certificates of Mantone, 96 N.J.A.R.2d (EDE) 5, 6.

Conduct unbecoming includes a broad range of behavior that impacts a certificate holder's ability to perform his or her duties or otherwise renders the certificate holder unfit to have the responsibility for the custody and care of students. See State Bd. of Exam'rs v. Charlton, 96 N.J.A.R.2d (EDE) 18; In re Certificate of Fargo, 91 N.J.A.R.2d (EDE) 1. Although "conduct unbecoming" a teacher or other public employee is not defined in the statutes or regulations, it has been described as an "elastic" phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted). The touchstone of the charge is a certificate holder's fitness to discharge the duties and functions of his position. See Laba v. Newark Bd. of Educ., 23 N.J. 364, 385–88 (1957). It is well settled that "teachers are held to a high standard of conduct because of the influence they exercise over the students." Charlton, 96 N.J.A.R.2d (EDE) at 21. Teachers "hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils." In re Tenure Hearing of Tordo, 1974 S.L.D. 97, 98–99. They "are professional employees to whom the people have entrusted the care and custody of . . . school children," and "[t]his heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." Tenure of Sammons, 1972 S.L.D. 302, 321. "'That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.'" In re Grossman, 127 N.J. Super. 13, 30 (App. Div.) (citation omitted), certif. denied, 65 N.J. 292 (1974).

There are no statutory or regulatory guidelines addressing when revocation or suspension is the appropriate remedy. In re Certificate of Fargo, 91 N.J.A.R.2d (EDE) 1, 3. Plainly, "[t]hat decision is discretionary, on a case-by-case basis, after considering the individual facts and circumstances." Ibid. Unfitness to hold a position in a school system may be demonstrated by a series of incidents or a single incident if sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944). Relevant factors in the equation of whether revocation or something less is appropriate include the nature and gravity of the offense, any

evidence as to provocation, extenuation or aggravation, and any harm or injurious effect that the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system. In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967).

There are multiple decisions from the Board of Examiners and the Commissioner of Education concerning a certificate holder's breach of security measures governing standardized testing that illustrate whether the teachers' respective courses of conduct constitute "unbecoming conduct" warranting discipline.

In In re Certificates of Radzik, EDE 02911-14, Initial Decision (January 29, 2016), http://njlaw.rutgers.edu/collections/oal/, modified, State Bd. of Exam'rs (April 14, 2016), http://www.nj.gov/education/legal/, a teacher was found to have engaged in unbecoming conduct during the administration of the 2010 and 2011 NJ ASK. Radzik allowed students to discuss the test and interact with each other during the administration of the test. He also repeated the correct answer to a question, and told stories to his students suggesting they remember them. During the test, after reading the writing prompts, he alluded to the stories to be used in answering the question. He also drew a shape on the board immediately prior to the math testing and demonstrated how smaller shapes could be assembled into the larger shape. One of the math problems in that section was the exact one that he had drawn on the board. During the testing, he also read numerous sample questions to his students, and provided answers, in the beginning of the math section even though only one sample question was allowed, and he encouraged a newly hired teacher to use non-verbal cues during testing. Based on this conduct, the Board of Examiners revoked Radzik's certificates.

In In re Certificates of Mascuch, EDE 458-07, Initial Decision (October 29, 2007), adopted, State Bd. of Exam'rs (January 17, 2008), http://njlaw.rutgers.edu/collections/oal/, the Board of Examiners issued an OSC following a report from the OFAC that concluded that a teacher had violated testing procedures in administering the NJ ASK. Mascuch was found to have engaged in unbecoming conduct by reading aloud reading-comprehension passages, by not abiding by test-time requirements, and by providing substantive assistance to a student

while she was taking the test. As a result of Mascuch's actions, the district was required to retest all seven students in Mascuch's room. Based on Mascuch's conduct, the Board of Examiners revoked his certificates.

In In re Certificates of Kelley, EDE 8144-12, Initial Decision (January 30, 2014), adopted, State Bd. of Exam'rs (April 4, 2014), http://www.nj.gov/education/legal/, the Board of Examiners issued an OSC following a report from the OFAC that concluded that a teacher had breached NJ ASK5 test protocol. Kelley was found to have engaged in unbecoming conduct by touching and pointing to students' test booklets during the test in response to students' questions and providing four students with assistance regarding test questions. Based on this conduct, the Board of Examiners suspended Kelley's certificates for three months.

In In re Licenses of Jacob, Dkt. No. 398-06/96-126, State Bd. of Exam'rs (November 20, 1997), http://www.nj.gov/education/legal/, a teacher was found to have engaged in unbecoming conduct by breaching security in the administration of the High School Proficiency Test by removing a test booklet and duplicating two pages of the math portion for his own use in instructing his pupils. Based on this conduct, the Board of Examiners suspended Jacob's licensure as a teacher for two months.

In In re Certificates of Evans, Jr., EDE 7017-12, Initial Decision (August 8, 2013), http://njlaw.rutgers.edu/collections/oal/, adopted, State Bd. of Exam'rs (December 6, 2013), aff'd, Comm'r (September 30, 2014), http://www.nj.gov/education/legal/, the Board of Examiners issued an OSC following a report from the OFAC that concluded that a teacher had breached the NJ ASK4 test protocol. Evans was found to have engaged in unbecoming conduct by providing hints and clues to students during the administration of the test, and his "interference with the students taking the test compromised the validity of the test scores such that they had to be discarded." Based on this conduct, the Board of Examiners suspended Evans's certificates for one year.

In In re Certificates of Karis, EDE 1564-07, Initial Decision (November 2, 2007), http://njlaw.rutgers.edu/collections/oal/, modified, State Bd. of Exam'rs (January 17, 2008), reversed, State Bd. of Educ. (June 18, 2008), http://www.nj.gov/education/legal/,

the Board of Examiners issued an OSC following information from the Office of Compliance that a teacher had breached security procedures in administering the Grade Eight Proficiency Assessment test. Karis was found to have engaged in unbecoming conduct by giving students prior information about the picture writing prompts for the language arts literacy test, which would give her students an unfair advantage on the test, and required the retesting of ninety-five students. Although the Board of Examiners revoked Karis's certificates, the State Board of Education reversed this penalty and imposed a suspension for the remainder of the school year (approximately six months).

In the present matter, the OSC reflected that the Board is seeking revocation of Mr. Forte's teaching certificates; however, the post-hearing submission argues that respondent's breach in testing protocol requires revocation or suspension of his certificates for an unspecified period of time. Mr. Forte's conduct had a tangible impact upon the administration of the 2010–2011 APA. Additionally, he received training on how the test should be administered. The credible testimonial and documentary evidence amply demonstrates that breaches of testing and security protocols occurred during respondent's administration of the 2010–2011 APA. Respondent's testimony that he "didn't notice" that numerous students produced nearly identical or identical essays strains credulity. His testimony that he did not "note the order of the words," and as such, did not recognize that the students had reproduced his own essays which he had used for years, is inherently unbelievable. This conduct is similar to that which has been found to constitute "unbecoming conduct" and for which revocations and suspensions have been imposed in the above-mentioned cases. The results achieved here would not be possible without substantive assistance.

Forte's conduct is somewhat distinguishable from the facts supporting the harsher penalties given in Mascuch, and Radzik, as unlike those cases, Forte's conduct did not result in a determination to re-administer testing. Based upon all of the foregoing, I **CONCLUDE** that a suspension is warranted in the matter of Mr. Forte's teaching certificate. His conduct is within the realm that past decisions of both the Board of Examiners and the Commissioner of Education have deemed "unbecoming."

The Board no longer seeks only revocation in this matter. Accordingly, I **CONCLUDE** that a suspension of six months be imposed.

ORDER

It is **ORDERED** that the charge of conduct unbecoming a teacher is sustained, and that respondent's teaching certificate be suspended for a period of six months.

I hereby **FILE** my initial decision with the **STATE BOARD OF EXAMINERS** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE BOARD OF EXAMINERS**, which by law is authorized to make a final decision in this matter. If the State Board of Examiners does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE STATE BOARD OF EXAMINERS, 100 Riverview Plaza, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 2019
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: June 25, 2019

Date Mailed to Parties: June 25, 2019

dr

APPENDIX

Witnesses

For Petitioner:

Elizabeth Celentano
Lisa Spano

For Respondent:

Craig Forte

Exhibits

Joint:

J-1	N.J. Dept. of Educ. OFAC Investigation Unit Report of Examination, March 2012 (NJDOE001–5)
J-2	Summary of Investigation Findings/Conclusions (NJDOE014)
J-3	Cicely Tyson Middle School Breaches (NJDOE015–016)
J-4	NJAPA 2011 Security Breaches (NJDOE023–030)
J-5	Portfolio for R.A. 7614-00020 (NJDOE 322–372)
J-6	Portfolio for W.A. 7614-00024 (NJDOE 373–423)
J-7	Portfolio for B.B. 7615-00001 (NJDOE 424–475)
J-8	Portfolio for W.B. 7713-00014 (NJDOE 476–523)
J-9	Portfolio for F.D. 7614-00025 (NJDOE 524–575)
J-10	Portfolio for F.D. 7713-00013 (NJDOE 576–623)
J-11	Portfolio for M.E. 7713-00012 (NJDOE 624–672)
J-12	Portfolio for A.A. 7614-00018 (NJDOE 673–726)
J-13	Portfolio for B.H. 7713-00018 (NJDOE 727–774)
J-14	Portfolio for J.E. 7713-00017 (NJDOE 775–823)
J-15	Portfolio for R.J. 7615-00003 (NJDOE 824–874)
J-16	Portfolio for K.K. 7713-00011 (NJDOE 875–923)
J-17	Portfolio for R.K. 7811-00025 (NJDOE 924–993)

J-18 Portfolio for M.C. 7811-00026 (NJDOE 994–1061)

J-19 Portfolio for M.M. 7614-00023 (NJDOE 1062–1112)

J-20 Portfolio of M.N. 7614-00022 (NJDOE 1113–1163)

J-21 Portfolio of P.C. 7614-00021 (NJDOE 1164–1216)

J-22 Portfolio of S.A. 7615-00002 (NJDOE 1217–1267)

J-23 Portfolio of S.H. 7713-00015 (NJDOE 1268–1317)

J-24 Portfolio of S.M. 7713-00016 (NJDOE 1318–1363)

J-25 Portfolio of W.W. 7811-00028 (NJDOE 1364–1434)

J-26 Portfolio of Z.W. 7811-00024 (NJDOE 1435–1504)

J-27 Excerpts from N.J. APA Procedures Manual 2010–2011 (NJDOE061, 063, 068–072)

For Petitioner:

P-1 Curriculum Vitae of Elizabeth Celentano

P-2 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part I – APA Introduction

P-3 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part II– APA Test Design & CPI Links

P-4 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part III – Common Mistakes 2010 (pages 1–3)

P-5 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part IV – Contents of an Entry & Acceptable Evidence (pages 1–10)

P-6 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part V – Acceptable Evidence (Cover)

P-7 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part VI – Universal Scoring Rules (pages 1–5)

P-8 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part VII – Different Instructional Activities and Complexity (Cover)

P-9 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Park VIII – Scoring Dimension – Independence

P-10 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part IX – Scoring Dimension – Performance

P-11 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part X – Steps to Developing Entries

P-12 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part XI – Teacher Instructional Resources (pages 1–2)

P-13 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part XII – Sample Entries (Cover)

P-14 NJ Alternate Proficiency Assessment 2010–2011 Teacher Training – Part XIII – Proficiency Levels, Score Reports & Administrative Topics

For Respondent:

R-1(a) Lesson Plan 11/15/10 (Forte00001)

R-1(b) Lesson Plan 11/16/10 – 11/17/10 (Forte00002)

R-1(c) Lesson Plan 11/18/10 – 11/19/10 (Forte00003)

R-1(d) Lesson Plan 11/22/10 – 11/23/13 (Forte 00004)

R-1(e) Lesson Plan 11/29/10 – 11/30/10 (Forte00005)

R-1(f) Lesson Plan 12/1/10 – 12/3/10 (Forte00006)

R-1(g) Lesson Plan 12/4/10 – 12/5/10 (Forte00007)

R-1(h) Lesson Plan 12/6/10 – 12/8/10 (Forte00008)

R-1(i) Lesson Plan 12/9/10 – 12/10/10 (Forte00009)

R-2(a) Sample Paragraph "A Look at A Christmas Carol" (Forte 00011–12)

R-2(b) Sample Paragraph "This Room" (Forte00013)

R-2(c) Sample Paragraph "Field Trip (Letter)" (Forte00014)

R-2(d) Sample Paragraph "White Fang" (Forte00015)

R-2(e) Sample Paragraph "Jimmy's Car" (Forte00016–17)

R-2(f) Sample Paragraph "Alone" (Forte00018)

R-2(g) Sample Paragraph "Describe White Fang" (Forte00019)

R-2(h) Sample Paragraph "Description Planning" (Forte00020)

R-2(i) Sample Paragraph "How to Make a Peanut Butter and Jelly Sandwich" (Forte00021)

R-2(j) Sample Paragraph "Superhero Cat" (Forte00022)

R-3 Curriculum Vitae – Dr. Lisa Spano

R-4 Expert Report of Dr. Lisa Spano/MG Behavioral Consulting

R-5 Proficiency Levels, Score Reports and Administrative Topics

R-6 Notes of Investigation

R-7 Notes of three interviews

R-8 Ms. Griffith meeting notes

81-20

New Jersey Commissioner of Education

Final Decision

Archange Antoine,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Synopsis

Petitioner contested his removal as a member of the respondent Roselle Board of Education (the Board) based upon his alleged failure to attend three or more consecutive Board meetings. Petitioner contended that his removal was improper and in violation of the Board's own policy, as he had missed only one regular meeting, and argued that the Board's decision to remove him was arbitrary, capricious and unreasonable. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; it is undisputed that petitioner failed to attend four consecutive meetings of the Board, though petitioner argued that he only missed one regular meeting that appeared on the Board's "Regular Public Meeting" schedule; *N.J.S.A.* 18A:12-3 explicitly addresses a board of education's authority to remove a board member for failure to attend three consecutive meetings of the board without good cause; the statute does not limit missed meetings to "regular" meetings; and the Board's Policy 0145 "Board Member Resignation and Removal" cannot override the authority afforded to it by *N.J.S.A.* 18A:12-3. The ALJ concluded that the Board properly removed petitioner pursuant to *N.J.S.A.* 18A:12-3 based on his failure to attend four consecutive meetings of the Board. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion in this matter. Accordingly, the Initial Decision of the OAL was adopted as the final decision and the petition was dismissed.

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

March 2, 2020

81-20
OAL Dkt. No. 12958-18
Agency Dkt. No. 218-8/18

New Jersey Commissioner of Education

Final Decision

Archange Antoine,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

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

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the Board properly removed petitioner pursuant to *N.J.S.A.* 18A:12-3 based on his failure to attend more than three consecutive meetings of the Board. The statute does not limit missed meetings to "regular" meetings, and the Board's policy cannot override the authority afforded to it by the statute.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/2/20
Date of Mailing: 3/4/20

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12958-18
AGENCY DKT. NO. 218-8/18

ARCHANGE ANTOINE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,

Respondent.

William Strazza, Esq., for petitioner (The Law Office of William Strazza, attorneys)

Allan C. Roth, Esq., for respondent (Ruderman & Roth, attorneys)

Gregory J. Cannon, Esq., for participant Jonathan Spearman (Sobel, Han & Cannon, attorneys)

Record Closed: December 30, 2019 Decided: January 27, 2020

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

STATEMENT OF THE CASE

Petitioner Archange Antoine (petitioner) contests his removal from respondent Roselle Board of Education (the Board) predicated on his alleged failure to attend three or more consecutive Board meetings.

PROCEDURAL HISTORY

On August 31, 2018, petitioner filed a Verified Petition with the Commissioner of Education (the Commissioner), accompanied by a motion for emergent relief. Petitioner alleges that his "removal from the board was improper, unlawful and in violation of the [Board's] own policy, since he only missed one regular meeting," and that the Board's decision to remove him was arbitrary, capricious and unreasonable.[1] Petitioner seeks an order enjoining the Board from enforcing its resolution removing him as a member of the Board, requiring his immediate reinstatement, and voiding the Board's actions to remove him. The Department of Education transmitted the matter to the Office of Administrative Law for a hearing. On September 12, 2018, oral argument was entertained on petitioner's emergent-relief motion, which was denied by Order dated September 27, 2018. The Commissioner issued a Decision on Application for Emergent Relief on October 12, 2018, adopting the Order denying emergent relief. On May 9, 2019, I issued an Order permitting Jonathan Spearman, who holds the Board seat formerly held by petitioner, to participate in the within matter. The hearing scheduled for February 26, May 14, and May 17, 2019, was adjourned at the parties' request, and the parties ultimately filed cross-motions for summary decision. In this regard, the parties filed a Joint Stipulation of Facts accompanied by various exhibits. Petitioner filed a brief in support of his motion. The Board submitted a brief in support of its motion; a brief in opposition to petitioner's motion; and a certification by counsel (Roth Cert.), which attached, among other documents, a certification by the District's business administrator/board secretary, Anthony Juskiewicz (Juskiewicz Cert.), and certifications by five Board members, Donna Eleazer (Eleazer Cert.), Patricia Fabrizio (Fabrizio Cert.), Sherise Pollard (Pollard Cert.), Richard Villeda

[1] Although the Verified Petition included three counts, petitioner is proceeding only as to count one and has voluntarily withdrawn count two (which contested the adequacy of the Board's notice) and count three (which asserted that petitioner had good cause for missing the meetings).

(Villeda Cert.), and Courtney Washington (Washington Cert.).[2] Mr. Spearman was afforded the opportunity to respond to the cross-motions. No response was received by the required deadline, on which date the record closed.

FINDINGS OF FACT

The parties stipulated to the majority of the facts. Based upon a review of the documentary evidence presented, including the Joint Stipulation of Facts (Stip.) and the certifications submitted by the Board, I **FIND** the following pertinent undisputed **FACTS**:

Petitioner was duly elected for a three-year term to the Board commencing on January 1, 2018. (Stip. at ¶ 1.) The Board is a public-school board of education organized under N.J.S.A. 18A:10-1 et seq. (Stip. at ¶ 2.) Pursuant to Board Policy 0141, the Board consists of nine members who serve a term of three years. (Stip. at ¶ 3.)

The Board posts its 2017–2018 "Board Agendas and Minutes" on its website. (Stip. at ¶ 7.) Items II(D) and II(E) on the Board's January 8, 2018, "Reorganization Meeting Agenda" detailed a proposed resolution announcing the "Legal Notice of Scheduled Meetings for the Year 2018" in order for the Board to be in compliance with the Open Public Meetings Act. (Stip. at ¶ 8.) According to District Policy 0154, "[t]he Board of Education shall at the organizational meeting . . . [r]eadopt existing bylaws and policies for the Board's operation and the operation of the school system." (Stip. at ¶ 9 and Exhibit C.) The Board's "Reorganization Meeting Minutes" for January 8, 2018, reflect that Items II(D) through (I) were tabled to the next Board meeting scheduled for Monday, January 29, 2018. (Stip. at ¶ 10 and Exhibit D.) The Board did not meet on January 29, 2018, due to inclement weather. (Stip. at ¶ 11.)

The Board held a "Special Meeting" on February 8, 2018. (Stip. at ¶ 12.) On the "Special Meeting Agenda" were items that had been tabled at the "Reorganization Meeting" on January 8, 2018. (Ibid.) The Board did not address these items on the

[2] The certifications by the business administrator/board secretary and the Board members had been previously filed in opposition to petitioner's motion for emergent relief.

February 8, 2018, "Special Meeting Agenda," as the minutes reflect that the Board took public comments and posed questions to the superintendent. (Ibid.)

On the Board's February 26, 2018, "Regular Meeting Agenda" was "Reorganization Item[ ] A. Designation of Annual Meeting Schedule," specifically stating:

> LEGAL NOTICE OF SCHEDULED MEETINGS FOR THE YEAR 2018
>
> Pursuant to Chapter 231.P.L. 1975 known as the "Open Public Meetings Act," the Roselle Board of Education . . ., at the Regular Meeting held on January 29, 2018, approve setting the Regular Meetings on the fourth Monday of each month when applicable, at the Abraham Clark High School, 122 East Sixth Avenue, Roselle, N.J. commencing at 7:00 p.m., February 2018 through December 2018.
>
Monday March 26, 2018	Regular Public Meeting	7:00 p.m.
Monday April 30, 2018*	Regular Public Meeting	7:00 p.m.
Monday May 21, 2018*	Regular Public Meeting	7:00 p.m.
Monday June 25, 2018	Regular Public Meeting	7:00 p.m.
Monday July 23, 2018	Regular Public Meeting	7:00 p.m.
Monday August 27, 2018	Regular Public Meeting	7:00 p.m.
Monday September 24, 2018	Regular Public Meeting	7:00 p.m.
Monday October 15, 2018*	Regular Public Meeting	7:00 p.m.
Monday November 19, 2018*	Regular Public Meeting	7:00 p.m.
Monday December 17, 2018*	Regular Public Meeting	7:00 p.m.
>
> *Identifies meeting not scheduled for the 4th Monday.
>
> Notice of any additions to the above schedule or changes in the time, date or place of any scheduled meeting will be posted in the locations and mailed to the newspapers designated by resolution of the Roselle Borough Board of Education adopted on January 29, 2018 in advance, as required by law.
>
> [Stip. at ¶ 13.]

The Board's "Regular Meeting Minutes" for February 26, 2018, indicate that the resolution passed by a vote of 8-0. (Ibid.) At the time of adopting this resolution, the Board had a total of ten "Regular Public Meetings" scheduled for 2018. (Ibid.) These ten meetings were meetings noticed as voting meetings. (Ibid.) Any other meeting of the Board was advertised and public notice was given if a vote of the whole Board was to be taken. (Ibid.)

On May 17, 2018, petitioner failed to attend the Board's "Workshop Meeting." (Stip. at ¶ 14.) This meeting was not set forth in the Board's annual meeting schedule. (Ibid.) The May 17, 2018, "Workshop Meeting Minutes" show that the "Workshop Meeting" began at 7:06 p.m. and ended 8:46 p.m. and was attended by five of the nine Board members.

"Workshop Meetings" were instituted for the express purpose of addressing Board agenda items prior to the scheduled monthly meetings so as to minimize the length of the scheduled monthly meetings and address issues of efficiency and timeliness during the monthly meeting. (Stip. at ¶ 15.) These Workshop Meetings were regularly held monthly meetings and not usually voting sessions. (Ibid.)

Petitioner attended the Board's "Regular Meeting" on May 21, 2018. (Stip. at ¶ 16.)

On May 24, 2018, petitioner failed to attend the Board's "Special Meeting." (Stip. at ¶ 17.) This meeting was not set forth in the Board's annual meeting schedule. (Ibid.) The only business on the "Special Meeting Agenda" was "District Goal Setting." (Ibid.; see Roth Cert. at Exhibit 6.) The "Special Meeting" minutes reflect that the special meeting was attended by six of the nine Board members. (Stip. at ¶ 17.) The "Special Meeting" minutes further reflect that neither the superintendent nor the assistant superintendent were in attendance. (Ibid.) Accordingly, the Board determined that it could not achieve the special meeting's business and "another [meeting] would need to take place." (Ibid.)

On June 11, 2018, petitioner failed to attend the Board's "Special Meeting." (Stip. at ¶ 18.) This meeting was not set forth in the Board's annual meeting schedule. (Ibid.) The only business on the "Special Meeting Agenda" was "District Goal Setting for 2018–19." (Ibid.; see Roth Cert. at Exhibit 6.) The "Special Meeting" minutes reflect that the special meeting was attended by seven of the nine Board members. (Stip. at ¶ 18.)

On June 20, 2018, petitioner failed to attend the Board's "Workshop Meeting." (Stip. at ¶ 19.) This meeting was not set forth in the Board's annual meeting schedule.

(Ibid.) The June 20, 2018, "Workshop Meeting" Agenda was the June 25, 2018, "Regular Meeting Agenda." (Ibid. and Exhibit E.) According to the "Notice of Roselle Board of Education Workshop Meeting Change," the Board "determined that there is a need to conduct workshop sessions for the purpose of preparing Board business and the presentation of Board Committee reports prior to the regularly advertised Board meetings." (Stip. at ¶ 19; see Roth Cert. at 6.) Public comments were not taken at the June 20, 2018, "Workshop Meeting," as members of the public were not present. (Stip. at ¶ 20.)

On June 25, 2018, petitioner failed to attend the Board's "Regular Public Meeting." (Stip. at ¶ 21.) This meeting was set forth in the Board's annual "Regular Public Meeting" schedule. (Ibid.)

Petitioner did not notify Business Administrator/Board Secretary Juskiewicz that he would not be in attendance at any of the above scheduled meetings. (Stip. at ¶ 23.) The Board's bylaws, policies, and regulations do not place an affirmative duty upon a Board member to alert the Board of a planned or unplanned absence from a meeting. (Ibid.) Past practice demonstrates that Board members can notify the business administrator/board secretary if a Board member is unable to attend a meeting. (Ibid.) Board members do appear telephonically at scheduled meetings. (Stip. at ¶ 24.) The Board has a practice of permitting Board members who give advance notice to the business administrator/board secretary to appear at Board meetings telephonically. (Stip. at ¶ 25.) The Board has not formally adopted a bylaw, policy, or regulation that recognizes the attendance of a meeting by a Board member via telephone, nor has the Board defined the exact practice and standard for telephonic attendance at meetings. (Stip. at ¶ 24.) Past practice demonstrates that Board members are aware that telephonic appearances are treated as attendance at the Board meeting. (Ibid.) Petitioner telephonically attended the "Special Meeting" scheduled for May 7, 2018. (Stip. at ¶ 25.)

The duties of Business Administrator/Board Secretary Juskiewicz include advertising to the public all meetings of a quorum of the Board. (Juskiewicz Cert. at ¶ 2.) He does not advertise committee meetings, which are not considered regular meetings of the entire Board. (Ibid.)

Business Administrator/Board Secretary Juskiewicz also maintains and updates the records regarding Board members' attendance at each meeting. (Juskiewicz Cert. at ¶ 6.) Petitioner failed to attend four consecutive Board meetings on May 24, June 11, June 20, and June 25, 2018, which were advertised meetings of the entire Board, where a quorum of the Board existed. (Juskiewicz Cert. at ¶¶ 2, 8-9; see Roth Cert. at Exhibit 6.) The meeting on June 25, 2018, was listed as a regular meeting on the Board's annual meeting schedule; the meetings on May 24, 2018, and June 11, 2018, were special meetings; and the meeting on June 20, 2018, was a workshop meeting. (See Roth Cert. at Exhibit 6.)

At the Board's meeting on August 16, 2018, a motion and a second were made to give notice to petitioner that the Board would be considering removing him from the Board for missing more than three consecutive meetings of the Board consistent with N.J.S.A. 18A:12-3. (Juskiewicz Cert. at ¶ 13.) The audio recording of the "Workshop Meeting" held on August 16, 2018, reflects a consensus of the Board to have the Board attorney provide notice to petitioner that his removal as a Board member would be discussed at the subsequent Board meeting. (Stip. at ¶ 22.) On or about August 21, 2018, Business Administrator/Board Secretary Juskiewicz sent a chart, via e-mail, to each Board member, including petitioner, indicating all of the Board members' attendance at meetings since January 2018. (Juskiewicz Cert. at ¶¶ 7, 18.)

On or about August 22, 2018, the Board's attorney, Allan C. Roth, Esq., sent correspondence to petitioner which states:

> Please be advised that pursuant to Board Policy 145, the Board has requested that you be provided notice that at its Monday, August 27, 2018 meeting, beginning at 7:00 p.m. in the Abraham Clark High School auditorium, the Board will discuss your removal from the Board for missing three consecutive meetings, pursuant to N.J.S.A. 18A:12-3 and Berg v. Blackhorse Pike Regional School District, 1981 S.L.D. March 3.
>
> [Stip. at ¶ 26 and Exhibit F.]

The notice did not specify the exact meeting dates missed by petitioner. (Stip. at ¶ 27.) No Board policy requires specific notice to a Board member of meeting dates missed by said member. (Ibid.)

Prior to the August 27, 2018, Board meeting, petitioner requested that, if the Board would be attempting to remove him from the Board, he wanted the discussion to be held in public session. (Juskiewicz Cert. at ¶ 14.)

On August 27, 2018, at the next meeting of the full Board, a motion and a second were made to remove petitioner for missing three or more consecutive meetings of the Board. (Juskiewicz Cert. at ¶ 15.) Following the motion to remove petitioner, petitioner was given the floor to present evidence of whether he had good cause to miss the meetings. (Id. at ¶ 16.) Petitioner presented evidence and handed out documents to the Board members. (Ibid.) Thereafter, a discussion was held by the Board and, following the Board's discussion, petitioner was given additional time to respond to the Board members' discussion. (Ibid.) At the conclusion of all discussion regarding the matter, the vote was taken to remove petitioner from the Board. (Id. at ¶ 17.) A majority of the Board voted to remove petitioner from the Board. (Ibid.) Petitioner was removed from his position on the Board by a 5-4 vote. (Stip. at ¶ 28.) The five votes for removal were cast by Board members Patricia Fabrizio, Donna Eleazer, Richard Villeda, Sherise Pollard, and Courtney Washington. (Ibid.; see also Fabrizio Cert. at ¶¶ 9, 11–13; Eleazer Cert. at ¶¶ 9–12; Villeda Cert. at ¶¶ 9–12; Pollard Cert. at ¶¶ 9–12; Washington Cert. at ¶¶ 5–8.)

On or about January 6, 2014, the Board adopted District Policy 0145, entitled "Board Member Resignation and Removal," which states in relevant part:

> A member who fails to attend three consecutive regular meetings of the Board without good cause may be removed from office on the affirmative votes of a majority of the remaining Board members, provided that
>
> 1. The member's removal was proposed at the immediately previous Board meeting; and
>
> 2. Notice of the proposed removal was given to the affected member at least forty-eight hours in

> advance of the meeting at which the vote will be taken.

[Stip. at ¶ 4 and Exhibit A.]

District Policy 0000.02, entitled "Introduction (M) Bylaws, Policies & Regulations," states in pertinent part:

> Definitions
>
> The following terms used in these bylaws, policies, and regulations shall have the meanings set forth below unless the context requires a different meaning or a different definition is supplied:
>
> . . . .
>
> "Meeting" means a gathering that is attended by or open to all of the members of the Board of Education, held with the intent on the part of the Board members present to discuss or act as a unit on the specific public business of the Board of Education.

[Stip. at ¶ 5 and Exhibit B.]

The policy further defines the rules of construction applicable to the Board's bylaws, polices, and regulations as follows:

> 1. Wherever possible, language shall be given its clear and ordinary interpretation;
>
> 2. Language shall be construed to have a meaning that complies with law;
>
> 3. In the event bylaws, policies and regulations conflict with one another, the later adopted bylaw, policy or regulation shall take precedence over the earlier, and the more specific bylaw, policy or regulation shall take precedence over the more general;
>
> 4. Except as otherwise provided by the context, the auxiliary verbs "shall," "will," and "must" indicate a mandated action, and the auxiliary verb "may" indicates an action that is permitted but is not mandated.

[Stip. at ¶ 6 and Exhibit B.]

During their respective tenures on the Board, Board members Fabrizio, Eleazer, Villeda, Pollard, and Washington have always understood regular Board meetings to mean a meeting of a quorum of the Board that was advertised and consistent with the Open Public Meetings Act, as opposed to a committee meeting which does not consist of a quorum of the Board and is not advertised, and that any advertised meeting of the entire Board is considered to be a regular meeting of the Board, including, but not limited to, scheduled monthly calendar meetings, special meetings, emergency meetings, workshop meetings, or any other full meeting of the Board. (Fabrizio Cert. at ¶ 4; Eleazer Cert. at ¶ 4; Villeda Cert. at ¶ 4; Pollard Cert. at ¶ 4; Washington Cert. at ¶ 4.)

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.
>
> [Citations omitted.]

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). The parties agree, and I **CONCLUDE**, that there is no genuine issue as to any material fact and the matter is ripe for summary decision.

Against this backdrop, it is undisputed that petitioner failed to attend four consecutive meetings of the Board. Petitioner argues, however, that he "only missed one (1) regular meeting that appeared on the [Board's] 'Regular Public Meeting' schedule—the June 25, 2018 regular meeting."

N.J.S.A. 18A:12-3 explicitly addresses a board of education's authority to remove a board member for failure to attend meetings. The statute directs in pertinent part:

> Cessation of membership.
>
> Whenever a member of a local or regional board of education shall cease to be a bona fide resident of the district, or of any constituent district of a consolidated or regional district which he represents, or shall become mayor or a member of the governing body of a municipality, his membership in the board shall immediately cease; and, any member who fails to attend three consecutive meetings of the board without good cause may be removed by it.
>
> [Emphasis added.]

The principles governing statutory construction are well settled. The "overriding objective in determining the meaning of a statute is to 'effectuate the legislative intent in light of the language used and the objects sought to be achieved.'" McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (citation omitted). The general rule of statutory construction requires an examination of the language of a statute to determine whether the language is clear or ambiguous and susceptible to more than one interpretation. The

Supreme Court explained in Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012) (citations omitted):

> The objective of all statutory interpretation is to discern and effectuate the intent of the Legislature. To achieve that objective, we begin by looking at the statute's plain language, ascribing to the words used "their ordinary meaning and significance." We do not view the statutory words in isolation but "in context with related provisions so as to give sense to the legislation as a whole." If the Legislature's intent is clear on the face of the statute, then we must apply the law as written. It is not our function to rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language.

Pursuant to the plain and unambiguous language of the statute, the Legislature did not limit the discretionary authority of boards of education to remove a member to situations where the member has missed only "regular" meetings of the board. Rather, N.J.S.A. 18A:12-3 provides that a board of education is authorized to act if a board member fails to attend three consecutive meetings of the board, without any limitation regarding the meeting's designation as a "special," "regular," or "workshop" meeting.

In Berg v. Black Horse Pike Regional School District Board of Education, EDU 0875-80 and EDU 1007-80, Initial Decision (January 19, 1981), adopted, Comm'r (March 3, 1981),[3] the petitioner, who had missed two regular meetings, one special meeting and two work sessions, asserted that the board was barred by the statute from removing him since he missed only two regularly scheduled monthly meetings. In rejecting this contention, the administrative law judge (ALJ) observed that the precursor of N.J.S.A. 18A:12-3 was N.J.S.A. 18:6-11, which provided that "[a] board member who shall fail to attend three consecutive regular meetings of the board without good cause may be removed by the board" (emphasis added), and that the new statute eliminated any reference to the type of meeting held by boards of education. The ALJ held that the "statute refers only to three consecutive meetings and not three consecutive regular monthly meetings as interpreted by petitioner, [and] [t]he plain meaning of the words supports the former interpretation." The Commissioner agreed and found the omission of the designation "regular" when the

[3] A copy of this unpublished decision is attached to the Roth certification as Exhibit 4.

Legislature revised the statute to be "significant," and that "if the revised version of the statute had intended to mean 'regular' the Legislature would have so stated."

The same rationale applies with equal force to the within matter. It is well settled that "[t]he Legislature is presumed familiar with prior legislation." N.J. Coal. of Health Care Prof'ls v. N.J. Dep't of Banking & Ins., 323 N.J. Super. 207, 256 (App. Div.), certif. denied, 162 N.J. 485 (1999). The Legislature's deletion of the designation "regular" in the current statute reasonably evidences an intent on the part of the Legislature to expand the ability of a board of education to remove a board member for poor attendance.

The crux of petitioner's argument is that, notwithstanding the statutory language, District Policy 0145 limits the Board's authority to remove him unless he "fail[ed] to attend three consecutive regular meetings of the Board . . . ." Petitioner relies on N.J.S.A. 18A:11-1 and Matawan Regional Teachers Association v. Matawan-Aberdeen Regional School District Board of Education, 223 N.J. Super. 504 (App. Div. 1988), in support of the binding nature of bylaws adopted by a local board of education.

The New Jersey Supreme Court has recognized that "[l]ocal boards of education are creations of the State and, as such, may exercise only those powers granted to them by the Legislature—either expressly or by necessary or fair implication." Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574, 579 (1979). A board of education derives the authority to adopt bylaws and policies from N.J.S.A. 18A:11-1(c), which directs:

> The board shall . . . [m]ake, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes . . . .
>
> [Emphasis added.]

In Matawan Regional Teachers Association, the Appellate Division addressed the issue of whether a local school board may lawfully adopt a plan, which included the

closing and sale of a school building by a majority vote of its full membership after consideration at a single public meeting, even though its bylaws required adoption by a two-thirds vote of its full membership after consideration at two public meetings. Although the court concluded that the board was bound by the bylaw that requires two public meetings for adoption of the plan, it explained that "the bylaw requiring that action on non-emergent matters of policy be considered at two public meetings does not conflict directly or indirectly with any statute [and] [i]ts purpose is not to remove the responsibility and authority to act from those members of a local board who are authorized by state law to act." Matawan Reg'l Teachers Ass'n, 223 N.J. Super. at 509. Accordingly, the court held that, "[i]n the absence of any statute to the contrary, the board's bylaw requiring two public meetings to adopt the plan is binding." Id. at 510. However, the court also held that the board was not bound by the bylaw that limits the authority of the majority of the board. The court reasoned that "N.J.S.A. 18A:11-1 is silent with respect to the number of votes necessary to adopt rules and to govern and manage the district," and "[i]t must be assumed that by its silence the Legislature intended the common-law rule to apply, i.e., a majority vote of the members of the board constituting a quorum shall be sufficient." Id. at 507. Accordingly, the court held that "the Legislature has empowered a majority of the majority of a local board to adopt bylaws and conduct the board's business" and rejected "the argument that the Legislature has merely established a minimum number of affirmative votes necessary for local board action, which the board may increase in its bylaws to assure a broader consensus." Ibid. In other words, a board of education is not bound by a bylaw that limits the authority of the board in a manner that is otherwise inconsistent with the law.

Similarly, in the context of a municipal regulation, it is well settled that "[a] municipality may not contradict a policy the Legislature establishes" and a "local government may not act contrary to State law." Summer v. Teaneck Twp., 53 N.J. 548, 554 (1969); see Auto-Rite Supply Co. v. Mayor of Woodbridge, 25 N.J. 188 (1957). A pertinent question for consideration in determining whether the State has preempted an area from municipal regulation is whether "the ordinance conflict[s] with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)." Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of W. New York, 71 N.J.

451, 461 (1976). And, "an ordinance will fall if it . . . forbids what a statute expressly authorizes." Summer, 53 N.J. at 554.

Turning to the within matter, if petitioner's asserted interpretation and binding nature of the Board's policy are accepted, the policy would in effect forbid the Board from removing a member for missing three consecutive meetings unless they were "regular" meetings, notwithstanding that N.J.S.A. 18A:12-3 unambiguously authorizes boards of education to take such action. Stated differently, petitioner's position would limit the discretionary authority of the Board in a manner that is otherwise inconsistent with N.J.S.A. 18A:12-3.

I **CONCLUDE** that the Board had the authority to remove, and properly removed, petitioner pursuant to N.J.S.A. 18A:12-3 based on his failure to attend more than three consecutive meetings of the Board.

ORDER

I **ORDER** that petitioner's Verified Petition be and hereby is **DISMISSED**.

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

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

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

January 27, 2020 — Margaret M. Monaco

DATE — **MARGARET M. MONACO**, ALJ

Date Received at Agency: January 27, 2020

Date Mailed to Parties: January 27, 2020

jb

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Maywood, Bergen County,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner Maywood Board of Education (Maywood) sought severance of its sending-receiving relationship with respondent Hackensack Board of Education (Hackensack) that provides for Maywood's high school students to be educated in Hackensack. The parties requested that the Commissioner consider the matter as an uncontested case. The Commissioner directed the parties to comply with the procedural requirements in *N.J.A.C.* 6A:3-6.1 for severance of a sending-receiving relationship.

Upon review and consideration of the record of this matter, including public comments, a feasibility study, and the submissions of the parties, the Commissioner found that: the criteria for withdrawal from a sending-receiving relationship at the high school level is set forth at *N.J.S.A.* 18A:38-13; the proposed severance of the relationship between Maywood and Hackensack will have no substantial negative impact upon either school district; and the withdrawal of Maywood students will alleviate overcrowding at Hackensack High School, improve conditions for remaining students, and have little or no negative financial or demographic impact on the school districts. Accordingly, the Commissioner granted the petitioner's application for severance, subject to establishment of a sending-receiving relationship with the Carlstadt-East Rutherford Regional School District for a minimum duration of five years.

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

March 2, 2020

Agency Dkt. No. 195-8/19

New Jersey Commissioner of Education
Final Decision

Board of Education of the Borough of Maywood, Bergen County,

Petitioner,

v.

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

Respondent.

In this matter, petitioner Maywood Board of Education filed a petition seeking a severance of the sending-receiving relationship with respondent Hackensack Board of Education that provides for Maywood's high school students to be educated in Hackensack.[1] The parties requested that the Commissioner consider the matter as an uncontested case, and the Commissioner directed the parties to comply with the procedural requirements in *N.J.A.C.* 6A:3-6.1.

Subsequently, the Commissioner received sixty comments from the public regarding the proposed settlement – fifty-seven in favor of severing the sending-receiving relationship and three opposed.[2] The opponents argue that the quality and number of educational and extracurricular opportunities are greater at Hackensack High School than at Becton; Maywood students will have a longer commute along a busy highway if they attend Becton, creating safety risks and decreasing

[1] Maywood proposes to enter into a sending-receiving relationship with the Carlstadt-East Rutherford Regional School District to allow its students to attend Henry P. Becton Regional High School (Becton).

[2] The Commissioner received an additional comment in opposition to the severance following the close of the comment period, which was not considered.

students' sleep time, family time, and time available for engaging in other activities. Further, opponents argue that the removal of Maywood students will negatively impact both Hackensack students – whose school will become less racially and economically diverse – and Maywood students – who will lose exposure to students of other races and socioeconomic backgrounds.

In response, petitioner argues that Hackensack High School is severely overcrowded, while Becton is underutilized. If the severance is approved, Hackensack students will benefit from having a high school that is no longer overcrowded, Maywood students will benefit by attending a school that is not overcrowded, and East Carlstadt-Rutherford will benefit from being able to fully utilize their high school, which will increase educational and extracurricular opportunities for its high school students. For these reasons, severing the agreement will have a positive educational impact on all three groups of students. Petitioner further contends that the financial impact on Hackensack and other districts currently sending students to Hackensack is *de mininimus*. Finally, because Hackensack and Maywood have similarly diverse demographic compositions, there will be no negative racial impact if the agreement is severed.

The record of this matter has been reviewed, including the public comments, the feasibility study, and the parties' submissions. The criteria for withdrawal from a sending-receiving relationship at the high school level is set forth at *N.J.S.A.* 18A:38-13, and establishes that prior to severance of a relationship, the Commissioner will make an equitable determination based on the circumstances, "including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." If there is no substantial negative impact, the Commissioner will grant the requested severance. *N.J.S.A.* 18A:38-13.

Upon review, the Commissioner is satisfied that the record establishes that there will be no substantial negative impact upon severing the sending-receiving relationship between

Maywood and Hackensack. An overwhelming number of public comments support ending the agreement, and the Hackensack Board of Education – the party in the best position to demonstrate any potential negative impacts on its district – does not oppose its severance. The withdrawal of Maywood students will alleviate the problem of overcrowding at Hackensack High School, which appears likely to improve educational opportunities for the remaining students, while having little or no negative financial or racial impact on the district.

Accordingly, petitioner's application for severance of its sending-receiving relationship with Hackensack is hereby granted, subject to establishment of a sending-receiving relationship with the Carlstadt-East Rutherford School District for a minimum duration of five years.[3]

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: 3/2/20
Date of Mailing: 3/4/20

[3] See *N.J.S.A.* 18A:38-13.1.

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

83-20M

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

March 2, 2020

Marc G. Mucciolo, Esq.
Methfessel & Werbel, P.C.
2025 Lincoln Highway, Suite 200
Edison, NJ 08818

Sanford R. Oxfeld, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, NJ 07102

Re: *Deanna DeGraff v. Board of Education of the Township of Belleville, Essex County, OAL Dkt. No. EDU 16478-16; Agency Dkt. No. 265-9/16; Commissioner Decision No. 50-20R.*

Dear Counsel:

I have reviewed the materials filed in connection with the Respondent Belleville Board of Education's Motion for Reconsideration of the Commissioner's February 4, 2020 decision, reinstating Petitioner Deanna DeGraff to her full-time position as a Teacher of Dance.

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

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

Upon review and consideration of the submissions, I find that the Board has failed to satisfy the factors set forth in *N.J.A.C.* 6A:3-1.15(b)(2). The Board argues that it was a "mistake" for the ALJ to grant summary decision because there are material facts in dispute regarding how much of petitioner's time was actually dedicated to dance and whether student demand supported the need for a full-time dance teacher. However, the Board made these same arguments in its exceptions, which were duly considered by the Commissioner. It is clear that the Board's disagreement is with the outcome of the decision, which is not a sufficient basis for the decision to be reconsidered. Accordingly, the Motion for Reconsideration is hereby DENIED.[1]

The Board also asks the Commissioner to clarify whether all school districts must employ a full-time certificated Teacher of Dance, solely for the purpose of teaching dance classes, regardless of the demand and need for same. The Commissioner's February 4, 2020 decision in this matter is based on the facts at issue in the Belleville school district, which improperly abolished its dance program. Having found that the Board improperly abolished the program, the consequences of that abolishment – namely, the RIF of petitioner – were reversed. These circumstances may not be present in other school districts in New Jersey and the Commissioner would evaluate any questions regarding these issues on a case-by-case basis.[2]

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: State Law Library

VIA REGULAR MAIL

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

[2] As the Commissioner has not imposed a statewide mandate, the Commissioner declines to address the Board's motion for clarification of whether there is an unfunded mandate regarding dance instruction in New Jersey.

84-20E

OAL Dkt. No. EDU 01428-20
Agency Dkt. No. 27-1/20

New Jersey Commissioner of Education

Order on Emergent Relief

F.P., on behalf of minor child M.P.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.[1]

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 3/2/20
Date of Mailing: 3/4/20

[1] The ALJ ordered that petitioner's application to overturn the suspension and to have M.P. reinstated in school is denied. The Commissioner considers these orders to be limited to the motion for emergent relief, and not a final determination on the issues raised in the petition regarding the suspension.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 01428-20
AGENCY DKT. NO. 27-1/20

F.P; O/B/O MINOR CHILD, M.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

F.P., petitioner, pro se

Afshan Ajimari Giner, Esq., and **Jaclyn S. D'Arminio,** Esq., for respondent (Florio, Perrucci, Steinhardt & Cappelli, LLC, attorneys)

Record Closed: February 12, 2020 Decided: February 13, 2020

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, F.P., on behalf of M.P. (student), seeks an order by way of emergent relief, that the student be reinstated at McKinley Elementary School (School), resulting from a wrongful suspension imposed by the petitioner, Board of Education of the City of Newark, (the Board), on November 27, 2019. In his emergent moving papers, F.P. alleges

that the Board violated his due process rights in failing to notifying him of the student's suspension and failing to provide him with a hearing before the Board regarding the same.

On January 29, 2020, M.P. filed a petition of appeal with the Office of Special Education Policy and Procedure (OSEPP), seeking emergent relief pursuant to N.J.A.C. 6A-31.6. The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on January 31, 2020, as an emergent and contested matter.

On February 4, 2020, the OAL Clerk's Office notified the parties that the petition for emergent relief had been filed, and that oral argument was scheduled for February 7, 2020. [1] On February 6, 2020, a telephonic status conference was held, at which time the counsel for the Board requested an opportunity to file opposition papers on February 7, 2020. The Board's request was granted, and oral argument held on February 11, 2020.

The emergent hearing was held on February 11, 2020. M.P., testified and presented evidence in support of his claim for emergent relief. The Board presented Sabrina Styza, Esq., Associate Counsel for the Board, (Styza) and Tito Rodriguez, Certified Teacher for the Board (Rodriguez), to testify and also submitted documents along with their opposition papers filed on February 7, 2020.

Following the emergent hearing, on February 12, 2020, M.P. wrote to me by email, which communication I will deem to be "closing summation". The record therefore closed on February 12, 2020.

FACTUAL SUMMARY

M.P. is an 11-year-old student, currently in the 6th grade. He was transferred to McKinley at the beginning of the 2018-2019 school year. Since entering McKinley, M.P. has had several physical incidents that resulted in out-of-school suspensions of varying lengths. The Board alleges that multiple efforts had been made to evaluate M.P. by the

[1] The matter was adjourned to February 11, 2020, due to a previously scheduled dental procedure for the undersigned on February 7, 2020, which the Clerk's office was unaware of when initially scheduling this matter.

Child Study Team (CST) to determine an appropriate program and that F.P. refused to consent to any evaluations.

After M.P.'s most recent incident on or about November 25, 2019, the Board suspended M.P. four (4) days).[2] Thereafter, on or about December 2019, F.P. filed an emergent relief application (December emergent), bearing OAL Docket No. EDU-17349-19, and petition of appeal with the Commissioner of Education ("Commissioner"). . An Emergent Relief hearing was scheduled for December 17, 2019 (Styza Certification ¶ 6). Simultaneous to M.P.'s filing, the Board filed a due process petition (due process petition) with a request for emergent relief to compel F.P., to consent to evaluations of M.P. by the CST.

On or about December 15, 2019, the Board was notified by Bradly Flynn, Esq, (Flynn) of Montgomery Law, LLC, Philadelphia, Pennsylvania, that he represented F.P. on the December emergent and due process petition (open matters), before the OAL. The Board asserts that F.P., and the Board, by way of their attorneys, entered into negotiations to settle the open matters. This culminated in the preparation and execution of a Stipulation of Agreement (Agreement) by Dr. Shirley Fonseca, (Fonseca) Supervisor S.F. Office of Special Education, on behalf of the Board, and F.P. The document was signed one hour before the scheduled emergent relief hearing. The Board asserts that having secured the terms of the Agreement with M.P. on December 17, 2019, the December emergent was settled and the Board then withdrew its due process petition.

F.P. testified that he did not know what was contained in the Agreement and that Flynn did not explain to him the terms of the Agreement. F.P. testified that he fired Flynn as his attorney in early January 2020, prior to filing the within petition. F.P. acknowledges his signature on the Agreement. F.P. now asserts that he did not agree to the terms contained in the Agreement. The Agreement provides that F.P. agrees to comply with the Board conducting a full CST evaluation on M.P. The Agreement also provides that the Board would provide M.P. home instruction amounting to ten (10) hours per week

[2] Contrary to Petitioner's allegation in the petition of appeal that M.P. was "expelled", the Board has stipulated that M.P. has not been expelled from school.

pending the completion of the CST evaluation. The Parties agreed to withdraw their respective petitions.

Styza testified that she was the attorney representing the Board in the open matters and that she had extensive communications with Flynn regarding the terms of the Agreement, culminating in the signature of F.P. and Fonseca on behalf of the Board. Styza testified further that Flynn informed her that he was in discussion with F.P. regarding the terms of the Agreement as the parties were negotiating the same.

After the December emergent was settled and the due process petition was withdrawn, the Board contracted a certified teacher, Rodriguez, who arranged to begin home instruction with M.P. after the winter holidays. Per his communications with F.P., Rodriguez made, and continues to make, arrangements to work with M.P. during the hours of 3:30PM-5:30PM Monday-Friday at the Library in the Marion A. Bolden Center ("Bolden Center Library"). In addition, Mr. Rodriguez has provided electronic lessons and instructions to M.P. through the clever Resources Portal available to M.P. on his Chrome Book, provided to him by the District.

Rodriguez testified that he contacted F.P. on December 18,2019, following the signing of the Agreement, to discuss providing home instruction to M.P., in accordance with the terms of the Agreement. F.P. testified that he requested the Board provide home instruction in the morning and not later afternoon, as proposed by the Board. However, the Board informed F.P. that it could not accommodate his request because Rodriguez was teaching during school hours and could only provide home intrusions after school hours.

Rodriguez testified that commencing January 8, 2020, through February, he has appeared at the Bolden Center Library, between the hours of 3:30PM and 5:30 PM, to provide M.P. home instructions, and that M.P. has failed to appear. Rodrigues testified further that M.P. has not substantially participated in any of the electronic lessons provided by Rodriguez to supplement M.P.'s in person instruction.

F.P. testified that the student has not appeared at the Bolden Center Library because he cannot take him there in the afternoon hours provided by Rodriguez. F.P. stated that the Assistant Principal, Perry Samuels (Samuels) agreed to provide the student with home instruction in the morning hours requested by F.P. However, both Styza and Rodriguez testified that Samuels cannot provide home instruction to students. F.P. testified further that the student could not access the lessons and instructions online, as there was an issue in "logging in" to the program. Rodriguez testified that, while there may have been log-in issues, the same could have been addressed with M.P. had he appeared for instruction at Bolden Center Library. Moreover, Rodriguez testified that he had access to when the student logged into the program, and his review of the same showed very few attempts at logging in.

F.P. argues that his son should be allowed to return to McKinley school as he has served his four day suspension and he did not agree to the terms of the Agreement, which provides that the student is to receive home instructions and is to be evaluated by the CST. [3]

The Board argues that instead of cooperating with the clear terms of a mutually agreed upon Agreement, F.P. has now filed the within emergent application – over one (1) month later – on substantially the same facts as his prior petition and request for emergent relief, without regard to the operative Agreement that is currently binding upon both parties.

DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

[3] Board counsel and Styza represented to the undersigned that the Board would fast track the four evaluations so that the same could be completed within thirty-days, or sooner.

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

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

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

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

[N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In the within matter, there has not been a showing of "immediate irreparable injury" or a "presently existing actual threat". The Pro Se Petition of Appeal (Petition) completed

by F.P.in his emergent application, requests that his son "be returned to school" and that he "has been fighting to get help for my son, no resources were given to him." His Petition also states that the school has not provided his son with "tutoring" and denies that he has he denied "resources" provided by the Board.

However, the record and testimony provided at the emergent hearing contradicts F.P.'s request for emergent relief. I **FIND** that F.P. did enter into the Agreement in December 17, 2019, wherein, he agreed to home instruction for the student and allow the CST to conduct the stated evaluations so that the Board could determine what "resources" to provide the student, if any. I **FIND** that F.P.'s testimony affirms that he was aware that the student was to receive home instructions, as the only issue concerned the hours of instructions, and not lack of knowledge of the same or denial of instruction by the Board.

For the foregoing reasons, I **CONCLUDE** that F.P. has not demonstrated that the student will suffer irreparable harm if the requested relief is not granted as F.P.'s failure to comply the Agreement is the reason the student is not receiving school instruction.

I CONCLUDE that since F.P. has failed to establish that M.P. will suffer irreparable harm a discussion concerning the remaining criteria set forth in Crowe, 90 N.J. at 132, is not necessary.

CONCLUSION

I **CONCLUDE** that Petitioner is not entitled to emergent relief because the proofs submitted fail to establish all of the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by F.P. The OAL Docket No. EDU-17349-19. Therefore, I **CONCLUDE** that F.P. has not met the burden of proof that he is entitled to such relief in this emergent application.

ORDER

IT IS hereby **ORDERED** that Petitioner, F.P.'s Application for Emergent Relief is hereby **DENIED,** as F.P. has not complied with the terms of the Settlement Agreement regarding, OAL Docket No. EDU-17349-19; and it is further

ORDERED that Petitioner's Application to overturn the Board's determination to suspend M.P. is hereby **DENIED**; and it is further

ORDERED that Petitioner's Application to have M.P. reinstated in classes at McKinley School for the remainder of the 2019-2020, school year is hereby **DENIED,** the student is eligible for home instruction in accordance with the terms of the Agreement; and it is further

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

February 13, 2020
DATE

JULIO C. MOREJON, ALJ

lr

88-20
OAL Dkt. No. EDU 14905-19
Agency Dkt. No. 269-10/19

New Jersey Commissioner of Education

Final Decision

T.C., on behalf of minor child, X.C.,

Petitioner,

v.

Board of Education of the Eastern Camden County Regional School District, Camden County,

Respondent.

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and including an advisement of petitioner's failure to appear at a scheduled hearing on January 21, 2020 – has been reviewed. Petitioner did not file any explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/9/20
Date of Mailing: 3/9/20

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

89-20

OAL Dkt. No. EDU 02929-18
Agency Dkt. No. 30-1/18

New Jersey Commissioner of Education

Final Decision

C.H. and S.H., on behalf of minor children, C.H., S.H., and S.H.,

Petitioners,

v.

Board of Education of the Township of Alloway, Salem County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners. The Administrative Law Judge dismissed the petition finding that the petitioners failed to appear at the February 3, 2020 status conference and that they did not provide an explanation for their nonappearance.

Based upon the petitioner's timely written explanation stating that they did not appear at the February 3, 2020 conference call because they did not receive adequate notice of the call, this matter is being retransmitted to the OAL for further disposition, pursuant to *N.J.A.C.* 1:1-3.3(b).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/9/20

Date of Mailing: 3/9/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAIL DECISION – DISMISSAL

FAILURE TO APPEAR

OAL DKT. NO. EDU 02929-18

AGENCY DKT. NO. 30-1/18

C.H. AND S.H. ON BEHALF OF
C.H., S.H. AND S.H.,
Petitioners,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF ALLOWAY,
SALEM COUNTY,
Respondent.

C.H. and S.H., petitioners, pro se

William Morlok, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: February 3, 2020 Decided: February 5, 2020

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Petitioners allege that the respondent denied access to the student records of their three children. Petitioners request that the records be released at no cost to the petitioners.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

The petitioners filed an appeal of the denial of access to the student records of their three children and requested a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL, where it was filed on February 26, 2018, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The petitioners filed a motion for summary decision on June 10, 2018. (P-1.) The respondent filed its cross-motion for summary decision and response on June 21, 2018. (R-1.) The petitioners filed a reply brief on July 2, 2018. (P-2.) On October 1, 2018, the petitioners filed a motion to supplement the record. (P-3.) On October 8, 2018, the respondent filed it's brief in opposition to the motion to supplement the record. (R-2.) Those cross-motions for summary decision were denied by Order dated June 12, 2019.

By Order dated September 24, 2019, petitioners' attorney was relieved as counsel. Since that date, the petitioners continue self-represented. On October 21, 2019, a telephone status conference was held and this matter was scheduled to be heard on February 18 and February 19, 2020.

At the request of the parties, an in-person settlement conference was held on December 26, 2019. At that time, the parties reached a settlement agreement that was placed on the record. During voire dire, the pro se petitioners, C.H. and S.H., affirmed that they understood the terms of the agreement and entered into the agreement freely, voluntarily and without coercion or duress. Counsel for the respondent was directed to reduce the agreement to a writing and provide it to the petitioners to execute.

By letter, dated January 14, 2020, counsel for the respondent informed this Administrative Law Judge that the petitioners returned the signed agreement with additions and deletions unilaterally made by them. (R-3.) Counsel for the respondent did not agree with the petitioners' amendments.

On January 16, 2020, this Administrative Law Judge sent a letter to the parties and acknowledged that clearly there was no meeting of the minds and that there was no

settlement of the case. (C-1.) In said letter, the parties were directed to participate in a telephone conference on January 23, 2020, to address outstanding issues. During the January 23, 2020, telephone conference, the parties still could not reach an agreement as to the petitioners' amendments and the petitioners were directed to provide respondent's counsel with a draft of their understanding of the agreement on or before January 27, 2020. The petitioners complied however; respondent's counsel was not in agreement with their submission.

On January 28, 2020, counsel for the respondent filed a motion to enforce the December 26, 2019, settlement agreement. (R-4.) The petitioners acknowledged receipt of the motion on January 30, 2020. (C-2.) By Letter Order, dated January 30, 2020, the respondent's motion was denied and it was ordered that the matter would proceed to a fair hearing, as scheduled, on February 18 and February 19, 2020. (C-3.) It was further ordered that a mandatory telephone conference would be held on February 3, 2020, at 4:00 p.m. to address prehearing issues. It was noted that if any party failed to participate in this telephone conference, the file would be returned to the transmitting agency for the appropriate action which may include imposition of the proposed penalty or granting the relief requested by the opposing party.

CONCLUSION

To date, the petitioners have not provided a request for an adjournment of the February 3, 2020, status conference or an explanation for their nonappearance for the same. Neither has this office received notice of legal representation on behalf of the petitioners. Therefore, I **CONCLUDE** that petitioners have failed to appear and abandoned their appeal.

ORDER

It is hereby **ORDERED** that this matter is **DISMISSED**.

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

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

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

February 5, 2020
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: February 5, 2020

Date Mailed to Parties: February 5, 2020

JRW/tat

APPENDIX

EXHIBITS

For Petitioners:

P-1 Petitioners' motion for summary decision, filed June 10, 2018

P-2 Petitioners' response to respondent's motion opposition and cross- motion, filed July 2, 2018

P-3 Petitioners' motion to supplement the record, filed October 1, 2018

For Respondent:

R-1 Respondent's motion for summary decision, brief in opposition to petitioners' motion for summary decision and in support of respondent's motion for summary decision, filed June 21, 2018

R-2 Respondent's brief in opposition to petitioners' motion to supplement the record, filed October 8, 2018

R-3 Respondent's letter, dated January 14, 2020

R-4 Respondent's motion to enforce settlement, dated January 28, 2020

Judge's Exhibits:

C-1 Administrative law Judge's letter to the parties, dated January 16, 2020

C-2 Petitioner's acknowledgement of receipt of respondent's motion to enforce settlement, dated January 30, 2020

C-3 Letter Order (with confirmation of delivery), dated January 30, 2020

96-20

New Jersey Commissioner of Education

Final Decision

German Rojas,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner claimed that the respondent Board violated his tenure and seniority rights by transferring him from a twelve-month teaching position to a ten-month teaching position, which allegedly resulted in a reduction of petitioner's salary. The petitioner sought an order requiring that the Board restore him to a twelve month-position, restore his salary to the appropriate twelve-month amount, and reimburse him for back pay and other emoluments.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact, and the matter is ripe for summary decision; it is well-settled that a board of education has the managerial prerogative to transfer teaching staff members within the scope of the endorsements on his or her Instructional Certificate; prior to the 2017-2018 school year, petitioner was assigned to teach at the school district's Adult Learning Center, an assignment that required an extended school year; under the collective bargaining agreement, a teacher assigned to work in an extended year program receives an additional 10 percent over the negotiated ten-month salary; in August 2017, the district superintendent recommended that petitioner be reassigned and transferred from his twelve-month position as an ESL Teacher of Spanish in the Adult Learning Center to a ten-month position as a Computer Teacher in the district's Alternative Design Academy, due to a poor evaluation and resulting corrective action plan as an ESL teacher; the petitioner did not suffer a reduction in compensation from his twelve-month position in 2016-2017 to his ten-month position in 2017-2018 because the Board ultimately restored petitioner to the same salary he had been paid for the 2016-2017 school year, $75,053; and the Board's deduction of $284.29 from one of petitioner's paychecks – which corrected a mistake on a previous paycheck – did not constitute an impermissible reduction in compensation. The ALJ concluded that petitioner's tenure and seniority rights were not violated. Accordingly, the ALJ granted summary decision to the Board, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter.

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

March 13, 2020

OAL Dkt. No. EDU 1148-18
Agency Dkt. No. 278-11/17

New Jersey Commissioner of Education

Final Decision

German Rojas,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, German Rojas, and the Union City Board of Education's (Board) reply thereto. In this matter, the petitioner alleges that the Board violated his tenure and seniority rights by transferring him from a twelve-month teaching position to a ten-month teaching position which resulted in a reduction in salary. The Administrative Law Judge (ALJ) found that the Board did not violate the petitioner's tenure and seniority rights and granted summary decision in favor of the Board. In so doing, the ALJ determined that the petitioner did not suffer a reduction in compensation from his twelve-month position in 2016-2017 to his ten-month position in 2017-2018 because the Board paid him $75,453.00 for the 2017-2018 school year, which was the same salary he had earned during the 2016-2017 school year. Finally, the ALJ found that the Board's deduction of a $284.29 overpayment from the petitioner's second paycheck of the 2017-2018 school year did not constitute an impermissible reduction in compensation.

The petitioner's exceptions substantially reiterated the substance of his submissions at the OAL, recasting the arguments therein to support the contention that the ALJ erroneously granted summary decision in favor of the Board. Specifically, the petitioner maintains that the Board did not pay him the amount that it agreed to pay the petitioner in the August 15, 2017 letter and that the ALJ improperly relied on the Board's language in the August 15, 2017 letter. Moreover, petitioner contends that the board reduced his compensation when it transferred him to a ten-month position and his immediate salary for the 2017-2018 school year was simultaneously reduced from the first pay period to the second pay period. In support of his argument the petitioner distinguishes the circumstances in this case from the issues raised in *Williams v. Plainfield Board of Education*, 176 *N.J. Super.* 154, 162 (App. Div. 1980), *certif. denied*, 87 *N.J.* 306 (1981), where the Appellate Division found that "tenured employees have no vested right in any future increases in salary."

The petitioner also contends the cases cited by the ALJ that address clerical errors for simply overpayments do not apply here because the petitioner is entitled a salary of $79,453.00, which his first paycheck of the school year properly reflected, but which was subsequently reduced. Therefore, the petitioner asserts that the Board improperly reduced his compensation in contravention of *N.J.S.A.* 18A:28-5 when it transferred him from a twelve-month position to a ten-month position. In reply, the Board reiterated the positions advanced in its submissions at the OAL and responded to the arguments made in the Petitioner's exceptions, stressing that the ALJ properly granted its motion for summary decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that the Board did not violate the petitioner's tenure and seniority rights and properly granted summary decision in favor of the Board. The Commissioner is also in accord with the ALJ's determination that the Board's deduction of the $284.29 overpayment from the petitioner's second paycheck of the 2017-2018

school year did not constitute an impermissible reduction in compensation. The Commissioner also finds the petitioner's exceptions to be unpersuasive, largely reflecting arguments previously raised before the ALJ and thoroughly considered by her in determining that the petitioner's compensation was not wrongfully reduced when he was transferred from a twelve-month position to a ten-month position.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 3/13/20
Date of Mailing: 3/16/20

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01148-18
AGENCY DKT. NO. 278-11/17

GERMAN ROJAS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,
Respondent.

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

Susanne Lavelle, Esq., for respondent

Record Closed: October 16, 2019 Decided: December 18, 2019

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

STATEMENT OF THE CASE

Petitioner German Rojas claims that respondent, the Board of Education of Union City (the District), violated his tenure and seniority rights by transferring him from a twelve-month teaching position to a ten-month teaching position, which petitioner asserts resulted in a reduction of his salary. The District controverts petitioner's claims.

PROCEDURAL HISTORY

Petitioner filed a Petition of Appeal contesting his transfer from a twelve-month teaching position to a ten-month teaching position and the resulting reduction in his salary. Petitioner seeks an Order declaring that the District violated his tenure and seniority rights and requiring the District to restore him to the twelve-month position, to restore his salary to the appropriate twelve-month amount, and to reimburse petitioner for back pay and other emoluments of employment. The District filed an Answer to the Petition of Appeal, and the Department of Education transmitted the contested case to the Office of Administrative Law for a hearing. Following the adjournment of earlier hearing dates, the matter was scheduled for a hearing on May 21 and May 22, 2019. Prior to the hearing, the District filed a motion for summary decision, which petitioner opposed. I entertained oral argument on the motion on June 28, 2019, after which the record remained open to afford the parties additional time toward an amicable resolution of the matter. Subsequently, counsel for petitioner sent an e-mail on October 16, 2019, confirming the parties' request that the motion proceed to disposition, and the record was closed.

FINDINGS OF FACT

In support of its motion, the District submitted a certification of its superintendent, Silvia Abbato (Abbato Cert.), and an Affidavit of its payroll coordinator, Uranka Petric (Petric Aff.), along with various documents (R-1 to R-25). Petitioner submitted a brief in opposition to the motion. Based upon a review of the documentary evidence presented, including the certification and affidavit submitted, I **FIND** the following undisputed **FACTS**:

Petitioner is a tenured teacher employed by the District. (See R-10 at No. 1.) He was initially employed by the District in 2002 as a substitute teacher and then hired as a teacher's aide effective February 3, 2003. (See R-1; R-2.) Subsequently, petitioner was hired as a Spanish teacher effective September 9, 2003. (See R-3.)

Petitioner held or currently holds the following Certifications: Teacher of Spanish, Certificate of Eligibility (issued March 12, 2002); Teacher of Spanish, Certificate of Eligibility (issued December 2003); Teacher of Spanish, Non-Citizen Standard Certificate (issued December 14, 2004); Teacher of Spanish, Standard Certificate (issued May 17, 2006, June 2006); Teacher of English as a Second Language (ESL), Certificate of Eligibility (issued February 1, 2007); Supervisor, Standard Certificate (issued July 7, 2010); Teacher of ESL, Certificate of Eligibility (issued February 2015); Teacher of ESL, Provisional (issued April 21, 2015); Teacher of ESL, Standard Certificate (issued January 5, 2016); and Teacher of ESL, Standard Certificate (issued February 9, 2016). (See R-4 to R-9.)

Prior to the 2017–2018 school year, petitioner was assigned to teach at the District's Adult Learning Center (ALC). (See R-10 at No. 2.) The assignment to this school required an extended school year. Although the parties disagree as to whether the extended year consisted of an eleven-month or twelve-month assignment, the resolution of this issue is not material to the within matter.

In accordance with the collective bargaining agreement, teachers assigned to work the extended school year receive an additional 10 percent over their negotiated ten-month salary at their step (which is paid in twenty-four pay periods). (See R-12, Article 11 at B4; R-10 at No. 4.)

For the 2016–2017 school year, petitioner was an MA15 at Step 11 on the Instructional Salary Guide (ISG). Accordingly, petitioner earned a total annual base salary of $75,053; i.e., $68,230 (for MA15, Step 11 on the ISG) plus $6,823 (10 percent for the extended school year). (See R-13; R-10, No. 5; R-14 at 3, lines 2 and 5.)

By letter dated August 15, 2017, the superintendent of schools, Silvia Abbato, provided petitioner with an accounting of his sick, vacation, and personal days, along with a summary of his benefits. (R-15.) The letter further notified petitioner of his salary for

the 2016–2017 school year and the salary for his tentative assignment in the 2017–2018 school year.[1] Specifically, the letter states in pertinent part:

> As of June 30, 2017[,] your records indicated the following:
>
> 16–17 Salary: $75,053.00 Degree Level MA+15 Step 11
> 17–18 Salary: $79,453.00 Degree Level MA+15 Step 12

The letter further informed petitioner, "This is not a promise of employment."

At its meeting on August 31, 2017, the Board approved petitioner's transfer to the Alternative Design Academy [ADA]. (See R-10 at No. 6.) By letter dated September 1, 2017, Human Resources informed petitioner that "at a regularly scheduled meeting of the Union City Board of Education held on Thursday, August 31, 2017[,] the Board approved your transfer as an ESL Teacher—Adult Education to Computer Teacher—Alternative Design Academy, effective September 1, 2017." (R-18.) Petitioner had been previously advised of his transfer by a telephone call on August 31, 2017. (See Exhibit 16, No. 14.)

According to the certification of superintendent Silvia Abbato, she recommended to the Board at its August 31, 2017, meeting that petitioner "be reassigned and transferred" from the ALC to the ADA effective September 1, 2017, "due to a poor evaluation of [petitioner] and a resulting corrective action plan as an ESL teacher." (R-21, Abbato Cert. at ¶ 3; R-22 to R-24.) The superintendent further certified that petitioner "was one of many employees that were reassigned and transferred at the August 31, 2017 meeting." (Ibid.) According to the certification, "the District has not had a reduction in force" since she became the superintendent in July 2014; "[t]he last time a reduction in force occurred in the District was in 2010, when [she] was Assistant Superintendent for Curriculum and Instruction"; and she understood that "the reduction in force only affected IT and transportation departments and employees." (Id. at ¶ 4.)

[1] Pursuant to the collective bargaining agreement, "[a]ll teachers shall be given written notice of their tentative class and/or subject assignments, building assignments and room assignments for the forthcoming year not later than June 1st." (R-12, Article 12 at A1.)

Petitioner's transfer to the ADA resulted in the resumption of a ten-month position.[2] Pursuant to the 2017–2018 ISG, the salary for a ten-month teacher at MA15, Step 12, was $72,230. (R-13.)

During the first pay period in September 2017, petitioner was paid his regular salary of $3,611.50 and a 10 percent additional amount of $284.29. (See R-19.) Specifically, petitioner was paid as an MA15 at Step 12 on the 2017–2018 ISG ($72,230) on a twenty-pay-period schedule. He also received the 10 percent additional pay, or $284.29, that he was receiving the previous year (i.e., $6,823 on a twenty-four-pay-period schedule, or 10 percent of the $68,230 salary for an MA15, Step 11, teacher on the 2016–2017 ISG).

During the second pay period in September 2017, petitioner's pay was corrected. He was paid as an MA15 at Step 12 on the 2017–2018 ISG ($3,611.50) with no additional 10 percent pay. The 10 percent amount of $284.29 that petitioner had received in the first pay period was deducted from petitioner's pay for the second pay period. (See R-10 at No. 10; R-19.) This made petitioner's rate of pay commensurate with an MA15 teacher at Step 12 on the 2017–2018 ISG ($72,230).

On or about November 29, 2017, petitioner filed his Petition of Appeal with the Commissioner of Education. The District filed its Answer to the Petition on or about January 10, 2018.

By letter dated January 31, 2018, counsel for the District notified petitioner's attorney that petitioner's salary would be corrected to reflect an annual salary of $75,053 effective the first pay period in February 2018 (February 15, 2018). The letter further advised that the District would be providing payment for the difference between what petitioner would have received at the annual salary of $75,053 and what petitioner did receive at the annual salary of $72,230 for the period September 2017 through January 2018. (See R-20.)

---

[2] Petitioner subsequently worked as a Spanish teacher.

On February 15, 2018, petitioner received back pay for the period September 2017 through January 31, 2018. (R-17.) Accordingly, for the 2017–2018 school year, petitioner received an annual salary of $75,053 (R-17 at 2, line 1), which was the same salary that petitioner had received in his twelve-month assignment during the 2016–2017 school year.

The District's payroll coordinator, Uranka Petric, submitted an affidavit addressing the payments made to petitioner in September 2017. On September 1, 2017, the Payroll Department received an updated salary record from Human Resources for petitioner for a total annual salary of $72,230 effective September 1, 2017. (R-25, Petric Aff. at ¶ 3 and Exhibit A.) The updated salary record also indicated that petitioner was moved to a ten-month assignment effective September 1, 2017, and that the 10 percent additional pay should be discontinued. (Ibid.) On the same date, petitioner's salary was updated and the 10 percent additional earnings for the 2017–2018 school year were inactivated. (R-25, Petric Aff. at ¶ 4 and Exhibit B.) Despite this inactivation, the 10 percent code from the previous school year (2016–2017) apparently remained active and, "due to this system error, the ADP [system] applied the additional earnings code" on the September 15, 2017, pay date, resulting in petitioner being paid the additional amount of $284.29, i.e., the pay-period amount of his 10 percent additional salary from the prior school year. (R-25, Petric Aff. at ¶ 5; see R-19.) Petric corrected the error for the next pay date and the amount of $284.29 was deducted from petitioner's earnings. (Petric Aff. at ¶ 6; see R-19.)

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.
>
> [Citations omitted.]

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). In this regard, "[re]liance on argument in a brief and the bare allegations of the complaint, unsupported by fact and merely stating bare conclusions, are insufficient . . . to create a fact issue [and] [m]ore is required than mere denials without supporting affidavits or proofs." Harris v. Passaic Bd. of Educ., EDU 1835-98, Initial Decision (July 8, 1998), adopted, Comm'r (August 10, 1998), https://njlaw.rutgers.edu/collections/oal/; see Borough of Franklin Lakes v. Mutzberg, 226 N.J. Super. 46, 57 (App. Div. 1988). In the within matter, petitioner submitted no supporting affidavits to contradict the facts submitted by the District and relies instead simply on the arguments advanced in his brief. Based upon a review of the documentation submitted, including the certification and affidavit submitted by the District, I **CONCLUDE** that there is no genuine issue as to any material fact and the matter is ripe for summary decision.

It is recognized that "[t]enure protects an employee in a particular position, and having acquired tenure in a position, a tenured teaching staff member may not be

'dismissed or reduced in compensation' except for cause in accordance with N.J.S.A. 18A:28-5 (for inefficiency, incapacity, unbecoming conduct, or other just cause), N.J.S.A. 18A:6-10 (after certification of charges and a full due process hearing) or N.J.S.A. 18A:28-9 (as a result of a reduction in force)." Howley v. Ewing Twp. Bd. of Educ., 1982 S.L.D. 1328, 1339, adopted, Comm'r, 1982 S.L.D. 1356, aff'd, State Bd. of Educ., 1983 S.L.D. 1554.

"Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in employment force is necessary." Howley, 1982 S.L.D. at 1340. In this regard, a board of education is vested with the right "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 . . . ." N.J.S.A. 18A:28-9. In situations involving a reduction in force (RIF), the board of education must determine the seniority of the persons affected, dismissals must be made on the basis of seniority, and tenured teaching staff members who suffer a loss of employment as a result of a RIF are entitled to be placed upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such individual shall be qualified. N.J.S.A. 18A:28-10; N.J.S.A. 18A:28-11; N.J.S.A. 18A:28-12.

It is well settled that a board of education has the managerial prerogative to transfer teaching staff members. Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 529 (App. Div. 1999); see N.J.S.A. 18A:25-1. "The power of a board of education to transfer teachers is limited only to the extent provided by the Tenure law." Howley, 1982 S.L.D. at 1339. "No teacher, in acquiring a tenure status, is guaranteed continuity of assignment or thereby acquires a vested right to any particular assignment, class, or school." Bigart v. Paramus Bd. of Educ., 1979 S.L.D. 123, 131. Rather, "[s]ince tenure attaches to position, and the position specified in N.J.S.A. 18A:28-5 is 'teacher,' a tenured teacher may be 'transferred' or reassigned within the scope of the endorsements on his or her Instructional Certificate." Carpenito, 322 N.J. Super. at 520. In other words, "a tenured

employee may be transferred to another assignment within his position but may not be transferred involuntarily from one position to another." Id. at 521.

Against this backdrop, petitioner contends that the reduction of his salary as a result of his transfer from a twelve-month position to a ten-month position violates his tenure rights. Petitioner asserts that he received a salary in accordance with the August 15, 2017, letter ($79,453) during the first pay period of the 2017–2018 school year, and that the District cannot reduce and must maintain that salary until such time as his salary guide "catches up" to the $79,453 he was paid. The pivotal issue is whether the District reduced petitioner's compensation in contravention of the prohibition set forth in N.J.S.A. 18A:28-5.

In Williams v. Plainfield Board of Education, 176 N.J. Super. 154 (App. Div. 1980), certif. denied, 87 N.J. 306 (1981), a tenured high-school principal challenged the determination of the State Board of Education that the local school district could properly transfer her to the position of elementary-school principal. At the time of the transfer, the petitioner's salary was frozen at the amount that she was earning as principal of the high school. Id. at 156–57. The petitioner contended that, although she initially suffered no reduction in salary, there was a reduction in her future salary expectancy because the formula used to determine the annual salary increments for elementary-school principals was lower than for high-school principals. Id. at 156. The Appellate Division affirmed the State Board's determination that the petitioner suffered no reduction in salary since she retained the same salary that she had been earning as high-school principal when she was transferred to the elementary-school position. The court also concurred with the State Board's conclusion that the prohibition against reduction in salary for tenured employees did not contemplate future increases in salary or salary expectancy, but rather referred only to the amount of compensation paid to the tenured employee at the time of the transfer. In so ruling, the Appellate Division held that the case law "support[s] the position that future increases in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer since tenured employees have no vested right in any future increases in salary." Id. at 162. The court further stated that "there is no suggestion much less an express statement" in the tenure statutes "that

future salary increases or adjustments are to be considered in determining the validity of a transfer which is otherwise proper." Ibid.

In Avery v. Trenton Board of Education, EDU 8316-93, Comm'r (November 3, 1997), appealed on other grounds and aff'd as modified, State Bd. (July 10, 2001), https://www.state.nj.us/education/legal/, the petitioners were employed in twelve-month positions as "teacher specialists." In April 1993 their positions were abolished, and the petitioners were informed that they would be placed in ten-month positions as classroom teachers, effective for the 1993–94 school year, and that they would not be employed or compensated during July or August 1993. The Commissioner determined that the petitioners were subjected to a reduction in salary, and their respective tenure rights were, therefore, violated by the transfer. Accordingly, the Commissioner held that the board must "reinstate petitioners to their respective salaries as of April 1993, and must reimburse them for the salary differential between what they actually received in the 1993–94, 1994–95, 1995–96, and 1996–97 school years, and what they would have received had they been compensated with the same salaries and emoluments they enjoyed in their roles as 'teacher/specialists.'" Ibid. The Commissioner further noted that, "[i]n that petitioners have 'no vested right in any future increases in salary,' Williams, supra, at 162, they are not entitled to salary and emoluments beyond that which they had received as of April 1993."

Similarly, in East Rutherford Education Association ex rel. Dolinsky v. East Rutherford Board of Education, EDU 12709-08, Initial Decision (February 13, 2009), adopted, Comm'r (March 30, 2009), https://njlaw.rutgers.edu/collections/oal/, the ALJ followed Williams in determining the salary a tenured secretary was entitled to receive when her 212-day secretarial position was abolished in June 2008 and she was retained as a twelve-month secretary.[3] The ALJ concluded that, even though the petitioner had an overall increase in salary as a twelve-month secretary for the 2008–2009 school year over that which she had earned in 2007–2008 as a ten-month secretary because she was

[3] The tenure statute governing tenured secretaries, N.J.S.A. 18A:17-2, similar to N.J.S.A. 18A:28-5, provides that any person who has acquired tenure in any secretarial or clerical position with a school district shall hold her position under tenure during good behavior and efficiency and shall not be reduced in compensation.

working more days, her compensation was reduced because her per-diem rate from 2007–2008 to 2008–2009 was reduced from $192.57 to $184.64. The ALJ further held:

> The District satisfies . . . [the statute's] requirement by paying [her] at her 2007–2008 212-day secretary per diem rate rather than at the higher per diem rate she would have received if she had remained a 212-day secretary in 2008–2009. Future increases in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer or reassignment since tenured employees have no vested right in any future increases in salary. Williams v. Bd. of Educ. of Plainfield, 176 N.J. Super 154 (App. Div. 1980). The District abolished [her] 212-day secretary position by the end of the 2007–2008 school year. Although the District could not reduce [her] 2007–2008 compensation upon moving her to the twelve-month secretary position, it was not obligated to award her what would have been the 2008–2009 [10-month] secretary's compensation level when she never worked in a position that paid that level of compensation.

Turning to the within matter, it is undisputed that the District restored petitioner to the same salary that he was earning in his twelve-month position during the 2016–2017 school year ($75,053) and that the District reimbursed petitioner the salary differential between what he was paid for the period of September 2017 through January 2018 and what he should have received for those pay periods had his salary been $75,053. Petitioner avers that he is entitled to the annual salary that he would have received for the 2017–2018 school year had he not been reassigned to the ten-month teaching position ($79,453). (See R-16, No. 15.) In support of this stance, petitioner relies upon the District's August 15, 2017, letter. According to the District, the August 15, 2017, letter is computer generated and is required pursuant to the terms of the collective bargaining agreement to advise employees of their tentative assignment and salary for the upcoming year, as well as the number of sick, vacation, and/or personal days they used and have remaining, along with the expected cost of their health-benefit contribution. (See R-12, Article 12 at A1.)

The above decisional law makes clear that future increases in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity

of a transfer or reassignment since tenured employees have no vested right in any future increases in salary. Further, petitioner's reliance on the District's August 15, 2017, letter is misplaced; the letter unambiguously informed petitioner, "This is not a promise of employment."

Petitioner further asserts that he received a salary in accordance with the August 15, 2017, letter during the first pay period of the 2017–2018 school year. Petitioner contends that the District cannot reduce his salary and must maintain that salary until such time as his salary guide "catches up" to the $79,453 salary that he was paid.

The record, however, does not support petitioner's claim that he began receiving the $79,453 salary during the first pay period of the 2017–2018 school year. Rather, as certified by the District's payroll coordinator, petitioner was paid in accordance with the 2017–2018 Step 12 MA15 salary guide ($72,230) and petitioner was also erroneously paid the 10 percent additional amount of $284.29 that he received for the 2016–2017 school year. The 10 percent payment was made due to a system error that applied the additional earnings code even though it had been inactivated. The error was corrected in the next pay period and the $284.29 was deducted from that paycheck. Simply put, petitioner's position that the District must maintain petitioner at $79,453 until his salary guide "catches up" is based on petitioner's erroneous calculation, as petitioner was never paid based on the salary referenced in the August 15, 2017, letter.[4]

Equally unavailing is any claim that the District must continue to pay petitioner the additional $284.29 that he was paid during the first pay period due to a system error and that the District cannot reduce his salary to recoup this amount. In Trenton Education Association v. Trenton Board of Education, EDU 7507-93, State Board (December 1, 1999), https://www.nj.gov/education/legal/, the Trenton Board of Education adjusted six

[4] The salary in the August 15, 2017, letter, which petitioner did not receive, was calculated as follows: $72,230 (MA15, Step 12 on the 2017–2018 ISG), plus $7,223 (which would have been petitioner's additional 10 percent of salary had he remained as a twelve-month employee), for a total of $79,453. If the 10 percent additional amount of $7,223 is divided by twenty pay periods ($361.15) or twenty-four pay periods ($300.95), neither calculation equals the 10 percent amount that petitioner received ($284.29). Similarly, if the total amount petitioner received during the first pay period ($3,895.75) is multiplied by twenty pay periods, the annual salary is $77,915. If the total amount petitioner received during the first pay period ($3,895.75) is multiplied by twenty-four pay periods, the annual salary is $93,498.95.

bi-weekly paychecks issued to tenured custodians to recoup overpayments made as a result of errors in calculating their pay. Specifically, the bi-weekly rate paid to each employee was calculated in error by using a 260-day work year rather than a 261-day work year and an additional two days of pay was erroneously included in their paychecks because of the board's miscalculation. The employees' union alleged that the board's action constituted a reduction in compensation in violation of its members' tenure rights and that, although the board could freeze the custodian's salaries in order to recoup an overpayment, it was prohibited from reducing their regular salary payments. The State Board disagreed and held that the board did not violate the custodians' tenure rights when it reduced their paychecks to recoup the overpayment. It noted that the overpayment "did not result from action by the Board in which it erred in placing the employees on the negotiated salary guide or incorrectly established such employees' annual salaries under the terms of that guide [but] . . . [r]ather, the Board erred in calculating the specific amounts to be included in the custodians' bi-weekly paychecks based on their established annual salaries." The State Board emphasized that there was no indication that the "employees received compensation for the 1992–93 school year which was less than the amount established by the Board under the terms of the district's negotiated guide or as set forth in that guide." Nor was it alleged that the "Board erred in placing these employees on the negotiated guide or that it had incorrectly established their annual salaries under the terms of that guide."

Similarly, in Sklute v. Trenton Board of Education, EDU 9852-94, State Board (February 2, 2000), https://www.nj.gov/education/legal/, the State Board held that the board of education's action in deducting the amount of an overpayment from subsequent paychecks issued to the petitioners did not constitute an impermissible reduction in compensation. The State Board noted that the overpayments did not result from the incorrect establishment of the petitioners' salaries in their part-time evening-school assignments but, instead, the district's payroll office erroneously used a time-and-a-half rate in calculating the petitioners' earnings in those assignments for one two-week period. Accordingly, the State Board concluded that, "[p]ursuant to our determination in Trenton Education Association . . . , the tenure laws do not prohibit the Board from recovering such an overpayment by reducing the petitioners' paychecks."

More recently, in Elson v. New Brunswick Board of Education, EDU 7092-10, Initial Decision (June 28, 2013), adopted, Comm'r (August 15, 2013), https://njlaw.rutgers.edu/collections/oal/, the Commissioner adopted the ALJ's determination that the board of education did not violate the petitioner's tenure rights when it reduced her paychecks to recoup an overpayment. The Commissioner found that the cases cited by the petitioner respecting salary-guide errors were distinguishable and that the facts were more closely analogous to the situation in Trenton Education Association. In Elson the overpayments did not result from the incorrect establishment of the petitioner's salary, but, instead, the district's payroll department erroneously double-paid the stipend amount owing to the petitioner. Accordingly, the Commissioner held that, "[p]ursuant to the decision in Trenton Education Association . . . , the tenure laws do not prohibit the Board from recovering such an overpayment by reducing the petitioner's paychecks."

In short, the same rationale applies with equal force to the within matter.

Finally, petitioner contends that his reassignment from a twelve-month position to a ten-month position constitutes a RIF and that the District's employment of less senior or non-tenured individuals in twelve-month positions violates his seniority rights. Petitioner relies on the State Board's decision in Avery in support of this argument. Succinctly stated, the facts in Avery are markedly distinguishable from the within matter. In Avery the State Board of Education concluded that the abolishment of the petitioners' twelve-month teacher specialist positions, and their reassignment to ten-month teaching assignments, with a corresponding reduction in salary, constituted a RIF that triggered the petitioners' tenure and seniority rights. By contrast, petitioner's twelve-month ESL teacher position was not abolished, and the record is bereft of any evidence that a RIF occurred. Rather, as certified by Superintendent Abbato, the District has not had a reduction in force since she became the superintendent in July 2014. (R-21, Abbato Cert. at ¶ 4.) Additionally, the undisputed evidence establishes that, upon the recommendation of Superintendent Abbato, the Board determined to reassign petitioner effective September 1, 2017, due to a poor evaluation and a resulting corrective action plan as an ESL teacher. (R-21, Abbato Cert. at ¶ 3.)

In Carpenito, the court recognized that seniority rights are triggered when a tenured teaching staff member is transferred to another position and suffers a loss of tangible employment benefits. Carpenito, 322 N.J. Super. at 533. In holding that Carpenito's reassignment from a full-time teaching position teaching social studies to another full-time position teaching other subjects after the abolishment of his former position did not trigger his tenure or seniority rights, the court stated, "Carpenito was neither dismissed nor was his salary reduced as a result of the Board's decision to assign him to a different position; he suffered no loss of employment . . . [and] [h]is seniority relative to non-tenured or tenured employees teaching social studies is irrelevant." Id. at 534. Similarly, petitioner's transfer from one full-time position as an ESL teacher due to poor work performance, to another full-time position within his certifications did not result in a loss of salary, as respondent continued to compensate him at the same annual salary ($75,053) that he was earning prior to his transfer.

Based upon the foregoing, I **CONCLUDE** that the District properly exercised its managerial prerogative to transfer or re-assign petitioner to another position. I **CONCLUDE** that the District did not violate petitioner's tenure rights by virtue of a reduction in compensation in violation of N.J.S.A. 18A:28-5. I **CONCLUDE** that petitioner has not suffered a reduction in compensation from his twelve-month position in 2016–2017 to his ten-month position in 2017–2018 since the District restored petitioner to the salary he received during the 2016–2017 school year ($75,053). I **CONCLUDE** that petitioner is not entitled to the $79,453 referenced in the August 15, 2017, letter. I **CONCLUDE** that the District's deduction of the $284.29 overpayment from petitioner's second paycheck did not constitute an impermissible reduction in compensation. I **CONCLUDE** that the District did not violate petitioner's seniority rights.

ORDER

I **ORDER** that respondent's motion for summary decision be and hereby is **GRANTED** and that the Petition of Appeal be and hereby is **DISMISSED**.

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

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

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

December 18, 2019
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: December 18, 2019

Date Mailed to Parties: December 18, 2019

jb

APPENDIX

List of Exhibits

For Petitioner:

None

For Respondent:

R-1 Letter from Carl Johnson to German Rojas dated February 6, 2003

R-2 Computer Sheet

R-3 Teacher's Contract dated September 15, 2003

R-4 Application Status Check-Results

R-5 Certificate of Eligibility as Teacher of Spanish issued December 2003

R-6 Non-citizen Standard Certificate as Teacher of Spanish issued December 2004

R-7 Standard Certificate as Teacher of Spanish issued June 2006

R-8 Standard Certificate as Supervisor issued July 2010

R-9 Certificate of Eligibility as Teacher of English as a Second Language issued February 2015

R-10 Petitioner's Response to Respondent's Request for Admissions

R-11 Certificate of Naturalization

R-12 Excerpt from Instructional Collective Bargaining Agreement

R-13 Instructional Salary Guide 2016–2017 and 2017–2018

R-14 Pay Statements—Rollup Totals

R-15 Letter from Union City Board of Education to German Rojas dated August 15, 2017

R-16 Petitioner's Answers to Respondent's First Set of Interrogatories

R-17 Pay Statements—Rollup Totals

R-18 Letter from Diane Capizzi to German Rojas dated September 1, 2017

R-19 Pay Statements for Periods Ending September 15, 2017, and September 30, 2017

R-20 Letter from Susanne Lavelle, Esq., to Gail Kanef Oxfeld, Esq., dated January 31, 2018

R-21 Certification of Union City Board of Education superintendent Silvia Abbato

R-22 January 2017 Observation 360

R-23 March 2017 Observation 360

R-24 June 2017 Teacher Corrective Action Plan

R-25 Affidavit of Union City Board of Education payroll coordinator Uranka Petric

97-20

New Jersey Commissioner of Education

Final Decision

J.P. on behalf of minor child, D.P.,

Petitioner,

v.

Board of Education of the Gloucester County Vocational-Technical School District, Gloucester County,

Respondent.

Synopsis

Petitioner appealed the respondent Board's determination that D.P. committed an act of harassment, intimidation and bullying (HIB) in violation of New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, when he called A.G., a fellow student, "gay". Petitioner admitted to calling A.G. "gay," but contended that he used the term in a joking manner and did not intend it in a demeaning way. The Board argued that D.P.'s actions constituted an act of HIB, and that its imposition of an in-school suspension was appropriate discipline for the infraction. Petitioner sought a reversal of the Board's determination and the resulting discipline. A hearing in this matter was conducted at the Office of Administrative Law (OAL) in December 2019.

The ALJ found, *inter alia*, that: the definition of HIB in the Board's HIB policy does not mirror the definition found in *N.J.S.A.* 18A:37-14; the statute requires a finding that the actor knew or should have known that the conduct at issue would cause harm; the Board failed to consider whether D.P. knew or should have known that his conduct would have the effect of harming A.G.; and the Board failed to consider D.P.'s motivation in making the statement at issue here. The ALJ concluded that the Board acted in an arbitrary, capricious and unreasonable manner when it determined that D.P. had committed an act of HIB based upon his own admission, without considering his explanation of the circumstances surrounding the comment and the fact that D.P.'s comments "were not motivated by any actual or perceived characteristic, such as sexual orientation..." of the targeted student. Accordingly, the ALJ reversed the Board's determination that D.P. committed an act of HIB, and instead found that D.P.'s conduct constituted a violation of the Student Code of Conduct.

Upon review, the Commissioner reversed the Initial Decision of the ALJ and affirmed the Board's determination of HIB. In so doing, the Commissioner found, *inter alia*, that: petitioner failed to demonstrate that the Board's actions were arbitrary, capricious or unreasonable; no evidence was provided to overturn the Board's finding of HIB other than D.P.'s alleged lack of subjective ill intent; the record contained sufficient credible evidence to support the Board's decision that commenting on or misstating another student's sexual orientation could reasonably be perceived as being motivated by that characteristic; D.P.'s comments substantially disrupted A.G.'s education; and such comments were reasonably considered to be insulting or demeaning. Accordingly, 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.

March 13, 2020

97-20

OAL Dkt. No. EDU 15220-18
Agency Dkt. No. 241-9/18

New Jersey Commissioner of Education

Decision

J.P., on behalf of minor child, D.P.,

Petitioner,

v.

Board of Education of the Gloucester County Vocational-Technical School District, Gloucester County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by the respondent pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed.[1]

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by D.P., who admitted to calling another student, A.G., "gay." The Board found that D.P. had committed an act of HIB and imposed an in-school suspension. Following a hearing, the ALJ found that the Board's decision should be overturned because the Board did not consider D.P.'s motivation in making the statement or whether a reasonable person should have known that calling a student "gay" would cause harm. The ALJ further found that the definition of HIB in the Board's HIB policy did not conform to *N.J.S.A.* 18A:37-14.

In its exceptions, the Board argues that its HIB policy is consistent with the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The Board cites to case law

[1] Petitioner did not file a reply to respondent's exceptions.

establishing that the subsections of the statute dealing with the effect of the alleged act of HIB are alternate criteria and that any of the three alternatives are sufficient to satisfy the statute. The Board disagrees that its decision finding that D.P. committed an act of HIB was arbitrary, capricious, or unreasonable. The Board indicates that it is undisputed that A.G. suffered emotional harm because of the comments made by D.P., pointing to testimony that A.G. was in counseling and did not want to attend school due to the comments. Therefore, according to the Board, two of the criteria regarding the effect of D.P.'s comments were met: 1) they had the effect of insulting or demeaning A.G., and 2) they created a hostile educational environment by severely or pervasively causing emotional harm to A.G. The Board contends that it is not necessary to establish that a reasonable person would know that the act would cause harm. However, the Board also argues that a reasonable person should know that purposely misstating another student's sexual orientation would cause emotional harm or that the victim would reasonably perceive the comment as insulting, and that D.P.'s subjective intent or motivation is irrelevant to the analysis. Furthermore, the Board disputes the finding in the Initial Decision that the comments could not have been construed by A.G. to be truthful because A.G. had a girlfriend, since the comments were made in an open school setting – where anyone could have heard them, including individuals who may not have known anything about A.G's sexual orientation.

Upon review, the Commissioner disagrees with the ALJ's conclusions that the Board's policy did not conform to the Act and that the Board's decision finding that D.P. committed an act of HIB was arbitrary, capricious, or unreasonable. The Act defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion,

> ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements.[2] First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that *one* of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

The Initial Decision incorrectly views subsection (a) – that a reasonable person should know the act will have a harmful effect – as the third requirement, with an additional fourth requirement being a choice between subsections (b) and (c). As a matter of standard statutory construction, the term "or" between subsections (b) and (c) also applies to subsection

[2] The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. The parties do not dispute that this element has been satisfied in this case.

(a), such that a demonstration of any of these three criteria can support a finding of HIB. *Ibid.* Accordingly, the Board's use of the term "or" between subsections (a) and (b) in the definition of HIB in its policy conforms entirely to the Act. The Commissioner therefore reverses the ALJ's conclusion on this issue.

Turning to the Board's decision that D.P. committed an act of HIB, the ALJ found that the Board's decision was arbitrary, capricious, and unreasonable because the Board did not consider whether D.P. knew or should have known under the circumstances that his conduct would have the effect of harming A.G. However, the Board was not required to consider this factor, because it is only one of three alternate criteria outlined in the statute, so its failure to do so does not render its decision arbitrary or unreasonable. [3, 4]

The Initial Decision also finds fault with the Board's decision because D.P. stated that he did not intend to harm A.G. This, too, is an incorrect interpretation of the Act.[5] In defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor.[6] *Wehbeh, supra.* Certainly,

---

[3] The Board's decision was instead based on the criteria outlined in subsection (b), because it found that the comments were insulting and demeaning.

[4] To the extent that the ALJ found the testimony of HIB specialist Edward Ferrari not credible regarding what a reasonable person should have known, that finding is based on the ALJ's erroneous legal interpretation of the Act. Because the Board was not required to consider what D.P. knew or what a reasonable person should have known, Mr. Ferrari's credibility on this topic is irrelevant. Mr. Ferrari testified that D.P.'s comments were insulting or demeaning – an appropriate basis for a finding of HIB – and the ALJ did not take issue with Mr. Ferrari's credibility in making this statement. Indeed, to the contrary, the ALJ also characterized the comments as insulting and demeaning.

[5] The ALJ found Mr. Ferrari not credible on the question of D.P.'s motivation but, again, this finding was based on the ALJ's erroneous legal interpretation of the Act. Mr. Ferrari testified that he considered A.G.'s perception of the comments – which is appropriate, as explained herein – and the ALJ did not take issue with Mr. Ferrari's credibility in making this statement.

[6] This conclusion does not make the Act a strict liability statute, as the ALJ opined it would. The statute is clear that the perception must be reasonable.

evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis. Moreover, an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . .". *N.J.S.A.* 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that his actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know. *Wehbeh, supra.* As such, a board of education can find that an individual committed an act of HIB even if the individual did not intend to cause harm.

When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974). Based on the evidence in the record, the Commissioner finds that petitioner did not meet her burden of demonstrating that the Board's decision was arbitrary, capricious, or unreasonable. Petitioner has provided no evidence to overturn the Board's finding other than D.P.'s alleged lack of subjective ill intent. On the other hand, the record contains sufficient credible evidence to

support the Board's decision that commenting on or misstating another student's sexual orientation could reasonably be perceived as being motivated by that characteristic, that D.P.'s comments substantially disrupted A.G.'s education, and that D.P.'s comments were insulting or demeaning.[7]

Accordingly, the Initial Decision is hereby reversed and the Board's decision finding that D.P. committed an act of HIB is affirmed. The petition is dismissed.

IT IS SO ORDERED.[8]



COMMISSIONER OF EDUCATION

Date of Decision: 3/13/20
Date of Mailing: 3/16/20

[7] The petition of appeal raised procedural concerns about the Board's decisions, but the Initial Decision did not address those concerns. However, the Commissioner finds that the Board followed the procedures required by the Act by making the petitioner aware of the charges and the evidence on which they are based and by offering the petitioner the opportunity to present evidence to the Board – an opportunity of which she availed herself. Following those procedures, the Board determined that the petitioner had committed an act of HIB. Nothing in the record indicates that the Board, in making that determination, operated in an arbitrary, capricious, or unreasonable manner.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 15220-18
AGENCY DKT. NO. 241-9/18

J.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, GLOUCESTER COUNTY,

Respondent.

J.P., petitioner, pro se

Jay Branderbit, Esq., on behalf of respondent (Kent McBride, P.C., attorneys)

Record Closed: January 13, 2020 Decided: February 5, 2020

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

STATEMENT OF THE CASE

Petitioner, J.P., on behalf of D.P., appeals the respondent, Gloucester County Vocational-Technical School District's Board of Education (the Board) determination that D.P. committed an act of harassment, intimidation or bullying (HIB) in violation of the New Jersey Anti-Bullying Law, N.J.S.A. 18A:37-13.2 et seq. and the resulting discipline. At issue is whether D.P. committed an act of HIB.

PROCEDURAL HISTORY

On September 19, 2018, petitioner, on behalf of her minor child, D.P., filed an appeal with the Department of Education, Bureau of Controversies and Disputes, seeking the reversal of respondent's determination that D.P. had committed an act of HIB and the withdrawal or reduction of the discipline imposed. On October 15, 2018 respondent filed an answer. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on October 19, 2018 as a contested case pursuant to N.J.A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. A pre-hearing telephone conference was conducted on December 5, 2018 and the matter was scheduled for a hearing on April 4, 2019.

Prior to the scheduled hearing date, respondent filed a motion for summary decision on February 27, 2019. Petitioner filed opposition to respondent's motion for summary decision on April 2, 2019. Respondent filed a reply on April 16, 2019. By Order dated May 15, 2019, respondent's motion for summary decision was denied. A hearing was conducted on December 5, 2019 and the record remained open to allow for closing submissions. The record closed on January 13, 2020 following receipt of closing statements.

FACTUAL DISCUSSIONS AND FINDINGS

Edward Ferrari testified on behalf of the respondent. He has a master's degree in educational school counselling and is employed by respondent as a school counsellor. He has worked for respondent for ten years and was the HIB specialist for a two-year period for the 2017-2018 and the 2018-2019 school years.

The HIB specialist works as part of a team and when a complaint is received, they conduct an investigation and the group determines if a violation of HIB has occurred. This complaint came in during Mr. Ferrari's first year as the HIB specialist. Other members of the team were Mrs. White, the school psychologist and Dr. Heicken, Director of Special Education and the HIB Director. This was not Mr. Ferrari's first HIB investigation. Mr. Ferrari prepared a certification in support of respondent's motion for summary decision to which he was referred to refresh his recollection (R-X). In early March 2018, Mr. Ruiz of

School Based Youth Services approached Mr. Ferrari and advised him that A.G. was having some problems with other students and that Mr. Ruiz referred him to Robin's Nest for crisis counselling. There was no mention of any harassment comments at that time. Thereafter, on or about March 27, 2018, Mr. Ferrari received an email from A.G.'s mother that read:

> "Good Afternoon: A few weeks ago, several students went to Guidance concerned with my son that he was not himself and seemed down. He and I met with Mr. Ruiz and Ms. Glazer. I was then advised to call Robin's Nest for an evaluation. After a few days A.G. finally opened up to me and Mr. Ruiz of what was going on. He was being bullied by a boy in his electrical program and two - three other boys would laugh and join in the comments that were being made. For example, you're "gay", bowling is not a sport, you will never get anywhere with that. No girl would like you rumors spread to other kids that would comment in the halls that he doesn't even know etc. . . . He has been working with an in-home therapist named Jenny. Mr. Ruiz as well who has suggested that A.G. and the boy meet to discuss the issues which A.G. does not feel comfortable doing and neither does Jenny his therapist. It was also brought up again today and I do not feel comfortable with how this is being handled. I clearly feel this is a case of bullying and should be addressed in a different manner and Jenny the therapist agrees along with A.G. If someone can get back to me in this regard that would be great."

The first page of exhibit R-V is the Initial Report of HIB with a copy of the March 27, 2018 email from A.G.'s mom attached. This was the first notice that there was an HIB incident (R-V). Prior to this date there was no indication that A.G. was being bullied. Based on this email an investigation was commenced. He was charged with conducting the interviews for the investigation and interviewed A.G. Exhibit R-L is a hand-written copy of the statement provided by A.G. The interview took no more than ten to fifteen minutes. During the interview, A.G. said he did not want to go to shop anymore, which Mr. Ferrari considered adverse to his educational experience since he did not want to go to class. He continued to interview the other students involved, including D.P. Exhibit R-J is a handwritten statement provided by D.P. during his interview. D.P. admitted to calling A.G. gay but stated that he did not mean it in a demeaning way but in a joking manner. Mr. Ferrari allowed the students to make additions to their statement and on April 6, 2018 D.P. added to his original statement taken on March 28, 2018. D.P. added that they had an inside joke and would say to each other "Dude your gay". Exhibit R-P

contains written statements from three other students, J.M., M.A. and G.C. Theses statements were given as a result of interviews Mr. Ferrari conducted. J.M. admitted that D.P. called A.G. gay, but J.M. did not admit to calling A.G. gay. J.M. also stated that he could not tell if D.P. was joking or not. This is significant because he did not know what the intent was or could not tell the intent based on the nature of the comments. J.M. said that G.C. also called A.G. gay.

M.A.'s statement does not admit to calling A.G. any names. G.C. did not admit in his statement that he called A.G. gay. Mr. Ferrari interviewed two other students, A.U. and A.R. who were also in the same class, but not in the same friend group, in order to get another perspective from a neutral party. Neither heard nor saw anyone pick on A.G. (R-Q).

Mr. Ferrari's certification at paragraph 8 references a meeting held March 28, 2018, the day after A.G.'s mother sent the email. In attendance were the shop teacher in the electrical program, Mr. McCoy, Mr. Ruiz, A.G., A.G.'s mother, Jenny the therapist and Mr. Ferrari. Mr. McCoy had stated during the meeting that if he had heard students making comments to A.G., he would have interceded and would have also reported the students (R-X). Mr. Ferrari did not take a written statement from Mr. McCoy because he knew from the meeting that Mr. McCoy did not witness anything, and Mr. Ferrari believed the best witnesses would be the students involved. The fact that D.P. admitted that he made the statements also effected Mr. Ferrari's decision that it was not necessary to take a statement from Mr. McCoy. Regardless of D.P.'s intent, he admitted to making the statements. Also, one of the accused indicated he did not know if D.P. was joking or not. Mr. Ferrari felt he did a thorough investigation. None of the other members of the HIB team advised him to do anything further in his investigation.

As a result of the investigation, there was a finding that D.P. violated the HIB policy. There was a report prepared by Mrs. White based on Mr. Ferrari's investigation. The

results of his investigation were discussed with Ms. White and Dr. Heiken (R-F). There were three separate findings:

1. No HIB finding against M.A. and J.M.
2. G.C. did not commit a HIB violation, but violated the Student Code of Conduct
3. D.P. committed an act of HIB

The HIB behavior committed by D.P. was "insulting or demeaning comments" based on his calling A.G. gay. The actual or perceived characteristic that motivated the behavior was "Perceived Sexual Orientation". The report indicated that this was a series of incidents. The report also indicated that the students had not previously committed an act of HIB and that A.G. had not previously been a target of HIB while attending school in the district (R-F, page 2, paragraphs 3 - 6). Ms. White signed off on the report.

D.P. received an in-school suspension as a result of the HIB finding and G.C. received an after-school detention from 3:00 – 6:00 p.m. (R-F, page 3). An in-school suspension involves staying in a room all day in school and not attending any classes. Discipline could have been more severe such as an out of school suspension or expulsion. Mr. Ferrari does not impose discipline, the administrator does.

There have been no further issues involving D.P. or A.G. or any of the students involved. Mr. Ferrari has interacted with D.P. as he is his guidance counsellor and they have discussed classes and grades. At no time did D.P.'s parents request that Mr. Ferrari be changed as D.P.'s guidance counsellor. He has had a normal relationship with D.P. since the investigation. D.P.'s performance has been averaged since the 2017-2018 school year. D.P. has done well in shop but struggles with some of his classes. Mr. Ferrari has not noticed any significant changes in his performance. D.P. has not complained to him about any emotional problems. He has not said heard from anyone that D.P. feels that he has been stigmatized by the HIB investigation.

On cross-examination, Mr. Ferrari was a shop teacher in the past and familiar with how students talk to each other and has heard students call each other gay in the past. After Mr. Ferrari spoke to A.G. his position was to move forward with the investigation.

When he first spoke with D.P. on March 28, 2018, he does not recall being upset with D.P. but rather being disappointed with the whole group. Mr. Ferrari did not refuse to extend a handshake to D.P. when he first met with him. When he met with D.P. again on April 6, 2018, he advised D.P. to add to his statement because it would help. When he met with all of the witnesses, he told them to write as much information as possible to explain that if they were joking to write it all down because the more information provided would help them. Initially, D.P. wrote down that he admitted he called A.G. gay. Mr. Ferrari was his counsellor and wanted to make sure D.P. got a fair shake. He did advise D.P. about the process and that if he felt strongly about it, his parents should appeal the finding.

J.M.'s statement that he could not tell if they were joking or not could mean both, that either they were joking, or they were not. Out of the four boys who were accused, the fact that D.P. admitted to calling A.G. gay, was the basis for finding D.P. in violation of the HIB policy and not the others.

Mr. Ferrari was not aware of a significant change in D.P.'s performance as far as grades go from the 2017-2018 school year until now and that he actually failed two classes last year when he has never even come close to failing, which J.P. claims was as a direct result of him being falsely accused.

Mr. Ferrari's recollection was that when they met as a team to discuss the case none of the others involved admitted to saying the comments other than D.P. and that is why they were not found in violation of the policy. Out of the four interviewed only D.P. admitted to calling A.G. gay. Mr. McCoy is the shop teacher and had them every day and did not notice anything. A statement should have been taken from him. Although D.P.'s admission was used against him, his explanation that they were joking with each other was not considered. Mr. Ferrari stated that students sometimes speak to each other in ways they should not. It was not commonplace in Mr. Ferrari's shop. He is training students to go into the carpenters' union and to go into peoples' houses. He cannot speak to what goes on in Mr. McCoy's shop class because he is not there every day. However, the language was not something he would accept in his class or as a counsellor. He did not interview Mr. McCoy because at the meeting he said he did not witness anything.

After he conducted the investigations, he was not instructed by any of his supervisors to go and interview Mr. McCoy. Mr. Ferrari has a decent relationship with D.P. and as the HIB specialist and D.P.'s counsellor, Mr. Ferrari was never looking to file a HIB charge on D.P. and being part of that was a very hard part of his job.

On redirect examination, Mr. Ferrari stated that if D.P. had not admitted making the statements, the outcome would be different.

Mr. Ferrari was part of the group of three people discussing whether D.P.'s conduct violated HIB. There was not enough evidence against the other students, but D.P. admitted it although his intent was different. The Board believed they could defend their decision in finding HIB against D.P. because of his admission. Mr. Ferrari explained that they took into consideration D.P.'s explanation of the circumstances surrounding the comments and D.P.'s intent, but it was perceived differently by A.G. When they spoke to people during the course of the investigation, there seemed to be an imbalance of power between D.P. and A.G., rather than a conflict. In his HIB training, with no imbalance of power, you can go back and forth making comments to the other person and that is considered a conflict. However, if comments are made and the other person is perceiving them differently because one person has power over the other and the comments are causing school avoidance, that is the reason the group recommended the finding of a HIB violation to the Board. The imbalance of power is the sexual orientation of the student. D.P. had more power over A.G. It was Mr. Ferrari's understanding that it was not a back and forth between D.P. and A.G. D.P. just made comments to A.G. and A.G. did not respond.

They have HIB training in-district each year. He and Ms. White also went to an additional one-day training for HIB at the firm of Strauss Esmay.

On re-cross examination, D.P.'s April 6, 2018 written statement stated:

> "In the beginning of the year our shop class had an inside joke 'Dude, you're gay' and we all made sure no one would be offended by it. We all said to each other all the time knowing that it was a joke. A.G. would

> say it as much as everyone else. I don't understand why people would be offended if they are saying it too." (R-J).

Although D.P. did say that in his statement, but Mr. Ferrari did not have any evidence that that was going on.

The comment that he made, 'Dude you're gay', disrupted A.G.'s education that he did not want to come to school to the point that he went to crisis intervention. The evidence was that it significantly disrupted A.G.'s educational process and he did not want to come to school anymore. The outside therapist was working with A.G. and revealed this information. Mr. Ferrari does not know A.G.'s sexual orientation and does not care either way. Mr. Ferrari took D.P.'s admission that yes, D.P. called A.G. gay, regardless of intent and that violates the policy. If D.P. did not admit it, then there probably would have to have been more investigation and additional individuals brought in.

Mr. Ferrari does not think D.P. believes A.G. is gay. However, it is the perception of the person accusing D.P. Mr. Ferrari did not know and could not say whether D.P., under the circumstances of this case, knew or should have known that his comments would cause harm to A.G. He thinks D.P. is a really nice kid and knows better than to say those words to someone. Mr. Ferrari admitted that he really did not know how to answer that question.

On re-direct, J.M. said G.C. also called A.G. gay. No one else corroborated D.P.'s statements that A.G. also called D.P. gay.

On re-cross examination, Mr. Ferrari did not know that A.G. had a girlfriend. He does not get involved in relationships. He admitted that sometime other students know students better than staff.

In Mr. Ferrari's opinion, if there was other evidence that there was a back and forth between A.G. and D.P. saying "Dude, your gay", as the HIB specialist at the time, there would not have been an imbalance of power, it would have been a code of conduct violation through the administration for them using inappropriate language pursuant to the policy. The imbalance of power would have been D.P. calling A.G. gay. It is only a HIB

violation if it is reported as an imbalance of power by the person targeted. It is the perception of the person being targeted. In Mr. Ferrari's opinion, D.P. is truthful. However, he has to have some corroboration. Even though he feels that D.P. is a truthful kid, he has to go with what he was instructed to do.

D.P. should have known that the comments would have harmed A.G. He believes D.P. made a mistake and this was a learning lesson and he would not do this again.

According to Mr. Ferrari, it was A.G.'s perception that D.P.'s comments were motivated by an actual or perceived characteristic of his and that was A.G.'s sexual orientation.

Philip Nicastro testified on behalf of the respondent. He has a B.A. from Glassboro State College; a Masters' degree in educational administration from Monmouth University; a doctorate in education from Temple University; and a Law degree from Widener University School of Law. He is licensed to practice law in Pennsylvania and New Jersey since 1994. He is a principal and employed by Strauss Esmay Associates, a New Jersey School Policy and Regulation Consulting firm. They work with about 480 public school districts in New Jersey; twenty-five charter schools and forty private schools for students with disabilities. There are about 550 – 560 public school districts in New Jersey and they have contracts with 480 of them to provide school policy and regulation consulting services. The firm has been in existence since 1972, but his wife, a former school teacher acquired the firm in 2001. He has worked as a legal consultant to Strauss Esmay since 1994. Usually a school district comes to the firm realizing they need to update their policies and then they work with the school district to develop a customized policy manual. Thereafter they have an annual contract with school district to provide them updates as the statutes, code and decisions come out that impact school policy. Mr. Nicastro retired after twenty years as a school business administrator and five years as a superintendent. He retired as the Superintendent of the Brick Township school district in 2003.

The current HIB law came into effect for the 2011 school year. The firm does professional development programs on the HIB law. Since 2011 he has trained

ten-thousand people on the HIB law. They run training programs for HIB specialists and teachers. One of the services they provide to their clients is if they have questions, they can call them. Mr. Nicastro was accepted as an expert to address the respondent's HIB policy and whether it conforms to the New Jersey HIB statute. Strauss Esmay wrote respondent's HIB policy 5512. Strauss Esmay provides a policy guide to school districts and it's the school districts decision whether to adopt it or not.

Mr. Nicastro recalls Superintendent Dicken reaching out to him in May 2019 regarding a question involving the school's HIB policy. Mr. Dicken had received the order denying the Board's motion for summary decision wherein it was pointed out that the Board's HIB policy was not consistent with the statute. Mr. McCastro sent an email dated May 21, 2019 to Michael Dicken in response (R-Y).

Mr. Nicastro stated to have HIB you need four things: motivation; location; it has to create substantial harm or effect the rights of other students; and there has to be harm. There have been lots of cases that if there is no motivation, you may have a code of conduct violation, but you do not have a HIB violation. There has to be motivation, the conduct has to be motivated by an actual or perceived characteristic. Location is an easy one. It has to affect the orderly operation of the school or the rights of other students. The last component is harm and the harm components are three. 1. that a reasonable person would know under the circumstances that whatever they did would cause harm; 2. The act had the effect of insulting or demeaning; or 3. The act created a hostile educational environment where the child did not want to come to school anymore. Those three elements in everything he and his firm have read was that only one of those items was required. In his opinion, you only need one of those three items to satisfy the statute.

His firm publishes a monthly school law digest where they report all major educational law decisions, eight a month for eleven months, eighty-eight a year. He has read every one since 2011. There has never been a requirement that you need as a threshold to find that a reasonable person would know under the circumstances that the conduct would cause harm before you went to the other sections. It has always been interpreted that you need any of the three – that is, a reasonable person would know

under the circumstances or has the effect of insulting or demeaning or creates a hostile educational environment.

The New Jersey Department of Education has issued a publication entitled "Guidance for School on Implementing the Ant-Bullying Bill of Rights Act (R-Y,3). This document on page three supports Mr. Nicastro's opinion that the statute was meant to be read with an "or" between the three sections.

In Mr. Nicastro's opinion, respondent's HIB policy in March 2018 comported with the statutory requirements and all the guidance put out by the Department of Education.

On cross-examination, Mr. Nicastro said they must have motivation. This is the hardest part to determine what is the motivation. Two kids are in a playground playing kickball and a disagreement breaks out on a call of an out on base. One of the children says not only were you out but proceeds to use a racial epithet. The motivation for using the racial epithet was not the race of the child, but the call out on base. It was a conflict, not a HIB. In Mr. Nicastro's opinion, the hardest thing for anti-bullying specialists to determine is what was the motivating factor.

Looking on page two of R-Y,3 under HIB definition, Mr. Nicastro indicated if you were required to meet all six bullet points, the number of HIB cases would be drastically reduced. Although Mr. Nicastro was not here to discuss the facts of this case, he indicated that in 90% of these cases, the ALJ and the Commissioner of Education have deferred to the school districts. Any interpretation that would limit a finding of bullying would be contrary to the policy of stopping the HIB conduct. Intent does not really matter as it is whether a reasonable person would conclude it would be harmful.

Mr. Nicastro does agree that the statute N.J.S.A. 18A:37-14 does not contain an **or** between sections (a) and (b). The statute as written demonstrates the legislative intent and is controlling. He does not know why it has not been amended if it is incorrect.

Michael Dicken testified on behalf of the respondent. He is the Superintendent of the Gloucester County Vocational-Technical School District. He has a B.S. degree from

Westchester State College with a certificate in health and physical education; a Masters' degree from Rowan University in School Business Administration. He spent five years working at Glen Mill School for Boys, which is a juvenile delinquent facility in Pennsylvania as a teacher and a counsellor. He was a teacher and administrator at the Yale school, which is a private school for the handicapped. He was employed in 1999 by the Gloucester County Special Services School District school as a program manager. He later served as assistant principal and later principal of that program. He has been the Assistant Superintendent of both school districts for three years. This is his ninth year as Superintendent of both programs, the Gloucester County Special Services School District and the Gloucester County Vocational and Technical School District. As Superintendent he oversees all operations of both school districts including finances, curriculum, students and faculty. He supervises all employees of the school districts, including Mr. Ferrari.

Mr. Dicken is familiar with the HIB complaint filed by the mother of A.G. Mr. Ferrari conducted the HIB investigation under the direction of Dr. Susan Heiken, the Director of Clinical Services and the HIB Coordinator. Mr. Ferrari's testimony was accurate as far as processing and procedure. As Superintendent, he reviewed the final HIB report after it was reviewed by the principal, Mr. James Dundee. He affirmed the HIB finding and Mr. Dicken then approved the HIB finding. A letter from the principal to D.P.'s parents regarding the HIB complaint involving their son was sent on March 29, 2018 (R-C). This was two days after the email sent by A.G.'s mother. Also, on March 29, 2018 a letter was sent to the parents of A.G. advising that A HIB investigation was being conducted concerning their son being the target of an act of HIB (R-G). A letter of April 20, 2018 was also sent to the parents of A.G. advising them of the results of the investigation. The results of the investigation were that a violation of the schools' code of conduct had taken place and that interventions and remedial measures were put into place (R-H). The final results of the investigation that Mr. Dicken signed off on were contained in exhibit R-F which bears his signature.

Mr. Dicken approved the in-school suspension punishment for D.P. An April 23, 2018 letter was sent out to D.P.'s parents alerting them to the findings and advising them of their rights to appeal (R-D). These are the standard letters the District uses advising the parties of the investigation and outcome. D.P.'s parents requested a hearing before

the Board of Education and Mr. Dicken sent them a letter dated April 30, 2018 advising them that the hearing was scheduled for May 9, 2018 (R-B). The minutes of the Executive Session of the Board of Education for May 9, 2018 reflect that D.P.'s mother had a hearing in front of the Board regarding a HIB violation against her son. J.P. had a written statement that she read to the Board. Some questions were asked of her and she thanked the Board (R-N). After J.P. left the Board meeting, the HIB team including Mr. Ferrari, Ms. White and Dr. Heiken spoke and answered questions of the Board and Mr. Dicken reviewed the HIB policy with the Board as to what qualified as HIB. He does not remember the discussion between the Board and the HIB team, but it took a few minutes longer than J.P.'s presentation. A decision was not reached by the Board at the May 9, 2018 meeting. The Board revisited the matter at the June 20, 2018 meeting which was the next board of education meeting. The Executive Session meetings for June 20, 2018 indicated that Mr. Dicken recommended affirming the HIB determination for D.P.(R-W). Mr. Dicken sent a letter to D.P.'s parents on June 25, 2018 advising them that the Board affirmed the results of the HIB investigation and further advised them of their right to appeal to the Commissioner of Education (R-E). The next thing Mr. Dicken received regarding this dispute was the due process petition.

D.P. received an in-school suspension which was not the most severe punishment. The fact that D.P. was found to have violated the school HIB policy and received an in-school suspension does not become a part of his school record and would not be provided to anyone requesting his school records including employers or colleges.

On cross-examination, the Board voted on Mr. Dicken's recommendation to find a HIB violation. The Board was not provided with all of the witnesses' statements. Mr. Dicken briefly reviews the facts of the case in open session without identifying the students. His recollection was that J.P. was asked questions by the Board when she said she was not asked any questions by the Board. The Superintendent is the last one to review the investigation and he reviewed it all. He was comfortable with the materials

presented to him and his discussions with the HIB team. He was okay with the teacher not being interviewed based on what was presented to him.

D.P. testified on his own behalf. He admitted that he called A.G. and others in his shop class 'gay'. A.G. called D.P. and others 'gay' also. He did not think A.G. was gay. A.G. had a girlfriend at the time. D.P. did not call A.G. 'gay' with intent to cause him harm.

Discussion

Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958).

In general, I believe all of the witnesses testified credibly, however Mr. Ferrari's testimony regarding the existence of an imbalance of power due to A.G.'s sexual orientation was not supported by the record. A review of the record indicates that the respondent basically found D.P. to have committed a HIB violation because D.P. admitted that he called A.G. gay. There was no consideration given to D.P.'s motivation in making the statement. He was not motivated to make the statement based on an actual or perceived characteristic such as sexual orientation because D.P. knew A.G. was straight. Mr. Ferrari admitted he did not think D.P. believed A.G. was gay. There can be no HIB finding without the required motivation. Mr. Ferrari testified that had D.P. not made the admission there would have been a different outcome. It is interesting to note that G.C. who did not admit to calling A.G. gay, but was said to have called A.G. gay by another witness J.M., was only found to have violated the Student Code of Conduct. J.M. also stated in his written statement that he did not know if the statements were made in jest. Mr. Ferrari also initially testified candidly that he did not know and could not say whether D.P., under the circumstances, knew or should have known that his comments would cause harm to A.G. and he really did not know how to answer that question. Respondent's

HIB policy, as written, did not require an initial finding that D.P. knew, or should have known, under the circumstances that his conduct would cause harm to A.G.

Although Mr. Nicastro was called as an expert to defend respondent's HIB policy as conforming to the statute, I was not persuaded by his explanation, since he admitted that the school policy does not mirror N.J.S.A. 18A:37-14 and that the statute controls and is the best evidence of the legislative intent.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

A.G., a classmate of D.P., had given a written statement dated March 27, 2018 indicating that in the last couple of months, students in his shop class had been making rude remarks/comments to him, including D.P., G.C., J.M. and M.A. (R-L). Petitioner's son, D.P. gave a written statement dated March 28, 2018 to his guidance counsellor and the schools HIB specialist, Edward Ferrari, wherein D.P. wrote,

> "Yes, I called him gay but in a joking matter. We all know we are straight and mess with each other. I never meant it to be in a serious matter and truly apologize that it was taken the wrong way."

D.P. further added to his statement on April 6, 2018, following the suggestion of Mr. Ferrari, that:

> "In the beginning of the year, our shop class had an inside joke, "Dude, you're gay" and we all made sure no one would be offended by it. We all said to each other all the time knowing it was a joke. A.G. would say it as much as everyone else. I don't understand why people would get offended if they are saying it too." (R-J).

Written statements were also taken from the other accused students G.C., J.M. and M.A., none of whom admitted to making any rude comments to A.G. (R-P). J.M.'s statement corroborated that G.C. also called A.G. gay. Other independent witnesses, A.U. and A.R., were also interviewed and stated that they did not notice anyone picking on A.G (R-Q). No statement was taken of the shop teacher, Mr. McCoy, in whose class

the incidents occurred because Mr. McCoy had advised Mr. Ferrari that he did not hear or observe any HIB conduct in his classroom, or he would have prevented and reported same.

J.M. and M.A. were exonerated. G.C. was found not to have committed an act of HIB, but to have violated the Student Code of Conduct and received a 3:00 p.m. – 6:00 p.m. detention. D.P. was found to have committed an act of HIB by making insulting and demeaning comments and received an in-school suspension (R-F).

Out of the four boys who were accused, the fact that D.P. admitted to calling A.G. 'gay' was the basis for respondent's finding that D.P.'s conduct was in violation of respondent's HIB policy and not the others.

D.P. did not believe that A.G. was gay.

D.P.'s statements to A.G. that "Dude, you're gay" were not motivated by any actual or perceived characteristic such as sexual orientation. The statements were motivated by D.P. and other students joking around with each other.

D.P. did not know, nor reasonably should have known that his comments would cause harm to A.G. as they were made in jest and that D.P. knew A.G. was not gay and had a girlfriend.

I further **FIND** as **FACT** that the Board's HIB definition as set forth in its Policy 5512 B and also as set forth in its HIB Investigation Report (R-F) does not conform to the HIB definition set forth in N.J.S.A. 18A:37-14. N.J.S.A. 18A:37-14 does not contain an **or** between sections (a) and (b). The statute as written demonstrates the legislative intent and is controlling.

LEGAL ANALYSIS AND CONCLUSION

New Jersey enacted the Anti-Bullying Bill of Rights Act (Act) to strengthen the standards and procedures for preventing, reporting, investigating, and responding to

incidents of harassment, intimidation, and bullying of students that occur in school and off school premises. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions,

action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>; See W.C.L. and A.L. ex rel L.L. v. Tenafly Bd.

Petitioner bears the burden of proof by a preponderance of the credible. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); DYFS v. M.R., 314 N.J. Super. 390, 414 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 168 (App. Div. 1998). This tribunal has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E.&A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

A close review of respondent's HIB Policy 5512 B, "Harassment, Intimidation and Bullying," indicates that the Board's definition of HIB does not mirror the New Jersey law in that respondent's policy contains an **"or"** between 3(a) and 3(b) whereas N.J.S.A. 18A:37-14(a) and (b) does not. The plain reading of the statute is that a reasonable person should know, under the circumstances that the conduct will have the effect of harming a student **and** the conduct has the effect of insulting or demeaning a student or creates a hostile educational environment for the student. The legislature, in enacting the statue, did not choose to insert an "or" between N.J.S.A. 18A:37-14(a) and N.J.S.A. 18A:37-14(b). Therefore, the statute should be read in the conjunctive which requires an initial finding that a reasonable person knew or should have known that the conduct would have the effect of harming a student. The statute was not written to be a strict liability statute and first requires a finding that the actor knew or should have known that the conduct would cause harm. To the extent that respondent has implemented HIB Policy 5512 B which sets forth a broader definition of HIB than set forth in N.J.S.A. 18A:37-14, I

CONCLUDE that respondent has acted in a manner that is arbitrary, capricious and unreasonable.

It is clear that in determining whether a HIB violation took place, respondent did not consider whether D.P. knew or should have known under the circumstances that his conduct would have the effect of harming A.G. Mr. Ferrari initially indicated that he did not know and that it was difficult for him to answer that question. Later in his testimony he indicated that D.P. was a smart boy and should have known his comments would cause harm. However, when finding a HIB violation according to their policy 5512 B as written, the respondent only had to satisfy one of the three prongs, either 3(a) or 3(b) or 3(c). Their focus was that D.P. admitted to making the comments and that the comments insulted, and demeaned A.G. Mr. Ferrari testified that the outcome would have been different if D.P. had not admitted to calling A.G. gay.

D.P. admitted that he called A.G. gay, however explained that it was a joke and that they all called each other gay, even though they all knew they were all straight. D.P. did not know, or should he have known, under the circumstances, that his comments to A.G. would have the effect of causing him harm, since he did not believe him to be gay and the boys were all joking with each other. D.P. did not believe that A.G. was gay and knew he had a girlfriend. D.P.'s comments were not motivated by any actual or perceived characteristic, such as sexual orientation, because D.P. knew A.G. was straight, had a girlfriend, was not gay and the boys were all joking with each other in calling each other 'gay'.

Since D.P.'s comments were not motivated by any actual or perceived characteristic, such as sexual orientation, his conduct does not rise to the level of a HIB violation. His comments, although certainly not condoned by this tribunal, at most would be more appropriately characterized as constituting a violation of the school code of conduct for making insulting and demeaning comments to A.G. D.P. was candid and truthful in admitting to calling A.G. gay. He also explained the circumstances surrounding the comments. I **CONCLUDE** that the respondent found D.P. in violation of the HIB policy because of D.P.'s admission yet acted in utter disregard of the facts in failing to consider D.P.'s explanation of the circumstances surrounding the comments and the fact that

D.P.'s comments were not motivated by any actual or perceived characteristic, such as sexual orientation of A.G.

A.G. had accused three other students of making rude remarks to him. There was corroboration by at least one other student, J.M., (in addition to A.G. and D.P.) that G.C. also called A.G. 'gay' (R-P). G.C. was charged with a code of conduct violation and received a 3:00 p.m. – 6:00 p.m. detention, whereas D.P. was found to have committed a HIB violation and received a one day in-school suspension. I further **CONCLUDE** that respondent's disparate treatment of D.P. in sustaining a HIB violation against him and imposing more severe punishment for the same conduct as G.C., is arbitrary, capricious and unreasonable.

Based on the whole of the credible evidence presented, I **CONCLUDE** that petitioner has met her burden of proof that the respondent acted in an arbitrary, capricious and unreasonable manner in finding that D.P.'s conduct constituted an act of HIB as set forth in N.J.S.A. 18A:37-14.

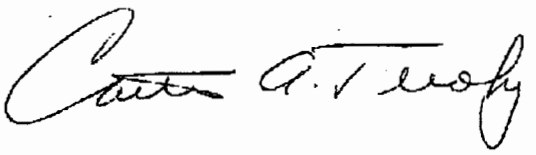
ORDER

Based on the foregoing, I **ORDER** that the petition be **GRANTED**. The Board's decision finding D.P. to have committed an act of HIB is **REVERSED** and **AMENDED** to a finding that D.P.'s conduct constituted a violation of the Student Code of Conduct.

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

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

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



February 5, 2020
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: February 5, 2020 (emailed)

Date Mailed to Parties: February 5, 2020 (emailed)

CAT/mel

APPENDIX

LIST OF WITNESSES

For Complainant:

D.P.

For Respondent:

Edward Ferrari
Philip Nicastro
Michael Dicken

LIST OF EXHIBITS IN EVIDENCE

For Complainant:

None

For Respondent:

R-A GCIT Parent/Student Handbook Excerpt (two pages)
R-B April 30, 2018 letter from Superintendent to D.P.'s parents
R-C March 29, 2018 letter from Principal to D.P.'s parents (two pages)
R-D April 23, 2018 letter from Principal to D.P.'s parents
R-E June 28, 2018 letter from Superintendent to D.P.'s parents
R-F Respondent's HIB Investigation Report Form (four pages)
R-G March 29, 2018 letter from Principal to A.G.'s parents (two pages)
R-H April 20, 2018 letter from Principal to A.G.'s parents
R-I Petition dated September 9, 2018 (two pages)

R-J D.P.'s written statement

R-K Respondent's HIB Policy 5512 (seventeen pages)

R-L A.G.'s written statement

R-M SSDS Incident Report Form (three pages)

R-N May 9, 2018 Executive Session Meeting Minutes

R-O N.J.S.A. 18A:37-14

R-P Written statements of J.M., M.A. and G.C. (three pages)

R-Q Written statements of A.U. and A.R.

R-R Consequences and Remedial Measures form (two pages)

R-S Certification of Michael Dicken (three pages)

R-T January 28, 2018 email from D.P.'s mother to Mr. Branderbit

R-U J.P.'s April 17, 2018 email to the Principal; D.P.'s parents April 30, 2018 letter to the Superintendent; and written statement read by J.P. to the Board at meeting of May 9, 2018 (three pages)

R-V Initial Report of HIB and March 27, 2018 email from A.G.'s mother (two pages)

R-W June 20, 2018 Executive Session Meeting Minutes

R-X Certification of Edward Ferrari (three pages)

R-Y May 21, 2019 email Opinion Letter from Strauss Esmay Associates to Mr. Dicken with attachments (R-Y, 1 – 3) (seventeen pages)

98-20

New Jersey Commissioner of Education

Final Decision

M.B., on behalf of minor children,
D.B. and M.B.,

Petitioner,

v.

Board of Education of the Township of Union,
Union County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that D.B. and M.B. did not reside within the Union Township School District during the 2018-2019 school year. The Board alleged that D.B. and M.B. were not residing at either of the two addresses provided by the petitioner, and sought payment of tuition for the period of their ineligible attendance.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(b)(2), petitioner has the burden of proof in a determination of residency; the residency investigation in this matter demonstrated that the children were not present at either of the addresses in Union Township provided by petitioner and were instead seen repeatedly at an address in Roselle; and based on the evidence submitted by the petitioner in support of his residency claim, D.B. and M.B. were not domiciled in the District while attending school there during the 2018-2019 school year. The ALJ concluded that D.B. and M.B. were not entitled to receive a free public education in the Union Township School District; accordingly, the respondent Board is entitled to reimbursement for tuition costs in the amount of $28,046 for the 2018-2019 school year.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter, and the petitioner was ordered to reimburse the Board for tuition in the amount of $28,046; 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.

March 17, 2020

98-20
OAL Dkt. No. EDU 02760-19
Agency Dkt. No. 21-1/19

New Jersey Commissioner of Education

Decision

M.B., on behalf of minor children,
D.B. and M.B.,

Petitioner,

v.

Board of Education of the Township
of Union, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Union for the 2018-2019 school year. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in Union. Therefore, the Board is entitled to tuition reimbursement in the amount of $14,023 for M.B. and $14,023 for D.B. for the 2018-2019 school year, during which time petitioner's minor children were ineligible to attend school in respondent's district.

[1] The Commissioner was not provided with a transcript of the January 31, 2020 hearing at the OAL.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $28,046 for tuition costs incurred during the time period in which M.B. and D.B. were ineligible to attend school in Union. The petition of appeal is hereby dismissed.

IT IS SO ORDERED. [2]



COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2020
Date of Mailing: March 17, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02760-19
AGENCY DKT. NO. 21-1/19

M.B. ON BEHALF OF MINOR CHILDREN D.B AND M.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

M.B., for petitioner, pro se

Nashali Amin Rose, Esq., for respondent (Florio Perrucci Steinhardt & Cappelli, LLC)

Record Closed: February 11, 2020 Decided: February 25, 2020

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioner M.B. challenges the Board of Education of the Township of Union's (Respondent or Board) residency determination that petitioners do not reside and/or not domiciled in Union.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on February 26, 2019, for hearing as a contested case. The hearing was scheduled and heard on January 31, 2020. The respondent submitted a closing brief and certification on February 11, 2020, at which time I closed the record.

FACTUAL DISCUSSION

Testimony

Daniel Hodge

Daniel Hodge is employed by respondent as a residency inspector. On February 23, 2018, he was assigned to investigate whether M.B. and D.B. lived in the Union. The reason for the investigation was that either M.B or D.B. stated that they lived in Roselle.

Hodge began the investigation on February 23, 2018, at the address of XXXX Hawthorne Avenue, Union. This is the address that the Board had on record for petitioners. On February 23 and February 26, 2018, no one exited the Hawthorne Avenue address between 7:15-9:00 a.m. On February 26, 2018, the principal of Hanna Caldwell School, where D.B. and M.B were registered, pointed out the children's father as he was picking them up from school to Hodge. Hodge followed petitioner's car to Roselle. A Honda Odyssey and a Jeep were registered to petitioner. Petitioner drove a white Ford Explorer when he picked up the children. On February 28, 2018, no one exited the Hawthorne Avenue address. On March 1, 2018, the Odyssey dropped the children at school and picked them up. Hodge followed the Odyssey after it picked the children up from school but lost it in traffic.

On March 12, 2018, there were no cars at the Hawthorne Avenue address at 7:30 a.m. The Odyssey driven by the children's mother dropped them at school. Hodge followed the Odyssey, which made several stops before finally stopping at the Oak Park apartments in Roselle. On March 13, 2018, both cars registered to petitioner

were at the Oak Park Apartments. The mother dropped the children at school and returned to the Oak Park apartments. Hodge never saw the children at the Hawthorne Avenue address.

A residency hearing was held which resulted in the children staying in school. Hodge was told to check on the residency. From September 4, 2018, through September 27, 2018, Hodge conducted surveillance to determine if the children lived at the Hawthorne Avenue address. He did no surveillance from September 27, 2018, to May 2, 2019.

In March 2019 petitioner informed the Board that they moved to Vauxhall Road in Union. Hodge did not see the Odyssey or the Explorer at the Vauxhall Road address until May 2, 2019. At that time Hodge questioned the crossing guard on Vauxhall Road, who stated that he had not seen any grammar school aged children coming out of the residence on May 7, 2019. Hodge knocked on the door of the Vauxhall Road residence at 7:00 p.m. There was no answer. He went by at 10:00 p.m. and the house was dark.

On May 13, 2019, May 14, 2019, and May 15, 2019, no cars were at the Vauxhall Road address in the morning. On May 16, 2019, Hodge again questioned the crossing guard at 7:15 a.m. who stated that he had seen high school children coming out of the Vauxhall Road residence, but he believes that they moved. On May 17, 2019, Hodge knocked on the door of the Vauxhall residence at 7:00 p.m. and there was no answer. A college-age neighbor told him that the premises were vacant.

On May 20, 2019, Hodge saw petitioner cutting the grass at the Vauxhall Road address at 10:00 a.m. On May 21, 2019, Hodge saw the Jeep at the Roselle address in the morning. On May 22, 2019, there were no cars at the Vauxhall Road address at 6:00 p.m. On May 23, 2019, the jeep was parked in Roselle at 7:00 a.m. On May 25, 2019, Hodge went past the Vauxhall Road address five different times and no cars were parked at the address.

On May 28, 2019, the Jeep and the Explorer were parked at the Roselle address at 7:15 a.m. On May 29, 2019, Hodge saw the Jeep and Explorer parked at the Roselle

address at 7:00 a.m. at 8:15 a.m. the children entered the Explorer, at 3:00 p.m. the children were picked up from school in the Explorer and taken to Roselle. On May 30, 2019, the Jeep and the Explorer were seen at Roselle at 7:30 a.m. The children at 8:20 a.m. came out of the Roselle address and entered the Explorer.

Hodge never saw the children at either Union address. He saw the children at the Roselle address. Hodge never saw the petitioner drive any car other than the Explorer. The Odyssey was driven by the children's mother. Hodge had driven by the Hawthorne Avenue address as late as 10:00 p.m. and did not see the Explorer.

M.B.

M.B. is the father of M.B. and D.B. He stated that he told the Board in March 2018 that they could not stay at the Hawthorne Street address. The children stayed with their mother due to a family issue. When the children were staying in Roselle with their mother, he would take them to school. After school he picked up the children and returned them to their mother in Roselle and went back to work. He drove the Explorer. The children's mother drove the Jeep and the Odyssey.

Petitioner's primary residence was on Hawthorne Avenue in Union. He moved to the Vauxhall Road, Union address in March 2019. If someone is looking in the driveway of the Vauxhall Road address, the yard cannot be seen. He enters and exits through the rear door at the Vauxhall Road address. When he leaves the Vauxhall Road address, he sees the crossing guard coming on duty. He signed the lease for the Vauxhall Road address on March 1, 2019.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witness and petitioner, the resolution of this matter requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come

from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Hodge to be credible. He was truthful and accurate. He testified clearly and directly. He did not have a bias against petitioner. I found M.B. to be less credible. He testified that the children could not stay at the Hawthorne Avenue address due to family issues, but he later testified that the children did live at the Hawthorne Avenue address. He was vague on the reason that the children could not stay at the Hawthorne Avenue address. He did not expound on what the family issues were for the children not living at the Hawthorne Avenue address.

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

Petitioner M.B. is the father of M.B and D.B. During the 2017-2018 school year a residency investigation was commenced to determine if M.B and D.B. lived at the Hawthorne Avenue address in Union. The Board believed that the children lived in Roselle. A hearing was held before the Board on April 10, 2018. At that meeting the Board allowed the children to remain in school for the remainder of the school year.

M.B. primarily drove a Ford Explorer. The children's mother drove a Honda Odyssey or a Jeep. On various dated in July 2019, Hodge saw the Odyssey parked in

Roselle. On August 1, 2018, August 8, 2018, and August 22, 2018, Hodge saw the Explorer parked in front of the Hawthorne Avenue address in Union. He did not see the children on any of the July or August surveillances.

On September 4, 2018, and September 10, 2018, Hodge saw the Odyssey parked in Roselle at 7:30 a.m. On September 11, 2018, and September 12, 2018, Hodge saw petitioner drive the children to school from Roselle at 7:30 a.m. and 7:45 a.m. On September 12, 2018, the children's mother picked them up from school and drove them to Roselle. On September 13, 2018, Hodge saw the children in Roselle at approximately 8:15 a.m. The car was parked in a lot near the Roselle address. On September 14, 2018, September 15, 2018, and September 18, 2018, Hodge saw the children enter the Explorer in Roselle at approximately 8:20 a.m. On September 20, 2018, the Odyssey and Explorer were seen at the Roselle address at 8:15 a.m. The children were taken to school at 8:45 a.m. in the Explorer. On September 21, 2018, the Explorer picked the children up from school and took them to Roselle. On September 24, 2018, the Explorer was seen at the Hawthorne address at 6:45 a.m. It was seen at the Roselle address at 7:30 a.m. The children were taken to school on September 25, 2018, from Roselle. On the same date the children were picked up from school and taken to the Roselle address. On September 26, 2018, the Explorer and Odyssey were at the Roselle address at 8:00 a.m. The children were taken to school in the Explorer from Roselle. They were picked up after school and taken to Roselle. Hodge never saw the children at the Hawthorne Avenue, Union address. There was no surveillance from September 27, 2018, to March 2019.

On or about October 29, 2018, petitioner received a letter from the Board stating that the children do not reside in the district because they reside with him in Roselle. The letter stated that the children would be removed from the district on November 7, 2018. Petitioner appealed the Board's residency decision on or about November 6, 2018. A residency hearing was scheduled for December 11, 2018. On January 3, 2019, the Board determined that the children no longer reside in Union, therefore they are not eligible to attend school in Union. Petitioner filed an appeal on January 23, 2019. On March 15, 2019, signed a one-year lease starting on April 1, 2019, to March 31, 2019, for property located on Vauxhall Road in Union.

In March 2019 petitioner informed the Board that they moved to Vauxhall Road in Union. Hodge did not see the Odyssey or the Explorer at the Vauxhall Road address until May 2, 2019. At that time Hodge questioned the crossing guard on Vauxhall road, who stated that he had not seen any grammar-school-aged children coming out of the residence. On May 7, 2019, Hodge knocked on the door of the Vauxhall Road residence at 7:00 p.m. There was no answer. He went by at 10:00 p.m. and the house was dark. On May 8, 2019, at 7:00 p.m. there was a box truck with the words Brother's Furniture on its side in the driveway at the Vauxhall Road address. The front door was open and there were people inside.

On May 13, 2019, May 14, 2019, and May 15, 2019, no cars were at the Vauxhall Road address in the morning. On May 16, 2019, at 7:50 a.m. Hodge again questioned the crossing guard, who stated that he had seen high school children coming out of the Vauxhall Road residence, but he believes that they moved. On May 17, 2019, Hodge knocked on the door of the Vauxhall residence at 7:00 p.m. and there was no answer. A college-age neighbor told him that the premises were vacant.

On May 20, 2019, Hodge saw petitioner cutting the grass at the Vauxhall Road address. On May 21, 2019, Hodge saw the jeep at the Roselle address in the morning. On May 22, 2019, there were no cars at the Vauxhall residence at 6:00 p.m. On May 23, 2019, the jeep was parked in Roselle at 7:00 a.m. On May 25, 2019, Hodge went past the Vauxhall Road address five different times and no cars were parked at the address.

On May 28, 2019, the Jeep and the Explorer were parked in Roselle at 7:00 a.m. At 8:15 a.m. the students came out of the Roselle address. At 2:45 p.m. Hodge went to the Vauxhall Road address and knocked on the door, but there was no answer. On May 29, 2019, Hodge saw the Jeep and Explorer parked at the Roselle address at 7:00 a.m. At 8:15 a.m. the children entered the Explorer in Roselle at 3:00 p.m. the children were picked up from school in the Explorer and taken to Roselle. On May 30, 2019, the Jeep and the Explorer were seen at Roselle at 7:30 a.m. At 8:20 a.m. the children came out of the Roselle address and entered the Explorer.

Hodge never saw the children at either Union address. He saw the children at the Roselle address. Hodge never saw the petitioner drive any car other than the Explorer. The Odyssey was driven by the children's mother. Hodge had driven by the Hawthorne Avenue address as late as 10:00 p.m. and did not see the Explorer.

M.B. testified that the children did not stay at the Hawthorne Avenue address because of a family issue. He did not address the substance of the family issue and why the children could not live at Hawthorne Avenue address. He also stated that his and the children's residence was at Hawthorne Avenue prior to moving to Vauxhall Road. He stated that he took title to the Vauxhall property on March 1, 2019. He also stated new furniture for the children was purchased for the children. Although he states that he took title to the premises on March 1, 2019, the lease has the April 1, 2019, as the beginning of the lease.

The daily rate for tuition for M.B. for the 2018-2019 school year was $77.91. The yearly rate for M.B.'s tuition for 2018-2019 was $14,023. The daily rate for tuition for D.B. for the 2018-2019 school year was $77.91. The yearly rate for D.B.'s tuition for 2018-2019 was $14,023.

LEGAL ANALYSIS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of

an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Board of Educ. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In this matter, petitioner provided no documentation that he resided at the Hawthorne Avenue address. There were no bills addressed to him at that address, he did not provide a copy of his driver's license with the Hawthorne Avenue address. In addition, petitioner stated that he the children resided at the Hawthorne Avenue address yet testified that the children could not stay at the Hawthorne Avenue address because of a family issue. The family issue was never explained in any terms other than there was a family issue. Hodge saw the children on numerous occasions leave from the Roselle address.

The children were never seen at the Vauxhall Road address from March 2019 when the lease was signed through May 30, 2019. On two occasions in May 2019, Hodge knocked on the door of the Vauxhall address at 7 p.m. and there was no answer. On two occasions in May 2019, Hodge drove by the Vauxhall Road address at 10:00 p.m. and there were no lights on in the house. Hodge never saw the children at the Vauxhall Road address in May 2019, but he did see them at the Roselle address in May 2019.

The daily rate for tuition for M.B. for the 2018-2019 school year was $77.91. The yearly rate for M.B.'s tuition for 2018-2019 was $14,023. The daily rate for tuition for D.B. for the 2018-2019 school year was $77.91. The yearly rate for D.B.'s tuition for 2018-2019 was $14,023.

The Board asserts that it is entitled to be reimbursed for tuition for the 2018-2019 school year for M.B and D.B.'s ineligible enrollment. Whereas here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioners were not a domiciliary in the Union School District for the 2018-2019 school year and that respondent is entitled to reimbursement for the costs of tuition in the amount of $14,023 for M.B. and $14,023 for D.B. for a total of $28,046.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and her children were not residents and domiciliary in Union, New Jersey, and were not domiciled within its school district during the 2018-2019 school year is hereby **AFFIRMED**. It is further **ORDERED** that respondent be reimbursed tuition from petitioner in the amount of $28,046.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

February 25, 2020

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: February 25, 2020

Date Mailed to Parties:

ljb

APPENDIX

LIST OF WITNESSES

For Petitioner:

For Respondent:

Daniel Hodge

LIST OF EXHIBITS

For Petitioner:

P-1 Lease Dated April 15, 2019

For Respondent:

R-1(a) Investigation reports of Daniel Hodge dated May 30, 2019, and September 17, 2019, Enrollment Form

R-1(b) Investigation Photos

R-2 Residency Investigation Request Form

R-3 March 26, 2018, Notice of Initial Determination of Ineligibility

R-4 May 1, 2018, Decision to allow D.B. and M.B. to complete the 2017-2018 school year

R-5 October 29, 2018, Notice of Initial Determination of Ineligibility

R-6 November 6, 2018, Letter from petitioner to the Board requesting a hearing

R-7 November 7, 2018, Letter from Board Scheduling the Hearing

R-8 January 3, 2019, Notice of Removal

R-9 Petitioner's Residency Appeal Petition

R-10 Respondent's Answer

R-11(a) Tuition Cost for D.B.

R-11(b) Tuition Cost foe M.B.

R-12 Certification of Manuel Viera regarding daily and yearly tuition for M.B. and D.B.

99-20

New Jersey Commissioner of Education

Final Decision

Jeffrey Klein,

Petitioner,

v.

Board of Education of the Passaic County Technical Institute, Passaic County,

Respondent.

Michelle Owens,

Petitioner,

v.

Board of Education of the Passaic County Technical Institute, Passaic County,

Respondent.

Synopsis

Petitioner appealed a suspension without pay imposed by the respondent Board. Petitioner was charged with the disorderly persons offense of possession of hashish and was suspended by the Board with pay. Following petitioner's receipt of a six-month conditional discharge, the Board changed the suspension to one without pay.

The ALJ found, *inter alia*, that: no genuine issues of material facts existed, and the matter was ripe for summary decision; *N.J.SA.* 18A:6-8.3 provides that tenured employees may be suspended without pay only if they are indicted or if tenure charges have been certified against them; and petitioner had not been indicted and the Board had not certified tenure charges against him. The ALJ concluded that the suspension without pay was in contravention of *N.J.SA.* 18A:6-8.3. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to reinstate petitioner's suspension with pay.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter.

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

March 17, 2020

99-20
OAL Dkt. Nos. EDU 08805-19, EDU 10789-19 (Consolidated)
Agency Dkt. Nos. 101-5/19, 149-6/19

New Jersey Commissioner of Education

Decision

Jeffrey Klein,

Petitioner,

v.

Board of Education of the Passaic County Technical Institute, Passaic County,

Respondent.

Michelle Owens,

Petitioner,

v.

Board of Education of the Passaic County Technical Institute, Passaic County,

Respondent.

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

In February 2019, petitioner Klein,[1] a special education teacher, was charged with the disorderly persons offense of possession of hashish and suspended with pay by the Board. In May 2019, after Klein received a six-month conditional discharge that did not require

[1] Petitioner Klein's matter was previously consolidated by the OAL with a similar matter involving Michelle Owens. On September 26, 2019, Owens withdrew her petition.

him to plead guilty, the Board changed his suspension to one without pay. The ALJ found that under *N.J.S.A.* 18A:6-8.3, a tenured employee may be suspended without pay only if the employee was indicted or if tenure charges were certified against him. Neither of those circumstances were present here, so the ALJ found that the suspension without pay was improper.

Upon review, the Commissioner concurs with the ALJ's conclusion that, in the absence of tenure charges or an indictment, the Board was not permitted to suspend Klein without pay. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. The Board is directed to reinstate Klein's suspension with pay, retroactive to May 2, 2019.

IT IS SO ORDERED. [2]



COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2020
Date of Mailing: March 17, 2020

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

JEFFREY KLEIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,
Respondent.

OAL DKT. NO EDU 08805-19
AGENCY DKT. NO. 101-5/19

CONSOLIDATED

MICHELLE OWENS,
Petitioner,
v.
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,
Respondent.

OAL DKT. NO. EDU 10789-19
AGENCY DKT. NO. 149-6/19

Ronald J. Ricci, Esq., for Petitioners (Ricci & Fava, LLC, attorneys)

Albert C. Buglione, Esq., for Respondent (Buglione, Hutton & Deyoe, LLC, attorneys)

Record Closed: January 29, 2020

Decided: February 21, 2020

BEFORE **JULIO C. MOREJON,** ALJ:

STATEMENT OF THE CASE

Petitioners, Jeffrey Klein (Klein), and Michelle Owens, allege that respondent, Board of Education of the Passaic County Technical Institute, (PCTI), decision to suspend them without pay is in violation of their respective tenure rights under N.J.S.A. 18A:6-8.3.

PROCEDURAL HISTORY

Klein filed his Verified Petition (Petition) with the Commissioner of the New Jersey Department of Education (Commissioner), on May 10, 2019, contesting PCTI's decision to suspend him without pay on May 2, 2019. Owens filed her Petition with the Commissioner on June 21, 2019, contesting PCTI's decision to suspend her without pay on June 14, 2019. PCTI filed an Answer to Klein's Petition with the Commissioner on June 17, 2019, and PCTI filed an Answer to Owens' Petition with the Commissioner on June 24, 2019.

The two matters were transferred to the Office of Administrative Law (OAL), as a contested cases under N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, as follows: Klein's matter was filed on June 27, 2019, and Owens' matter was filed on August 7, 2019. Thereafter, on September 17, 2019, an Order of Consolidation was entered.

On August 23, 2019, Klein filed a motion for summary decision. On October 3, 2019, PCTI filed its opposition to Klein's motion for summary decision, and on October 9, 2019, Klein filed a reply to PCTI's opposition.

On September 19, 2019, Owens' filed her motion for summary decision, and on September 26, 2019, Owens withdrew her Petition pursuant to an agreement with PCTI and her motion for summary decision was withdrawn.

On January 29, 2020, oral argument was held, at which time the record closed.

DISCUSION

The following facts are undisputed, and I **FIND** them to be **FACTS** of this case:

Klein was hired by PCTI as a special education teacher in 2007 and received tenure in 2011. On February 9, 2019, Klein was charged with possession of hashish under 5 grams. This was in violation of N.J.S.A. 2C:35-10a (4), a disorderly persons offense. As a result of the charge and arrest, PCTI suspended Klein with pay on February 11, 2019.

On April 29, 2019, Klein appeared in municipal court on the disorderly persons offense and received a six-months conditional discharge under. N.J.S.A. 2C:36A-1 On May 2, 2019, the Board changed the suspension from with pay to without pay, as a result of Klein entering into conditional discharge. Klein has not been indicted nor has he been notified of tenure charges against him.

The conditional discharge concluded on October 31, 2019, at which time the original charge of N.J.S.A. 2C:35-10a (4), would be dismissed, provided Klein complied with the terms of his conditional discharge. [1] As part of his conditional discharge, Klein was not required to enter a guilty plea, but did have to pay mandatory fines and assessments.

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

[1] During oral argument on January 29, 2020, counsel for Klein represented that Klein had complied with the terms of his conditional discharge and the underlying misdemeanor charge was dismissed.

A determination whether a genuine issue of material fact exists that precludes summary judgment requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have held that the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Anderson, 477 U.S. at 252. Conversely, it is critical that a favorable ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 77 (1954).

No genuine issues of material fact exist in this case. For the reasons set forth in greater detail below, Klein is entitled to summary decision ordering his suspension be with pay and awarding back pay. As the underlying facts are not in dispute in this matter, the fundamental issue to be decided is whether Klein's suspension without pay is proper, and whether he is entitled to backpay.

The relevant statute, N.J.S.A. 18A:6-8.3, provides:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in Chapter 6 of which this section is a supplement . . . "
>
> [N.J.S.A. 18A:6-8.3].

Klein moves for summary decision claiming that he should be placed on suspension with pay and additionally, that he is entitled to back pay for the period he has been suspended without pay. In support of his argument, he relies on a variety of cases; the most decisive is the seminal case of Slater v. Bd. of Educ. of Ramapo-Indian Hills Reg. High Sch. Dist., 237 N.J. Super. 424 (App. Div. 1989). In Slater, a tenured school employee was arrested for the sale of marijuana. He was immediately suspended without pay. Months later, he was indicted and convicted, which led to his forfeiture of employment. The court held that "a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay." Id. at 246. Further, since the employee was not indicted at the time of suspension, nor were tenure charges certified against him, the suspension should have been with pay up until he was indicted. Accordingly, the court remanded for entry of an order requiring backpay to the date of indictment.

PCTI contends that Klein behaved inappropriately and that his possession of hashish in addition to improperly securing his illicit drugs amounts to conduct unbecoming of a teacher.[2] However, the appropriateness of Klein's conduct is not the dispositive issue. In fact, it is well settled law that a tenured school employee may be suspended without pay only if indicted or if tenure charges were certified [emphasis supplied], neither scenario which exists herein. Furthermore, PCTI relies on In the Matter of Tenure Charges of Brenda Bruni (No. 207-9/17) (February 9, 2018), where a "teacher *inter alia* had drug charges that were dismissed, and a two-month suspension without pay was imposed" to support the assertion that withholding Klein's salary is proper during this probationary period. [3] The Bruni decision is distinguishable herein as Bruni was suspended with pay for several months pending investigation. Before her penalty of suspension without pay was levied, tenure charges were brought against her [emphasis supplied].

[2] PCTI refers to an alleged incident where a fourteen-year-old classmate of Klein's daughter received a marijuana edible and began vomiting.
[3] PTCI, Br. at 5

In the present matter, Klein is a tenured employee. He has not been indicted and tenure charges have not been certified against him. While he was arrested and charged with a misdemeanor drug offense, he entered a conditional discharge term that did not require him to plead guilty. Conditional discharge in misdemeanor drug offenses is set forth in N.J.S.A. 2C:36A-1, which states in pertinent part:

> Whenever any person who has not previously been convicted of any offense under section 20 of P.L.1970, c.226 (C.24:21-20), or a disorderly persons or petty disorderly persons offense defined in chapter 35 or 36 of this title . . . . and who has not previously participated in a program of supervisory treatment . . . or conditional dismissal . . .or a Veterans Diversion Program . . . is charged with or convicted of any disorderly persons offense or petty disorderly persons offense under chapter 35 or 36 of this title, the court upon notice to the prosecutor and subject to subsection c. of this section, may on motion of the defendant or the court:
>
> (1) Suspend further proceedings and with the consent of the person after reference to the State Bureau of Identification criminal history record information files, place him under supervisory treatment upon such reasonable terms and conditions as it may require; **or**
>
> (2) After a plea of guilty or finding of guilty, and without entering a judgment of conviction, and with the consent of the person after proper reference to the State Bureau of Identification criminal history record information files, place him on supervisory treatment upon reasonable terms and conditions as it may require, or as otherwise provided by law.

A guilty plea is not required under N.J.S.A. 2C:36A-1, in every case, and it was not required of Klein when he entered into his conditional discharge for a six-month term. In addition, PCTI has not certified tenure charges against Klein for his conduct. As such, I **CONCLUDE** that Klein's initial suspension with pay was appropriate under N.J.S.A. 18A:6-8.3 and should not have been converted to a suspension without pay.

In addition, I **CONCLUDE** that since Klein was neither indicted nor facing tenure charges, he is entitled to backpay commencing May 2, 2019 when his penalty was modified to suspension without pay. I/M/O Tenure Hearing of Robert G. Morton, EDU

0253-97, Initial Decision (06/11/99), adopted, Comm'r (07/30/99) <http://lawlibrary.rutgers.edu/oal/ search.html>. In Morton, a tenured teacher was indicted on numerous drug offenses, to which he pled guilty and was sentenced to probation. Thereafter, Morton was suspended without pay for one month before tenure charges were certified against him. He was eventually granted backpay for the time between his conviction and the certification of his tenure charges.

Also, in Adrian McConney v. Twp of Piscataway Bd. of Educ. Middlesex Cty, EDU 0576 (2017), McConney was a tenured teacher who was indicted on "official misconduct" charges. He was subsequently suspended without pay. The indictment was eventually dismissed and McConney was placed on payroll a month after. The court in McConney grants him backpay for the month between the dismissal of his indictment and his reinstatement on payroll.

Accordingly, Klein's motion for summary decision is **GRANTED** and PCTI's opposition to said motion is **DENIED.**

ORDER

It is hereby **ORDERED** that Klein's motion for summary decision that PCTI's decision to suspend him without pay since May 2, 2019, is in contravention of N.J.S.A. 18A:6-8.3, is **GRANTED**.

It is hereby further **ORDERED** that since Klein was neither indicted nor facing tenure charges, he is entitled to backpay commencing May 2, 2019, when PCTI modified Klein's suspension from with pay to a suspension without pay, and it is hereby further **ORDERED** that PCTI is to reinstate Klein's suspension with pay retroactive to May 2, 2019.

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

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

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

February 21, 2020
DATE



JULIO C. MOREJON, ALJ

Date Received at Agency: February 21, 2020

Date Mailed to Parties: February 21, 2020

lr

100-20

New Jersey Commissioner of Education

Final Decision

South Harrison Township Education Association,

Petitioner,

v.

Board of Education of the Township of South Harrison, Gloucester County,

Respondent.

Synopsis

Petitioner, the South Harrison Township Education Association (Association), filed a petition of appeal against the respondent Board for violations arising under the school laws pursuant to *N.J.S.A.* 18A:6-9, violation of Board policy, and arbitrary and capricious conduct for improperly withholding wages from Heidi Wagner, a former Association member who retired on January 1, 2019. The Association contended that the Board unilaterally changed the terms of Wagner's employment to a per diem employee in violation of *N.J.S.A.* 18A:27-6 and reduced the salary of a tenured employee in violation of *N.J.S.A.* 18A:6-10. The Board maintained that the retired teacher received an appropriately pro-rated final paycheck based on the number of days she worked prior to her retirement. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact, and the matter is ripe for summary decision; the issue in this matter is whether the Board's action in deduction $1,146.86 from the final paycheck of a retiring teacher constituted a reduction in compensation in violation of *N.J.S.A.* 18A:6-10; *N.J.S.A.* 18A:28-5 provides that teachers who are under tenure shall not have their compensation reduced except for inefficiency, incapacity or unbecoming conduct; *N.J.S.A.* 18A:27-6(3) provides that salary payments must be made in equal semi-monthly installments; and the Board's policy did not provide any basis for prorating Wagner's final paycheck. The ALJ concluded that the Board's recalculation of Wagner's semi-monthly salary by deducting $1,146.86 to reflect a per diem basis of pay constituted an improper reduction in compensation in violation of *N.J.S.A.* 18A:27-6(3), *N.J.S.A.* 18A:28-5, and *N.J.S.A.* 18A:6-10. Accordingly, the ALJ granted summary decision to petitioner.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter. The Commissioner ordered the Board to compensate Wagner for the difference between her full semi-monthly salary and what she received in her final paycheck.

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

March 17, 2020

100-20
OAL Dkt. No. EDU 05378-19
Agency Dkt. No. 61-3/19

New Jersey Commissioner of Education

Decision

South Harrison Township
Education Association,

Petitioner,

v.

Board of Education of the Township
of South Harrison, Gloucester County,

Respondent.

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

In this matter, the South Harrison Township Education Association represents the interests of its member, Heidi Wagner, who had been employed by the Board as an elementary school teacher for thirty years. In August 2018, the Board approved Wagner's notice of retirement, effective January 1, 2019. From September 2018 to the first pay period of December 2018, petitioner received her salary of $76,594 in semi-monthly installments of $3,829.70. For the final paycheck in the second pay period of December 2018, the Board deducted $1,146.86 from Wagner's paycheck and indicated that her salary had been prorated based on the number of days she had actually worked, relying upon a Board policy that authorizes the withholding of salary or wages for services not provided.

Upon review, the Commissioner concurs with the ALJ's conclusion that the Board improperly reduced Wagner's salary in violation of her tenure rights. Pursuant to

N.J.S.A. 18A:27-6(3), teacher salaries, including those of tenured teachers and teachers who work less than a full year, must be calculated on the basis of monthly or semi-monthly pay periods. *See Tucker v. Bd. of Educ. of the Twp. of Montgomery, Somerset Cty.*, Commissioner Decision No. 277-05 (decided August 3, 2005). The Board is therefore precluded from adjusting the contracted salary installment for a teacher not on leave status who has worked each day during the period that teaching staff members were required to report to work. *Ibid.* The Commissioner reiterates the ALJ's statement in the Initial Decision that there is nothing discretionary or ambiguous about *N.J.S.A.* 18A:27-6(3). There is no indication in the record that Wagner failed to report to work on any day that schools were in session during the second pay period of December 2018.[1] The Board's decision to reduce her salary is therefore a violation of her protection against reduction in compensation under *N.J.S.A.* 18A:28-5.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to compensate Heidi Wagner for the $1,146.86 difference between the salary payment she was owed for the second pay period of December 2018 and what she actually received, together with such additional pension contributions as are necessitated by this action.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2020
Date of Mailing: March 17, 2020

[1] The ALJ found that, for this reason, the Board could not use its policy regarding "services not rendered" as justification for withholding earned wages. While the Commissioner bases this decision on the Board's statutory obligations, which the Board cannot abrogate through its policy, the Commissioner also concurs with the ALJ's conclusion that the policy does not provide sufficient justification for the Board's decision.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05378-19
AGENCY DKT. NO. 61-3/19

SOUTH HARRISON TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
SOUTH HARRISON TOWNSHIP BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

Jeffrey P. Catalano, Esq., for petitioner (Zeller & Wieliczko, LLP, attorneys)

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: February 12, 2020 Decided: February 20, 2020

BEFORE **KATHLEEN M. CALEMMO,** ALJ:

STATEMENT OF THE CASE

Petitioner, South Harrison Township Education Association (petitioner or Association), filed a petition of appeal against the South Harrison Township Board of Education, Gloucester County (respondent or Board) for violations arising under school laws pursuant to N.J.S.A. 18A:6-9, violation of Board policy, and arbitrary and capricious

conduct for improperly withholding wages from a former Association member who retired on January 1, 2019. The Board maintained that the retired teacher received an appropriately prorated final paycheck based on the number of days she worked prior to her retirement.

PROCEDURAL HISTORY

This matter arose with the Association's March 21, 2019, filing of its petition of appeal with the Office of the Commissioner of Education. On April 10, 2019, the Board filed a notice of motion to dismiss the petition in lieu of answer or, in the alternative, to compel arbitration. The Commissioner of Education transmitted the matter to the Office of Administration Law (OAL) where it was filed on April 18, 2019.

By Order, dated August 20, 2019, I denied the Board's motion to dismiss and scheduled the matter for a telephone conference. During the telephone conference, the parties agreed that there were no material facts in dispute and the matter could be resolved summarily. On December 4, 2019, I received the Association's brief and certification in support of its motion for summary decision. On January 8, 2020, I received the Board's opposition, cross-motion for summary decision, and supporting certification. On January 27, 2020, I received the Association's letter brief in reply. On February 12, 2020, I received the Board's letter brief in reply to the Association's opposition. Thereafter, I closed the record.

ISSUES PRESENTED

The petition raises the following issues for determination:

1. Whether the Board's action in deducting $1,146.86 from the final paycheck of a retiring tenured teacher constituted a reduction in compensation in violation of N.J.S.A. 18A:6-10?

2. Whether the Board's action was arbitrary, capricious, and unreasonable, when it prorated the final paycheck of a tenured teacher who retired on January 1, 2019, to reflect the actual number of days she worked?

STATEMENT OF FACTS

The following facts pertinent to the cross-motions for summary decision are uncontroverted, and I **FIND**:

On July 1, 2017, the Association and the Board entered into a Collective Bargaining Agreement (CBA), effective July 1, 2017 through June 30, 2020. Certification of Cosmas P. Diamantis, Esquire (CPD Cert.), Exhibit 2.

Heidi Wagner (Wagner) was employed with the South Harrison School District (District) for thirty years as an elementary school teacher and was a member of the Association. At the Board's August 20, 2018 meeting, the Board approved Wagner's notice of retirement, effective January 1, 2019. Wagner's last day of work was December 31, 2018.

The CBA, at Article 11 (B) (1), provides for teachers employed on a ten-month basis to be paid in twenty equal semi-monthly installments. (CPD Cert, Exhibit 2.) Wagner's salary for the 2018-2019 school year was $76,594, as set forth in the CBA. Id. Starting in September 2018, and continuing through the first pay period in December 2018, Wagner received $3,829.70 in semi-monthly installments. Rather that receiving her semi-monthly installment for the second pay period in December 2018, Wagner received a paycheck that was $1,146.86 less than the $3,829.70 she had been receiving since September 2018.

On behalf of Wagner, the Association filed a grievance requesting that the "docked" pay of $1,146.86 be returned to Wagner. (CPD Cert., Exhibit 1 at B.)

In a letter, dated February 12, 2019, Dr. James J. Lavender, (Lavender), Superintendent of Schools, denied the Association's request to reimburse Wagner the

money that had been deducted from her last paycheck. (CPD Cert., Exhibit 1 at C.) His written response was as follows:

> Mrs. Wagner was employed and provided a salary based on a complete contract year of 187 days. However, Mrs. Wagner worked 72 days during the 2018-2019 school year, constituting an early separation from her contract. Therefore, Mrs. Wagner's salary was prorated based on the number of days she actually worked. In Mrs. Wagner's case, her annual salary was $76,595. By dividing 187 contract days into her salary, Mrs. Wagner's daily rate of pay was equal to $409.59. To prorate her salary correctly, the payroll administrator multiplied her daily rate by the number of days she worked.

The Board calculated Wagner's entitlement based on the 72 days she worked against the 187 contract days in the school year. Public holidays and other school closures from the first full staff day of school on September 4, 2018 through December 31, 2018, were not included in the Board's prorated calculation. According to the 2018-2019 South Harrison school calendar, the teachers had 72 working days from September 4, 2018 through December 31, 2018. The school was closed to both students and staff for 13 days: November 5, 2018 through November 9, 2018; November 22 and 23, 2018; and December 24, 2018 through December 31, 2018. (CPD Cert., Exhibit 1 at A.)

In support of its decision to prorate Wagner's wages, the Board relied upon Board Policy 6510 which authorizes withholding of salary or wages for services not provided. (CPD Cert., Exhibit 1 at D.)

The Association maintains that the Board unilaterally changed the terms of Wagner's employment to a per diem employee in violation of N.J.S.A. 18A:27-6 and reduced the salary of a tenured employee in violation of N.J.S.A. 18A:6-10.

LEGAL DISCUSSION

Summary decision may be rendered in an administrative proceeding if the pleadings, discovery and 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. 1:1-12.5(b). The standard to be applied in deciding a motion pursuant to N.J.A.C. 1:1-12.5(b) is essentially the same as that governing a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121, (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533.

A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, 142 N.J. at 528-29. When making a summary decision, the "judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540.

Here, the parties agree that there are no material issues of fact in dispute, and both have filed cross-motions for summary decision. After careful review of the record, I am satisfied that the material facts giving rise to this matter are not in dispute and that this matter can be decided as a matter of law. Accordingly, I **CONCLUDE** that it is appropriate to decide this matter by way of summary decision.

N.J.S.A. 18A:28-1 to -18 defines the conditions under which teaching staff members are entitled to the security of tenure. Tenure is a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), certif. denied, 371 U.S. 956 (1963). These statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). They are "designed to aid in the establishment of a competent and efficient school system by

affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

Wagner's claim springs from N.J.S.A. 18A:6-10, which provides as follows:

> No person shall be dismissed or reduced in compensation,
>
> > (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
> >
> > . . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Similarly, N.J.S.A. 18A:28-5 provides that teachers who are under tenure shall not have their compensation reduced except for inefficiency, incapacity, or unbecoming conduct.

Wagner was a tenured teacher with thirty years' experience. At its August 20, 2018 meeting, the Board approved Wagner's notice of retirement, effective January 1, 2019. At the start of the 2018-2019 school year, Wagner's salary was $76,594. In accordance with N.J.S.A. 18A:27-6(3), Wagner was required to be paid in equal semimonthly or monthly installments. As stated, Wagner was paid in semimonthly installments through the first installment in December 2018. Without prior notification, Wagner's paycheck for the second installment in December 2018, was reduced by $1,146.86.

Without addressing the requirement set forth in N.J.S.A 18A:27-6(3) that a teacher's salary be payable in equal semimonthly installments, the Board maintained that Wagner was appropriately paid for services rendered in accordance with Board Policy, 6510, Payroll Authorization. (CPD Cert., Exhibit 1 at C.) The Board relied on one sentence in the policy which states that "[t]he School Business Administrator/Board Secretary is authorized to withhold salary or wages for services not rendered, in accordance with Board policy." The next sentence in the policy states that "[s]taff members shall be paid in accordance with the provision in their collective bargaining agreement and/or in accordance with a schedule provided to all employees prior to the beginning of the contract or school year." There is nothing in the record to suggest that Wagner failed to perform teaching services on each day that school was in session from the beginning of the school year until December 31, 2018. The Board never articulated what services Wagner failed to render. The Board is attempting to use Board Policy 6510 as justification for changing the terms of Wagner's contract of employment from a salary paid on equal installments to per diem. Without articulating which services Wagner failed to render, the Board cannot use this policy as a justification for withholding earned wages. Therefore, I **CONCLUDE** that Board Policy 6510 did not provide any basis for the Board's action in prorating Wagner's final paycheck.

The Board simply ignored the statutory language requiring salary payments to be paid in equal semimonthly installments. There is nothing discretionary or ambiguous about N.J.S.A. 18A:27-6(3) and its requirement. The Board did not maintain that its prior installment payments of $3,829.70 were in error. Rather, the Board maintained that its actions were justified because of Wagner's early termination from her contract. Yet, the Board approved Wagner's retirement date in August 2018, and issued semimonthly installment payments based on her contract amount for the next three and one-half months. In contradiction to the Board's argument, Wagner was paid her full salary installments for the month of November 2018, when there were only fifteen teaching days. Wagner received her full contractual pay for each month that she worked until her last payment when she was docked for the days when school was not in service.

To accept the Board's reasoning would lead to illogical results. Would a tenured teacher who had to resign mid-year for health or personal reasons be required to pay

back the money she already earned? The Board's actions herein, interfered with Wagner's earned contractual rights not a prospective right. Consequently, the Board's reliance on New Jersey Ass'n of Sch Adm'rs v. Schundler, 211 N.J. 353 (2012), is unfounded. In Schundler, the New Jersey Supreme Court reiterated a well settled principal that the Legislature and the Commissioner of Education may enact **prospective** legislation that modifies the terms and conditions of public service. Such reasoning has no bearing on the Board's actions herein. The Board's decision affected Wagner's contractual right to her earned salary. This modification to her existing salary did not stem from a policy, was not negotiated through a collective bargaining agreement, and cannot be justified under exiting law.

The Legislature made the policy decision to limit how compensation could be reduced when it enacted the tenure statutes. N.J.S.A. 18A: 28-5 provides that tenured teachers during good behavior and efficiency, shall not have their compensation reduced without just cause. Likewise, N.J.S.A. 18A:6-10 provides that a tenured teacher's compensation shall not be reduced during good behavior and efficiency.

As sited by the Association, the Commissioner of Education reviewed a similar issue in the matter of Diane M. Tucker, Petitioner, v. Board of Education of Montgomery Township, Somerset County, Respondent, 234-7/03, 2005 WL 1794528 (N.J. Adm. June 20, 2005). In Tucker, the Commissioner of Education adopted the initial decision and concurred with the ALJ that the applicable statute, N.J.S.A. 18A:28-5, required that teachers' salaries, including those of tenured teachers and teachers who work less that a full year, be calculated on the basis of monthly or semimonthly pay periods. The Board of Education of Montgomery Township had recalculated Mrs. Tucker's semi-monthly salary on a per diem basis which caused her to suffer a reduction in compensation. The issue in Tucker was not retirement but maternity leave, however, the reasoning by the ALJ and the Commissioner is illustrative. With Board approval, Ms. Tucker had structured her maternity leave so that she would return to work on April 16, 2003, the first day of the pay period and the day before spring recess. Following the school recess, Ms. Tucker returned to work on April 28, 2003, for the last three days of the pay period. Consequently, Ms. Tucker worked every single day the school was open. The ALJ concluded that the Board's recalculation of Ms. Tucker's semi-monthly salary on a per

diem basis by failing to pay her for the spring recess constituted an improper reduction in compensation in violation of N.J.S.A. 18A:28-5. The Commissioner of Education agreed. The Commissioner ordered the Board to pay Ms. Tucker $1,310.40, representing the difference between the salary payment she was owed and what she received on a per diem basis. Further, the Commissioner stated that N.J.S.A. 18A:27-6(3) precludes a board from adjusting the contracted salary installment for a teacher who has worked each day during the period that teaching staff members were required to report to work. There is no difference between what the Board attempted to do in Tucker and what the Board is attempting to do herein. Wagner worked each day from the start of the school year until December 31, 2018, that teaching staff members were required to work and she should be compensated accordingly. The Board adjusted her salary while she was still employed so the argument that Wagner was in the process of retiring is of no import.

For the reasons expressed above, I **CONCLUDE** that the Board's recalculation of Wagner's semi-monthly salary by deducting $1,146.86 to reflect a per diem basis of pay constituted an improper reduction in compensation in violation of N.J.S.A. 18A:28-5 and 18A:6-10. I further **CONCLUDE** that Wagner was entitled to receive her full semi-monthly salary of $3,829.70 for the second pay period in December 2018.

The Board's actions in unilaterally converting Wagner's salary from equal semimonthly installments to a per diem rate of pay violated N.J.S.A. 18A-27-6(3) and constituted an improper reduction in compensation in violation of N.J.S.A. 18A:28-5 and 18A:6-10. In this instance, I **CONCLUDE** that the Board's actions were arbitrary and capricious. The Board acted to reduce a retiring tenured teacher's salary without any basis in law, policy, or agreement.

Based upon the foregoing, I **CONCLUDE** that the Board's recalculation of Wagner's semi-monthly salary on a per diem basis constituted an improper reduction in compensation and must be overturned.

CONCLUSION

The Association's motion for summary decision is **GRANTED** and the Board's cross-motion for summary decision is **DENIED.**

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

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

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

Kathleen M. Calemmo

February 20, 2020
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/tat

APPENDIX

LIST OF EXHIBITS

For petitioner:

Certification of Cosmas P. Diamantis, Esq.

Exhibit 1 – Petition of Appeal with attachments: Exhibit A – 2018-2019 South Harrison School Calendar; Exhibit B – Grievance Form; Exhibit C – February 12, 2019, letter from Dr. Lavender; Exhibit D – 6510 Payroll Authorization Policy; Exhibit E – Association's Grievance Form; and Exhibit F – February 29, 2019, Board's response.

Exhibit 2 – CBA

For respondent:

Certification of Counsel, incorporating by reference, Exhibits to Certification of Cosmos P. Diamantis, Esq.

101-20
OAL Dkt. No. EDU 2771-16
Agency Dkt. No. 15-1/16

New Jersey Commissioner of Education

Final Decision

Deborah Moore,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

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

Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 3 of the Agreement makes reference to an action that was to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon a mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2020
Date of Mailing: March 17, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2771-16

AGENCY DKT. NO. 15-1/16

DEBORAH MOORE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

Michael Berman, Esquire, for petitioner

Michael A. Pattanite, Jr., Esquire, for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, LLC, attorneys)

Record Closed: March 2, 2020 Decided: March 2, 2020

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 24, 2016, 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 (C-1) indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes and does not require Board approval.

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

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

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

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

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

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

March 2, 2020
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 3/5/2020

Date Mailed to Parties: 3/3/2020

mph

APPENDIX

EXHIBITS

For the Court

C-1 Settlement Agreement

LENOX, SOCEY, FORMIDONI, GIORDANO, LANG, CARRIGG & CASEY, LLC
Michael A. Pattanite, Jr. Esq. No. 019212010
136 Franklin Corner Road, 2B
Lawrenceville, New Jersey 08648
(609) 896-2000

Attorney(s) for: Hamilton Township Board of Education

Deborah Moore, Petitioner, v. Hamilton Township Board of Education, Respondents.	Before the New Jersey Department of Education, Commissioner of Education New Jersey Office of Administrative Law **OAL Docket No. EDU 02771-2016** **Agency Ref. No.: 15-1/16** **SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**

RECEIVED
2020 MAR -2 A 9:55
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Settlement Agreement and General Release (the "Agreement") has been stipulated to and agreed upon by and between Deborah Moore individually, and the Hamilton Township School District (the "Board" or "District") as a resolution to a controversy submitted in the form of a due process petition that was filed before the Department of Education, Office of Controversies and Disputes, and transmitted to the Office of Administrative Law for a hearing captioned under OAL Docket Number EDU 20771 - 16 / Agency Ref. No.: 15-1/16 (Petitioner, and the Board, hereinafter the "Parties").

This Agreement is the written form of the material terms of the agreement between the parties to resolve any and all disputes founded in the referenced Petition, and all other issues between the parties from the beginning of time through the date of this Agreement.

1. The District agrees to resolve the instant litigation, including all claims ever brought by the Petitioner against the Respondent, by payment of nineteen thousand dollars ($~~$19,000~~.00) to the Petitioner, Deborah Moore.

2. In consideration of the payment made to Petitioner, Deborah Moore, she agrees to the dismissal with prejudice of the instant litigation, and the terms of the release and settlement agreement set forth herein

3. Payment of the settlement funds referenced in paragraph 19 will take place after the Board of Education ratifies this agreement at its next regularly scheduled Board of Education meeting. This agreement is made without prejudice to either party should the Board reject the contents of the agreement.
4. The settlement check will be forwarded by the District to the Petitioner and will include in the memo portion of the check "settlement of litigation."
5. The Parties waive and release any claims they may have including but not limited to bodily injury, personal injury, sick time, accrued vacation time, any other wage loss or other loss stemming from her employment with the Hamilton Township Board of Education from the beginning of time until the date of the execution of this agreement by all parties.
6. This Agreement is made without any admission of liability or responsibility by any Party hereto and shall not be construed as an admission by the District that its actions were not at all times appropriate.
7. The parties agree they are responsible for their own attorney' fees and legal expenses. The parties agree there is to be no prevailing party or other attorney's fee claim made in reference to this matter.

8. Liens. It is further understood that as a condition of the settlement, all claims and/or liens, past, current and/or future arising out of the settlement or asserted against the proceeds of the settlement are to be satisfied by Releasor and/or their Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Releasor(s) therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and attorneys fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of the Agreement and Releasor(s) and their Attorneys agree to pay all costs, interest and attorneys fees relative to any such lien.

9. The Parties acknowledge they have read and understand the terms of this Agreement, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

10. Petitioner represents she has the sole authority to enter into this Agreement on her behalf.

11. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

12. This Agreement may only be amended in writing by way of a document signed by all Parties.

FOR PETITIONER:

BY: Deborah Moore DATED: October 28, 2019
Deborah Moore

HAMILTON TOWNSHIP BOARD OF EDUCATION

BY: Susan Lombardo DATED:
Susan Lombardo
Board President

BY: _____ DATED:

HAMILTON TOWNSHIP SCHOOL DISTRICT

RESOLUTION AUTHORIZING SETTLEMENT WITH Former Employee Deborah Moore PURSUANT TO N.J.A.C. 6A;3-1.13(d)

December 18, 2019

WHEREAS, N.J.A.C. 6A:3–1.13(d) requires that a Board of Education provide a resolution authorizing settlement indicating that the district board of education has consented to the terms of the settlement;

BE IT RESOLVED, that the Board hereby consents to settlement with **Deborah Moore** pursuant to the terms of the Release and Settlement Agreement attached hereto and authorizes the Board of Education President, **Mrs. Susan Lombardo** to execute the Agreement on behalf of the Board.

Resolution passed by vote of:

8 Aye

0 Nay

0 Abstain

Katherine Attwood

Katherine Attwood
Business Administrator\Board Secretary

RECEIVED
2020 MAR -2 A 9:55
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

102-20

OAL Dkt. No. EDU 17302-19
Agency Dkt. No. 287-10/19

New Jersey Commissioner of Education

Final Decision

T.D., on behalf of minor child, T.D.,

Petitioner,

v.

Board of Trustees of the Achieve Community Charter School, Essex County,

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the respondent's motion to dismiss should be granted. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 3/27/2020
Date of Mailing: 3/30/2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 17302-19
AGENCY DKT. NO. 287-10/19

T.D. ON BEHALF OF MINOR T.D.,
Petitioner,
v.
BOARD OF TRUSTEES OF THE ACHIEVE COMMUNITY CHARTER SCHOOL, ESSEX COUNTY,
Respondent.

T.D., petitioner, pro se

Thomas O. Johnston, Esq., for respondent (Johnston Law Firm, attorneys)

Record Closed: January 31, 2020 Decided: February 28, 2020

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a Petition with the New Jersey Department of Education, Office of Controversies and Disputes on October 24, 2019. Respondent, Board of Trustees of the Achieve Community Charter School (respondent or Board) filed a Motion to Dismiss In

Lieu of an Answer on December 5, 2019. The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 10, 2019 as a contested case.

A prehearing conference was held on January 15, 2020, at which time a briefing schedule was established to allow petitioner an opportunity to file an opposition to the respondent's Motion to Dismiss. During the prehearing conference, petitioner was given until January 24, 2020 to file an opposition to respondent's Motion to Dismiss. While he was offered additional time to file an opposition, he declined and insisted on the January 24, 2020 deadline. Respondent was given until January 31, 2020 to file a reply to any opposition to the motion. As of the date this order was signed, petitioner has not filed an opposition to the respondent's Motion to Dismiss and never contacted the undersigned to request additional time to file an opposition.

FACTUAL DISCUSSION

Respondent filed a Motion to Dismiss in Lieu of an Answer seeking to dismiss the Petition on the basis that the Commissioner of Education lacks jurisdiction to address petitioner's claims.

Petitioner's son, T.D., is a student at Achieve Community Charter School (Achieve). Petitioner alleges that the Board improperly filed in T.D.'s school record a custody order dated April 17, 2019. According to respondent, this custody order was provided to the Board by T.D.'s mother, D.Q. Petitioner essentially alleges in the Petition that respondent improperly filed the custody order in T.D.'s school record "without due process and not with probable cause." The Petition asserts that the respondent's handling of the child custody order (referenced in the petition as "a petition") violates "New Jersey State and Supreme Law 18 U.S.C. § 241 as well as NJ Judiciary Rules of court." The Petition also appears to allege that the custody order is invalid and "excluded validated proof of registry of a certified issuance of a lawful judicial order furnished and stamped by an Essex County New Jersey clerk, a court issued affidavit signed by an Hon. Essex County Superior Court Judge in Support of such issuance in a court of record to be used after due process of law as probable cause for filing of such a claim."

The April 17, 2019 custody order attached to respondent's motion was signed by a New Jersey Superior Court Judge and reads in part: "NF shall not remove minor child from school or after school program without the consent of NM. NM shall notify the school on the day that NF can pick-up or remove the minor child from school."[1] The Order indicates that petitioner did not present to the hearing that resulted in the Order but was properly notified.

Respondent moves to dismiss this Petition on the basis that the Commissioner of Education lacks jurisdiction over this matter because the school laws do not bestow on the Commissioner authority to decide child custody matters, or to enforce child custody orders, and petitioner's claim is that the Board is not correctly complying with a child custody order. Moreover, the Board does not have the authority to disregard a custody order that is valid on its face, and the Commissioner does not have the authority to enforce or amend an order issued by the Superior Court. Respondent, therefore, asserts that the Petition should be dismissed.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 3:1.10 provides, in relevant part:

> At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason. Id.

"To exercise jurisdiction over a dispute, an administrative agency must have specific legislative authority." Dolan v. Centuolo, Nos. A-2470-10T4, A-2710-10T4, at *11 (App. Div. July 9, 2012), http://njlaw.rutgers.edu/collections/courts/ (citing Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 426 (App. Div. 2002)). Pursuant to N.J.S.A. 18A:6-9, the Commissioner of Education

[1] Respondent maintains that NF refers to petitioner and NM refers to the student's mother, D.Q. A copy of the custody order was attached to respondent's Motion to Dismiss.

> shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner . . .
>
> [N.J.S.A. 18A:6-9 (emphasis added).]

The issue here is whether the Petition advances a cause of action that falls within the Commissioner's jurisdiction if I accept petitioner's factual allegations (as expressed in the Petition) as true. Here, the Petition challenges respondent's handling of, and compliance with, a child custody order that, in part, limits his ability to pick up or remove his son, T.D., from school. The legal controversy here is not one that arises under the school law or State Board regulations, and the Petition does not cite to any school law that governs custody orders. While the Commissioner has broad authority over school-related matters, he does not have jurisdiction over child custody disputes, nor the authority to interpret, enforce, or determine the validity of child custody orders. Therefore, based on my review of the Petition, respondent's Motion to Dismiss, and applicable law, I **CONCLUDE** that, even if accepting as true all of petitioner's factual allegations, the Petition does not suggest any claim for which relief can be granted by the Commissioner of Education. For the foregoing reasons, I, therefore, **CONCLUDE** that the respondent's Motion to Dismiss should be **GRANTED.**

ORDER

It is hereby **ORDERED** that respondent's Motion to Dismiss should be **GRANTED**. It is further **ORDERED** that 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 days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

February 28, 2020
DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

103-20

OAL Dkt. No. EDU 15423-19
Agency Dkt. No. 262-9/19

New Jersey Commissioner of Education

Final Decision

Y.S., on behalf of minor children, J.C.G. and S.G.,

Petitioner,

v.

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

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled February 18, 2020 OAL hearing, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/2020
Date of Mailing: 3/30/2020

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

104-20

OAL Dkt. No. EDU 1408-20
Agency Dkt. No. 3-1/20

New Jersey Commissioner of Education

Final Decision

F.P., on behalf of minor child, X.P.,

Petitioner,

v.

Board of Education of the Township of Saddle Brook, Bergen County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/2020

Date of Mailing: 3/30/2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01408-20
AGENCY DKT. NO. 3-1/20

F.P. ON BEHALF OF X.P.,

Petitioners,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF SADDLE BROOK,
BERGEN COUNTY.

Respondent.

F.P., petitioner on behalf of X.P., appearing pro se

Jessika Kleen, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: March 4, 2020 Decided: March 5, 2020

BEFORE **JULIO C. MOREJON**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 29, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

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

2. Petitioner has agreed to withdraw this appeal.

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

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

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

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

March 5, 2020
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: March 5, 2020

Date Mailed to Parties:

lr
Attachment

F.P. o/b/o X.P

EDU 01408-20

v.

Saddle Brook Board
of Education

Stipulation of Agreement

In order to fully resolve their residency appeal captioned above, the Parties hereby agree as follows:

1. X.P. will submit to a psychiatric evaluation by Dr. Fridman before returning to Saddle Brook High School;
2. X.P. will have to be cleared by Dr. Fridman as safe to return to school before he will be permitted to return to school or/and school activities.
3. Once X.P. is cleared by Dr. Fridman, he may return to Saddle Brook high school to complete English and health classes, which are all that are left for him to complete prior to graduation
4. X.P. will continue to recieve home instruction until he is cleared to return to school.

5. The District will permit X.P. to return to Saddle Brook high school despite the contested residency status.
6. F.P. will withdraw this appeal of the District's residency determination.
7. This agreement resolves all matters between the parties.

F.P. _____
Parent

X. P. _____
Student

X _____
Jessika Kleen, Esq.
For the Board

X _____
X _____
X _____

1A. If Dr. Fridman is unable to see X.P. by March 12, 2020, the parties agree that X.P. can see an alternative, mutually agreed upon psychiatrist.

105-20

OAL Dkt. No. EDU 11811-19
Agency Dkt. No. 182-7/19

New Jersey Commissioner of Education

Final Decision

H.L., on behalf of minor child, O.C.,

Petitioner,

v.

Board of Education of the Borough of Fairlawn, Bergen County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/20

Date of Mailing: 4/24/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11811-19
AGENCY DKT. NO. 182-7/19

H.L. ON BEHALF OF O.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY.
Respondent.

H.L., petitioner on behalf of O.C., appearing pro se

Paul Green, Esq., for respondent (Schenck Price Smith & King, LLP, attorneys)

Record Closed: March 10, 2020 Decided: March 10, 2020

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 27, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

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

2. Petitioner has agreed to withdraw this appeal.

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

4. Board Resolution attached.

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

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

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

March 10, 2020
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: March 12, 2020

Date Mailed to Parties: 3/12/20

lr
Attachment

cD 3/10

Schenck Price

SCHENCK PRICE SMITH & KING, LLP

Serving Our Clients and Community For Over 100 Years

Paul H. Green
Admitted in NJ
Direct Line: 973-540-7305
Email: phg@spsk.com
220 Park Avenue
PO Box 991
Florham Park, NJ 07932
Telephone: 973-539-1000
Fax: 973-540-7300

www.spsk.com

March 6, 2020

Via Federal Express
Hon. Danielle Pasquale, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: H.L. o/b/o O.C. v. Fair Lawn Board of Education
OAL Dkt. No.: EDU 11811-2019-N

Dear Judge Pasquale:

As you know we represent the Fair Lawn Board of Education in the above referenced matter. Enclosed for filing, please find an original and one copy of a fully executed Stipulation of Settlement and Board Resolution. Kindly return one copy stamped "filed" in the self-addressed stamped envelope provided.

Should you require anything further, please do not hesitate to contact me. Thank you.

Very truly yours,
SCHENCK, PRICE, SMITH & KING, LLP

Paul H. Green

PHG/rmr
Enclosure
cc: Mr. Harikrishan Lal

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Respondent,
Fair Lawn Board of Education

H.L., o/b/o minor child, O.C., *Petitioner*, *v.* BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY, *Respondent.*	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO.: EDU AGENCY REF. NO.: 182-7/19

STIPULATION OF SETTLEMENT

This Agreement is made by and between Petitioner, HariKrishan Lal, and the Respondent, Fair Lawn Board of Education ("Board").

RECITALS

WHEREAS, on June 27, 2019, the Board determined, based on the results of a residency investigation, that minor student O.C. was not domiciled in the Fair Lawn School District ("District") and thus not entitled to a free, public education in the District. The Board passed a resolution ordering the removal of the student from the District; and

WHEREAS, Petitioner denied the Board's conclusion concerning O.C.'s residency in the District and appealed the Board's determination; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, agree to adopt a full and final

settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation;

NOW, THEREFORE, for good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. Petitioner shall pay the Board the sum of Five Hundred Dollars ($500.00) in full and final settlement of all claims by the Board regarding O.C.'s eligibility for a free public education in the Fair Lawn School District.
2. The $500 payment will be made within fifteen (15) days after approval of this Agreement by the Administrative Law Judge and Commissioner of Education. Payment shall be made in the form of a check made payable to the "Fair Lawn Board of Education," hand-delivered or mailed to the office of Ms. Brooke Bartley, School Business Administrator/Board Secretary, at the District administrative offices, 37-01 Fair Lawn Avenue, Fair Lawn, New Jersey 07410.
3. Petitioner, in consideration of this Stipulation of Settlement, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal and/or dismissal, with prejudice, of the Petition of Appeal in this matter.
4. Petitioner further agrees to indemnify the Board for any and all costs, including court costs and attorneys' fees, associated with any action instituted by the Board to enforce the terms of this Agreement should Petitioner fail to make payment as required hereunder.
5. The Board agrees that, so long as Petitioner and O.C. continue to reside in Fair Lawn, O.C. will be permitted to continue attendance in the Fair Lawn School District with the full rights and privileges of a Fair Lawn Public School District student, and upon

completion of graduation requirements will be eligible for a Fair Lawn High School diploma and to participate in the graduation ceremony.

6. This Agreement is subject to approval by the Fair Lawn Board of Education. If approved, the Board President and/or Business Administrator is/are fully authorized to execute this Agreement on behalf of the Board.

7. This Agreement is entered into for purposes of resolving contested claims and shall not constitute an admission of wrongdoing by any party.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

9. Petitioner hereby represents that he is freely entering into this Agreement, that he was advised of his right to obtain counsel of his choosing and has knowingly waived that requirement, and that he has read and fully understand the contents of this Agreement.

10. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

11. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

12. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or

understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below.

PETITIONER

Date: 1/1/2020

HariKrishan Lal

FOR RESPONDENT,
FAIR LAWN BOARD OF EDUCATION

Date: 12/19/19

Fair Lawn Public Schools

Brooke Bartley
Business Administrator/Board Secretary

37-01 Fair Lawn Avenue
Fair Lawn, New Jersey 07410
Tel: (201)794-5500 x 7091
Fax: (201)703-4630
E-mail:bbartley@fairlawnschools.org

Resolved, that the Fair Lawn Board of Education approves the Stipulation of Settlement in the controversy filed under OAL Docket No. EDU 11811-2019-N, Agency Ref. No. 182-7/19, and authorizes its Business Administrator/Board Secretary to execute the same on behalf of the Board for submission to the Administrative Law Judge assigned to this controversy.

This is to certify that the resolution listed above is a true and accurate copy of such resolution as it appeared on the November 25, 2019 Re-scheduled Monthly Meeting.

Brooke Bartley
Business Administrator/Board Secretary

106-20

OAL Dkt. No. EDU 16045-18
Agency Dkt. No. 253-9/18

New Jersey Commissioner of Education

Decision

N.U., on behalf of minor child, M.U.,

Petitioner,

v.

Board of Education of the Town of Mansfield, Burlington County,

Respondent.

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

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by M.U. The Board found that M.U. had committed an act of HIB and imposed an in-school suspension. Following the presentation of petitioner's case at a hearing, the ALJ granted the Board's oral motion to dismiss.

Upon review, the Commissioner disagrees with the ALJ's conclusion that the Board's motion for summary decision should be granted. The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender

[1] The record did not include a transcript of the hearing held at the OAL.

> identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB under the Act requires three elements.[2] First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that *one* of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20, decided February 4, 2020.

The letter to N.U. from the school's principal, which the Board affirmed in its decision, indicates that the investigation found evidence of the first element – that M.U.'s conduct was reasonably perceived as being motivated by another student's distinguishing characteristic. However, the letter does not provide any information regarding the remaining

[2] The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. This element appears to have been satisfied in this matter.

elements required to prove an act of HIB. Nor does the Initial Decision address these elements of the statute.

The Commissioner is mindful that when a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). However, in the instant case, the Commissioner cannot determine whether the decision was arbitrary, capricious, or unreasonable based on the current record.

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2020
Date of Mailing: April 24, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 16045-18
AGENCY DKT. NO. 253-9/18

N.U. ON BEHALF OF M.U.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF MANSFIELD, BURLINGTON COUNTY,
Respondent.

Megan A. Oduyela, Esq. appearing for petitioner

Marc G. Mucciolo, Esq. appearing for respondent, (Methfessel & Werbel, P.C. attorneys)

Record Closed: March 3, 2020 Decided: March 10, 2020

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, N.U. on behalf of her minor child, M.U., challenges respondent's, Board of Education of the Town of Mansfield, Burlington County (Board) Harassment Intimidation and Bullying (HIB) determination relative to M.U.

PROCEDURAL HISTORY

The petitioner filed a challenge of the Board's HIB determination and requested a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL on November 2, 2018, where it was filed on November 5, 2018, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The petitioner filed an amended petition with the OAL on February 21, 2019. The Board filed its answer to the amended petition on March 11, 2019. The fair hearing was conducted on March 3, 2020. At the close of the petitioner's case, counsel for the respondent made an oral motion to dismiss the petition.

FACTUAL DISCUSSION AND FINDINGS

The following facts of this case are not in dispute; therefore, I **FIND** as **FACT** that on December 11, 2017, M.U. was eleven years old and in the sixth grade. On that date, he approached a fellow classmate who had just gotten a haircut and said that he looked like Donald Trump. The classmate took offense to the comment and the incident was reported. A HIB investigation was conducted at it was determined that M.U.'s conduct towards his classmate constituted HIB.

LEGAL ANALYSIS AND CONCLUSION

The Administrative Code does not provide guidelines for a motion to dismiss. However, pursuant to N.J.A.C. 1:1-1.3, in the absence of a specific rule, an administrative law judge may proceed in accordance with the New Jersey Court Rules, provided that the rules are compatible with the matter at hand.

Pursuant to N.J. Ct. R. 4:37-2(b), the test on a motion for involuntary dismissal has been characterized as follows: whether the evidence and legitimate inferences therefrom could sustain a judgment in favor of the claimant, that is, whether reasonable minds could differ on the evidence. If so, the motion must be denied. Dolson v. Anastasia, 55 N.J. 2, 258 A.2d 706 (1969).

A motion for involuntary dismissal under N.J. Ct. R. 4:37-2(b) is also comparable to a motion for directed verdict or judgment of acquittal under N.J. Ct. R. 3:18-1, and the standard for deciding both motions is the same. Accepting as true all the evidence that supports the position of the claimant and affording the benefit of all inferences that can be deduced therefrom, if reasonable minds could differ the motion must be denied.

Pursuant to N.J. Ct. R. 3:18-1, at the close of the State's case or after the evidence of all parties has been closed, the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction. As to the standard to be applied in determining such a motion, the following classic statement found in State v. Reyes, 50 N.J. 454 (1967) remains fully viable:

> . . . the question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge. . . .

Petitioner challenges the determination of the Board that M.U.'s conduct towards his classmate constituted HIB.

New Jersey enacted the Anti-Bullying Bill of Rights Act (Act) to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing

> characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > (b) has the effect of insulting or demeaning any student or group of students; or
> >
> > (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Petitioner alleges that the HIB investigation was conducted improperly and was incomplete. Petitioner urges this tribunal to conclude that there was no HIB and that the HIB investigation was conducted improperly and was incomplete therefore the determination should be reversed.

The Board urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that M.U.'s conduct did constitute HIB.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by

improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it.

Based on the whole of the credible evidence presented, I **CONCLUDE** that petitioner has not met her burden of proof that the Board acted in an arbitrary, capricious or unreasonable manner in concluding that M.U.'s actions constituted harassment, intimidation or bullying under the Act. Furthermore, I **CONCLUDE** that the petitioner failed to demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

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

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

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

March 10, 2020
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JRW/tat

APPENDIX

WITNESSES

For Petitioner:

N.U.

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

107-20E

OAL Dkt. No. EDU 03599-20
Agency Dkt. No. 64-3/20

New Jersey Commissioner of Education

Order on Emergent Relief

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

Petitioner,

v.

Board of Education of the Borough of Paulsboro, Gloucester County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 4/24/20
Date of Mailing: 4/27/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 03599-20
AGENCY DKT. NO. 64-3/20

B.B. ON BEHALF OF MINOR CHILD,
A.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF PAULSBORO,
GLOUCESTER COUNTY,
Respondent.

B.B. for petitioner, pro se

Stephen J. Edelstein, Esq., for respondent (Weiner Law Group, L.L.P., attorneys)

Record Closed: March 17, 2020 Decided: March 17, 2020

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

B.B. (petitioner) on behalf of her minor daughter, A.S. brings an action for emergent relief against the Board of Education of the Borough of Paulsboro, Gloucester County (respondent), seeking an order for all of her daughters to attend another school, of the petitioner's choice, where they can participate in spring track and be able to start

competing immediately. Petitioner argues that the HIB investigation was conducted improperly and was incomplete therefore the determination will be flawed.

The respondent opposes the relief requested and asserts that the petitioner's application is legally defective as none of the arguments in their petition provide a basis to grant the requested emergent relief. The respondent argues that the petitioner cannot satisfy any of the mandatory prerequisites outlined in Crowe v. DeGoia, 90 N.J. 126 (1982).

PROCEDURAL HISTORY

Petitioner filed a request for emergent relief on March 10, 2020, at the New Jersey Department of Education (NJDOE). On March 10, 2020, the NJDOE transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioner. A telephonic status conference was held on March 12, 2020.

Pursuant to Executive Order 104, Issued by Governor Philip D. Murphy on March 16, 2020, relative to the outbreak of coronavirus COVID-19:

> All public, private, and parochial preschool program premises, and elementary and secondary schools, including charter and renaissance schools, shall be closed to students beginning on Wednesday, March 18, 2020, and shall remain closed as long as this Order remains in effect.

Accordingly, Paulsboro Public Schools closed March 17, 2020, and the Gloucester County Institute of Technology closed March 16, 2020. Therefore, the parties presented oral argument on the emergent relief application telephonically, on March 17, 2020, and the record closed.

FACTUAL DISCUSSION

Petitioner, B.B., is the mother of A.S. A.S. is one of three sisters. Although they all reside in Paulsboro, New Jersey, neither A.S. nor her sisters attend school at the

Paulsboro High School. They all attend Gloucester County Institute of Technology (GCIT). Because GCIT does not have a girl's track team, A.S. participates in the Paulsboro High School track program.

In her Petition of Appeal, the petitioner avers that on October 22, 2019, she received a letter from her daughter, A.S., in which A.S. stated she wanted to kill herself due to the alleged actions of her track coach/teacher during the previous school year's track season. On October 30, 2019, the petitioner informed the Superintendent of A.S.'s letter and expressed her concerns relative to the track team's coaching personnel. The Superintendent related that he would investigate the situation.

During this time, A.S. was removed from school on two occasions for psychiatric evaluation due to her suicidal ideations. Mobilization services were secured through PerformCare[1]. A.S. continues to receive weekly sessions with her licensed therapist.

On or about January 21, 2020, the Superintendent informed the petitioner that a "HIB-like" investigation had been conducted. Not satisfied with this response, on January 23, 2020, the petitioner submitted a written request for a full HIB investigation. The HIB investigation was not completed until February 21, 2020. The petitioner was informed that she will receive the formal results of the investigation after the Board's meeting on March 30, 2020; however, she was informed verbally that HIB was unfounded. The petitioner contends that though HIB may have been unfounded, the aforementioned conduct of the track coach/teacher constitutes conduct unbecoming a coach/teacher. No student should be made to feel negative about themselves to the extent that they want to commit suicide.

The petitioner argues that if completed pursuant to the ten-day rule, the HIB investigation should have appeared on the Board's February 10, 2020, agenda because other HIB investigations were listed on the Board's agenda with incident dates close in time to the date of her request for a HIB investigation.

[1] PerformCare partners with the New Jersey Children's System of Care (CSOC) to coordinate the care of children with behavioral, mental health or emotional challenges to gain access to the services they need.

The petitioner urges that emergent relief must be granted because the spring track season is about to commence. Her children should not have to miss out on opportunities to participate due to the coach/teacher remaining in that position.

The petitioner and her family are seeking a unilateral, out-of-district placement for all of petitioner's daughters and a waiver of the New Jersey State Interscholastic Athletic Association's[2] (NJSIAA) transfer rules that would permit her daughters to participate in a full season of spring track a program at the school they select.

The respondent opposes the relief requested and asserts that the petitioner's application is legally defective as none of the arguments in their petition provide a basis to grant the requested emergent relief.

LEGAL ANALYSIS AND CONCLUSION

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. These standards for emergent relief include 1.) that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted; 2.) the existence of a settled legal right underlying the petitioner's claim; 3.) that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and 4.) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner bears the burden of satisfying all four prongs of this test. Crowe v. DeGoia, 90 N.J. at 132–34.

The petitioner argues that irreparable harm is established because she will not receive the formal results of the HIB investigation until after the Board's meeting on March 30, 2020. By that time, the spring track season will be two-thirds completed. This would impact all of her children, not just A.S. It would impact their psychological well-being and all aspects of their lives. It would impact her children's' ability to fully participate in track events which will result in the loss of opportunities for colleges to evaluate and assess their athletic potential on the next level versus immediate participation in a full season.

[2] The New Jersey State Interscholastic Athletic Association (NJSIAA) is an association of hundreds of New Jersey high schools that regulates high school athletics and holds tournaments and crowns champions in high school sports

Here, there has been no showing of irreparable harm to the petitioner, A.S. or any of the petitioner's other children. A.S. and her siblings have not been precluded from trying out for and/or participating in the Paulsboro spring track program. Furthermore, pursuant to Executive Order 104, there may not be any spring sports programs at the high school level in the State.

The petitioner alleges that the Board was derelict for the perceived delay in completing its HIB investigation; but it must be noted that the petitioner waited more than a week after receiving her daughter's letter to contact the superintendent. It was not until three months after receiving her daughter's letter that she filed a formal HIB complaint. In light of the aforementioned, I **CONCLUDE** that the petitioner has not met her burden of establishing irreparable harm.

The next prongs of the Crowe test to be addressed are the existence of a settled legal right underlying the petitioner's claim and that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim. Here, the petitioner's petition fails because she failed to demonstrate a well settled right to the requested emergent relief. Because there is no well settled right to the request emergent relief, there is no likelihood of the petitioner prevailing on the merits of the underlying claim.

In light of the aforementioned, I **CONCLUDE** that the petitioner has not met her burden of establishing the existence of a settled legal right underlying her claim and that the she has a likelihood of prevailing on the merits of the underlying claim.

The final prong of the Crowe test requires a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner failed to demonstrate any harm she or A.S. would suffer if the requested emergent relief is not granted. In contrast, the harm to the District if the requested relief is granted would be considerable. The District has a significant interest in ensuring their investigations are fulsome and complete while ensuring students' continued participation in HIB investigations and encouraging victims to come forward and to speak candidly.

Thus, I **CONCLUDE** that the respondent would suffer greater harm than the petitioner if the requested relief was granted.

I **CONCLUDE** that the petitioner is not entitled to emergent relief because the proofs submitted fail to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there is no showing of an irreparable injury, a settled legal right, the likelihood to prevail on the merits, or that the balance of harm favors the petitioner. The parties have advised me that no other issues remain once the emergent relief is resolved.

ORDER

For the foregoing reasons, it is **ORDERED** that petitioner's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 17, 2020
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: March 17, 2020

Date Sent to Parties: March 17, 2020

JRW/tat

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Pro Se Petition of Appeal, filed March 10, 2020

P-2 Documents emailed from petitioner, received March 16, 2020

For Respondent:

R-1 Respondent's brief and supporting documents, filed March 16, 2020

IN THE MATTER OF THE TENURE ARBITRATION
BETWEEN

SCHOOL DISTRICT OF CAMDEN COUNTY TECHNICAL SCHOOLS, CAMDEN COUNTY, NEW JERSEY,

PETITIONER,

AND

BRETT FETTY,

RESPONDENT.

DOCKET NO. 302-11/19

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

DECISION ON MOTION TO DISMISS

APPEARANCES:

FOR THE DISTRICT:

DAVID C. PATTERSON, ESQ.
MARESSA PATTERSON LLC
191 W. WHITE HORSE PIKE
BERLIN, NEW JERSEY 08009

FOR RESPONDENT:

ANDREW L. SCHWARTZ, ESQ.
SCHWARTZ LAW GROUP, LLC
MONROE CENTER AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831

I. PROCEDURAL BACKGROUND

The School District of the Camden County Technical Schools, Camden County ("District" or "Employer") initiated and the Camden County Technical Schools Board of Education ("Board") certified to the Commissioner of Education tenure charges ("Tenure Charges") seeking the demotion of Brett Fetty ("Respondent" or "Mr. Fetty"), who holds tenure as a Principal within the District. In lieu of an Answer, Respondent on December 10, 2019, timely submitted a Motion to Dismiss ("Motion"). Thereafter, by letter dated December 23, 2019, the Commissioner of Education, through the Office of Controversies and Disputes, referred the

charges to this Arbitrator pursuant to N.J.S.A. 18A:6-16. The Arbitrator conducted a conference call with counsel on December 20, 2019, at which time the parties agreed that full briefing and consideration of the Motion would proceed before further scheduling was undertaken. In anticipation of this process and with the agreement of the parties, the Arbitrator secured approval from the Office of Controversies and Disputes for an extension to June 30, 2020, of the statutory deadline for completion of this proceeding.

In accordance with the schedule agreed to by the parties, Respondent submitted his brief in support of the Motion, the District filed a response, followed by Respondent's brief reply. The District also provided a short sur-reply. All were timely conveyed to the Arbitrator and opposing counsel. In reaching the conclusions and decision herein regarding the Motion, the Arbitrator has given full, fair, and careful consideration to all arguments presented by the parties, the charges and all supporting documents provided by the District, and all authorities and citations offered by the parties.

II. THE CHARGES

The Camden County Technical Schools Board of Education on November 20, 2019, voted to certify to the Commissioner of Education that it had determined that the instant Tenure Charges and the evidence adduced in support by the Superintendent were sufficient, if true, "to warrant the demotion of Brett Fetty from his position as Principal at the Pennsauken Campus of the Technical Schools to an Assistant Principal position and reassignment to the Gloucester Township Campus." The Board conveyed same to the Commissioner of Education, with certification dated November 21, 2019. By letter dated December 23, 2019, the Commissioner, through the Office of Controversies and Disputes, referred the Tenure Charges to this Arbitrator pursuant to N.J.S.A.18A:6-16 for further proceedings and for a final determination.

The Board previously, on October 16, 2019, had certified tenure charges based on the same allegations set forth in the instant Tenure Charges, asserting, as here, that demotion and reassignment were warranted. Respondent in that proceeding also had submitted a motion to

dismiss, although that motion was based upon various technical, procedural shortcomings. Those charges were referred to Arbitrator Arnold H. Zudick, who granted the motion, dismissing the charges without prejudice to the District's right to re-file. *In the Matter of the Tenure Charges of the Camden County Technical Schools against Brett Fetty,* Agency Docket No. 173-7/19. In the Decision on Motion to Dismiss, Arbitrator Zudick held as follows: "The District shall reinstate the Respondent with full back pay and benefits consistent with the above Conclusion." The Conclusion referenced was as follows: "The District shall immediately reinstate the Respondent with full back pay and benefits, as if he were in a principal position, but this Decision is not intended to require the District to return the Respondent to the principal position at the Pennsauken (or at the Gloucester) Campus." Arbitrator Zudick did not hold, as incorrectly described in the District's Introductory Statement to the instant Statement of Charges, that Respondent "was not to be returned to duty as a Principal at either the Pennsauken or Gloucester Township Campus or the Technical Schools." The difference is the subtle but important distinction between what is directed by an arbitrator's ruling versus that which is simply "not required." The dismissal directed that, if the charges were refiled, "the District must provide sworn statements from those staff members it chooses to rely upon." In the Statement of Charges submitted in this proceeding, the District has complied with that directive. These Tenure Charges now are before this Arbitrator.

The District asserts one charge of "unbecoming conduct" and alleges that said conduct was in violation of the District's Policy 3351 – Healthy Workplace Environment as well as Policy 3211 -- Code of Ethics. The District also references "failure in his performance," citing various domains of the Multidimensional Principal Performance Rubric. The District in its Statement of Charges asserts that the allegations constitute "just cause, warranting [Respondent] to be removed from his position as Principal of the Pennsauken Campus with CCTS and re-assigned as an assistant principal at the Gloucester Township Campus with mandatory employee assistance program counseling, as assigned by the manager of human resources/affirmative action officer." The Statement of Charges also states that the conduct unbecoming "warrants an increment withholding for" Respondent. The District, however, clarified in its briefing on the Motion that it had already effectuated this step through a Board resolution and was not seeking a ruling in

this forum regarding the increment. Indeed, the increment withholding is not referenced in the Board's certification of the charges, and the Board voted only that the charges should be preferred against Respondent "for conduct unbecoming and to demote Mr. Fetty from the position of Principal at the Pennsauken Campus of the Technical Schools to an Assistant Principal positions and reassignment to the Gloucester Township Campus of the Technical Schools."

III. THE MOTION TO DISMISS

In the pending Motion to Dismiss, Respondent asserts two arguments. First, Respondent argues that the District failed to follow the investigative protocols of its Healthy Workplace Environment policy, thereby violating its own policy, and thus should have no recourse in this forum. Second, Respondent contends that the District, in seeking to implement a demotion, is inappropriately attempting to use the formal processes of N.J.S.A. 18A-6-10 *et seq.* ("Tenure Law") for "what amounts to be an internal personnel decision."

As to Respondent's first argument, the Arbitrator finds that, while the District relies in large part upon the Healthy Workplace Environment policy in its charges against Respondent, the Tenure Charges do not rest entirely on that policy. Further, whether the processes articulated in the policy were or were not followed is a question of fact that cannot be disposed of without the taking of evidence. For these and other reasons, addressed below, the Arbitrator provides no ruling regarding the use of the processes under that policy and any effect they may have on proceedings under the Tenure Law.

Before turning to Respondent's second, more availing argument, the Arbitrator notes that much of Respondent's Motion is based upon his contentions that the actions alleged in the charges would not, even if true, constitute conduct unbecoming. Conduct unbecoming, argues the Respondent, contemplates actions that are "so egregious fair warning to the employee that such conduct is prohibited is not required." He cites a number of Tenure Law decisions in which conduct unbecoming was found, and each involves actions of arguably greater severity than what

is alleged here. Yet Respondent's contention that conduct unbecoming is limited only to egregious action that would warrant discharge disregards the specific terminology of the statutory scheme. The Tenure Law provides protection by establishing the limited grounds and strict procedures through which tenured employees may be subject to either of two actions: "dismissal or reduction in compensation." The statute then specifies the grounds for either action, to wit: "inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. By its very terms, therefore, the processes of the Tenure Law are not limited only to instances in which a school district seeks – and alleged conduct is so egregious as to warrant – termination of a teacher or principal's employment. The element of unbecoming conduct can be a basis for the other available action, which is reduction in compensation. Thus, the specific structure of the statute precludes Respondent's theory that unbecoming conduct is only that which would support discharge from employment. By the same token, however, this statutory specificity, which undercuts Respondent's characterization of unbecoming conduct, operates to support Respondent's second argument, to which the analysis now turns.

A district's use of the Tenure Law proceedings to address issues such as unbecoming conduct is limited by the clear and stark terms of the statute. Tenure Law proceedings in this forum are available in instances in which a district has determined that "dismissal or reduction in compensation" is warranted. Here, the District has concluded that a step less severe than dismissal is warranted. It thus does not seek Respondent's dismissal, nor does it seek the other available action, which is reduction in compensation. The Arbitrator has contemplated whether a reduction in compensation may be implicit in the District's effort to demote Respondent to Assistant Principal, but the District has not made that argument and, in fact, has noted in its brief instances in which the post of Assistant Principal garners higher compensation than that of Principal. Thus, nothing offered by the District enables the Arbitrator to construe the effort to demote Respondent as the operational equivalent of a reduction in compensation.

Respondent argues that the proper and exclusive mechanism by which the District may take action in response to the allegations against him is the internal complaint process set forth in the Healthy Workplace Environment policy. While certainly that policy provides a means by which

some of these concerns may be addressed, the Arbitrator does not conclude and this ruling is not to be construed as a holding that the Healthy Workplace Environment procedures provide the only forum through which a demotion could be achieved or that the policy articulates a step that must be exhausted before tenure charges may be preferred.[1] The Arbitrator does not and need not address those issues in reaching her holding in this matter.

The District argues that, because Respondent holds tenure as a Principal, there is no way for the District to move him to a lesser position other than through Tenure Charges adjudicated in this forum. Yet the District cites no precedent and no reading of the statute or regulations that supports the use of this forum for that purpose. The District also argues that the demotion "is clearly a disciplinary matter affecting Respondent's employment," yet the Tenure Law did not establish this forum as a general system for imposition of corrective discipline. In this regard, the District likens the Tenure Act processes to the provisions regarding civil service protection under Title 11A – Civil Service. Specifically, the District emphasizes that N.J.S.A. 11A:2-6 provides specifically for "disciplinary demotion" in addition to suspension, fine, or removal. This does not support the District argument. In fact, it illustrates how a statute would be worded if it were intended to provide for a means by which districts could implement options such as demotion. The Tenure Act, in its specificity, contains no option for a district to seek demotion or action other than dismissal or reduction in compensation. As required by the canon of statutory construction *expressio unius es exclusio alterius*, one must conclude that the legislature, by specifically articulating only two forms of action, with no additional or general options, intended this forum to be available for adjudication of only those charges in which a district asserts that an employee's actions warrant dismissal or reduction in compensation.

---

[1] Policy Number 3351 Healthy Workplace Environment: cites the importance of a healthy workplace environment; describes the characteristics of such an environment; identifies "unacceptable conduct"; specifies that "unacceptable conduct" under the policy does not include conduct based upon protected class or activity (which is addressed through various laws); sets forth a procedure for employees to report unacceptable conduct; provides that the Superintendent or designee will conduct an investigation and then inform the reporting person of completion; allows the Superintendent/designee latitude in determining what will be revealed to the reporting person; and concludes that, if the investigation determines that conduct prohibited by this policy has taken place, the Superintendent or designee "will meet with the offender(s) and the victim(s) to review the investigation results and to implement remedial measures to ensure such conduct does not continue or reoccur." The policy also states, "Appropriate disciplinary action may be taken depending on the severity of the conduct."

This limitation also is reflected in the regulations governing this proceeding. As Respondent notes, N.J.A.C. 6A:3-5.2(a)(1) hews closely to the statutory terminology and requires that the certificate of determination accompanying tenure charges "shall contain a certification by the district board of education secretary" that the board "has determined the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or a reduction in salary. . . ." In this case, the Board has certified not that the charges are sufficient to warrant dismissal or a reduction in salary, but, rather, that they are sufficient to warrant only demotion. Thus, the Board's certification does not comport with the regulations or the Tenure Law and seeks to use this forum for a purpose that is beyond its strict and specific statutory scope.

The Arbitrator does not opine on how or whether a demotion may be effectuated. She holds only that this forum, through its enabling statute and the applicable regulations, is available only in those instances in which a board of education has found that evidence exists that warrants one of two actions: dismissal or reduction in compensation. As neither is sought in this instance, the Tenure Charges against Respondent must be dismissed.[2]

[2]As Respondent has noted, arbitrators adjudicating charges under the Tenure Law can fashion remedies other than discharge or reduction in compensation. Nothing in this Decision is intended to suggest that the statutory restrictions on the purposes for which a district may invoke these processes imposes any limitation on the remedies found by arbitrators following adjudication of properly posed charges.

DECISION

For the reasons stated in this Decision on Motion to Dismiss, the Arbitrator finds that the Tenure Charges brought by the District against Respondent must be dismissed. As provided in N.J.S.A. 18A:6-14, Respondent is to be reinstated immediately with full pay from the first day of his suspension.

Dated: March 23, 2020

Jacquelin F. Drucker, Esq.
Arbitrator

AFFIRMATION

I, Jacquelin F. Drucker, Esq., an attorney admitted to the practice of law in the State of New York, hereby affirm under penalty of perjury that I am the duly appointed Arbitrator in the foregoing matter and that this document, which I have executed on this day, is my Decision on Motion to Dismiss, issued in resolution of the foregoing matter and in compliance with all relevant and applicable laws.

Dated: March 23, 2020

Jacquelin F. Drucker, Esq.

109-20

IN THE MATTER OF THE TENURE CHARGES AGAINST

VINCENT CINQUINA

DOCKET NO. 272-11/18

BY

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

BOARD OF EDUCATION OF THE CITY
OF PERTH AMBOY, MIDDLESEX COUNTY

AWARD

FOR THE DISTRICT:	ISABEL MACHADO, ESQ. KYLE ULTSCHT, ESQ. MACHADO LAW GROUP DEVIS RODRIGUEZ, ASSISTANT SUPERINTENDENT MICHAEL HEIDELBERG, PRINCIPAL[1]
FOR MR. CINQUINA:	PAULINE M. K. YOUNG, ESQ. KYARAH BAUTISTA, PARALEGAL MCLAUGHLIN & NARDI, LLC VINCENT CINQUINA, RESPONDENT
HEARING DATES:	MAY 30, JULY 22, SEPTEMBER 4, SEPTEMBER 18,; SEPTEMBER 30, AND DECEMBER 11, 2019; AND JANUARY 17, 2020

I. Procedural Background

The Perth Amboy Board of Education, Bergen County ("Board," "District," or "Employer") has initiated charges against Vincent Cinquina ("Respondent" or "Mr. Cinquina"), who is employed by the Board as a tenured teacher of special education. The charges at issue seek dismissal from employment on the grounds of inefficiency, conduct unbecoming, incapacity, and other just

[1] Mr. Heidelberg was present during the testimony of students, taken on December 11, 2019, and January 17, 2020.

cause and were certified to the Commissioner of Education on November 15, 2018. The Commissioner of Education's Office of Controversies and Disputes, by correspondence dated November 19, 2018, notified Respondent and his then-counsel that it had received the certified tenure charges. Respondent had changed legal counsel, effective January 4, 2019, and thereafter began proceeding *pro se*, so an extension of the deadline to file an answer was extended for Respondent "while he obtains new counsel." Respondent thereafter requested and was granted a final extension, to March 6, 2019, for submission of his answer. Respondent's Answer, which he prepared and submitted without legal counsel, gave rise to a Motion to Dismiss. On March 13, 2019, the Office of Controversies and Disputes referred the charges to this Arbitrator to hear and decide pursuant to N.J.S.A. 18A:6-16.

Through a number of email communications with the parties, the Arbitrator and her Office Administrator attempted to arrange for a conference call to address scheduling and information exchange. Respondent, who continued to function *pro se* at that time, argued that it was not appropriate for the charges to be heard but eventually agreed to discuss scheduling. Respondent thereafter requested and was granted two postponements of scheduled conference calls to allow time to secure counsel. On March 29, 2019, Respondent reported and counsel confirmed that he had retained the firm of McLaughlin & Nardi, LLC. From that point, throughout this proceeding, both Respondent and the District were ably and vigorously represented by legal counsel.

Through subsequent conference calls, the parties agreed to a schedule for submission of briefs regarding the District's Motion for Summary Decision ("Motion") and also agreed to initial hearing dates to be used if the Motion were denied. Detailed papers were submitted by both parties regarding the Motion, and, following oral argument held on May 30, 2019, the Arbitrator on June 24, 2019, issued a ruling denying the Motion and confirmed same with a full opinion issued on July 17, 2019, which is incorporated herein by reference.

While the Motion was pending, the Arbitrator submitted a request to the Office of Controversies and Disputes, seeking an extension of the statutory hearing and decision deadlines in light of the

delay that had occurred while Respondent sought counsel and to allow time for consideration of the District's Motion for Summary Decision. An extension was granted to November 30, 2019.

Evidential hearings on the charges were held on July 22, September 4, September 18, September 30, December 11, 2019, and January 17, 2020. By agreement of the parties, hearings were held at the Administrative Offices of the Board, at the High School, and at the offices of the Machado Law Group. As hearings progressed, it became clear that additional time would be required to accommodate schedules and witness availability. Therefore an extension of time was requested and approved to March 31, 2020, as the deadline for conclusion of the proceedings and issuance of the Award.

In the course of the hearings, each party was given a full and fair opportunity to present evidence through documents and testimony of witnesses. All witnesses, except Mr. Cinquina and the District's party representative, were sequestered and all testimony was provided under oath and was subject to direct, cross, redirect, and re-cross examination.[2] At the commencement of the hearing, it was agreed that a court reporter would prepare a transcript that would be provided to both parties and the Arbitrator. When the presentation of evidence was concluded, the parties agreed to a schedule for post-hearing briefs. Same were timely submitted to the Arbitrator, and exchange copies were forwarded by the Arbitrator's Office Administrator, whereupon the record was closed.

[2] The Arbitrator notes that, as to some witnesses, the transcript of this proceeding indicates that the witness "was sworn/affirmed by the Notary Public." This is not correct. The oath/affirmation for each witness was administered by the Arbitrator.

II. FINDINGS OF FACT

A. Background

Respondent holds tenure as a special education teacher in the District. He was educated at Rutgers and, for graduate-level work, William Paterson University, and he holds teaching certifications in business administration and special education. Mr. Cinquina began his career as an educator teaching severely disabled youths. He then worked for a number of years as a substitute teacher, which he combined with his work in other industries not associated with the education field. Respondent initially was hired by the District in October 2004 as a long-term substitute teacher. In May 2005, however, the Principal of the McGinnis School asked that Respondent be taken off the list for assignment as a substitute teacher at that school.

Effective September 2005, Respondent was hired as a full-time special education teacher for the 2005-2006 school year. The charges at issue in this case in some respects cover his entire career at the District, but the more specific issues relate to actions taken by Respondent in the school years 2016-17 and 2017-18 and, even more significantly, in May 2018. Relevant circumstances, however, date back to 2012, during which time Respondent was assigned to the High School and the Adult High School.

B. 2011-2012 and 2012-2013 School Years

Respondent in March 2012 received a Letter of Reprimand for an incident in which students in a class Respondent was co-teaching used an offensive and inappropriate group label, posted on a classroom board, for their activity team. The Letter of Reprimand, which was not challenged by Respondent, indicated that even if Respondent had not been aware of the use of the term, it was his responsibility to become aware of the students' activities and to correct them when needed and when the students were in need of guidance. He was advised in the Letter that he was to become "immediately familiar with the lesson being taught and immediately attempt to remedy

an inappropriate situation." He was notified that "Any future deviation will result in withholding of increment or termination." Respondent did not grieve or otherwise challenge the Letter of Reprimand, but at hearing he testified that the inappropriate team name had been on the board from the prior class, that he entered the room after his co-teacher had begun a movie, when the room was dark, and he therefore had not noticed it.

Soon after the 2012-2013 year began, a student alleged and submitted a written statement indicating that, when he asked Respondent if he could play some music he had selected, Respondent answered with a derogatory, racist description of the music and a remark that the student viewed as a comment on his sexual orientation. The student told an English teacher about the conversation and his reaction. The English teacher mentioned it to Respondent, to let him know that she had forwarded the information to the Principal, and she advised Respondent and the Principal that she had no direct knowledge of the conversation the student cited. The Principal of the Adult High School issued a letter to Respondent on October 24, 2012, directing him to "arrange to meet with me at your earliest convenience" and that he should attend with his Union representative. Respondent replied by returning the letter with the handwritten note that said, "Call my lawyer for a conference time," providing the name and telephone number of the attorney. Ultimately, at the direction of the Superintendent, a meeting with Respondent and a Union representative was held on November 15, 2012. Documentation of the meeting indicates that Respondent denied all wrongdoing, at which time Respondent was shown the student's written statement and that of the teacher to whom the student spoke. Respondent was advised to be careful with the "vocabulary he uses when students are present and to behave in a professional manner at all times."

On December 21, 2012, an incident occurred that resulted in Respondent being placed on paid administrative leave, effective that day. Respondent testified that a plan was underway to hold an ice cream party for the students and that, on December 20, he purchased items needed for the party, which he loaded in his personal vehicle. On December 21, he arrived early at the school to unload the items from his car, taking them to the basement. He said that, by the time he finished, the parking spot he usually used was taken. As he drove by, he saw a sign for faculty

parking and parked there in an open space. Later, while Respondent was preparing for the party, a security guard approached him and told him he would have to move his car, as the spot he was in was reserved for another employee. According to the guard's written statement, the space had been reserved for an employee of the Business Office. Respondent refused to move his car and told the security guard not to have him towed. At hearing, Respondent explained that, even though there was a vacant spot next to where he was parked, he refused because he believed the guard was giving the space to a non-faculty member, whose position Respondent did not know; Respondent believed that he was entitled to the space on a "first come first served" basis. Respondent explained that he had concluded that the spaces were public because he had noticed that they were numbered, which, he said, had to have been done by the municipality.

The Principal of the Adult School was alerted and had Respondent come to the office, at which time he instructed Respondent to move his car. Respondent refused, asserting that the parking was public and cars did not have permits indicating assigned spaces. The Director of Buildings and Grounds also met with Respondent, in the presence of the Principal, and told Respondent that he had five minutes to move his car or it would be towed. Respondent still refused. He testified that the Director of Buildings and Grounds called him an idiot and stormed out of the meeting. At some point, Respondent's vehicle was towed. The Superintendent was notified of the situation and directed that Respondent be sent home. Security guards found Respondent in the main office and told him he was to be escorted from the building. Respondent reportedly proceeded nonetheless to visit two classrooms. Eventually, he was escorted from the building. Respondent had called the local Police Department but was told that there was nothing they could do. The Police Officers, however, did provide Respondent with a ride to retrieve his car.

By letter dated that same day, December 21, 2012, the Human Resources Manager notified Respondent that he had "been placed on paid administrative leave effective immediately. Central Administration will be contacting you." The letter notes that copies were sent to the Superintendent, the Principal, and the Union representative.

C. Paid Administrative Leave: December 2012 – February 2016

It is peculiar that Respondent then remained off duty, on paid leave, through the remainder of the 2012-2013 school year, all of the 2013-2014 school year, and the remainder of 2014. While the details of the December 2012 incident and the actions taken by the District and by Respondent are not at issue in the Arbitrator's resolution of the charges in this matter, Respondent contends that the events of December 21, 2012, gave rise to Post-Traumatic Stress Disorder ("PTSD") and, combined with the lengthy period of paid administrative leave, created a lens through which his subsequent actions as a teacher will be forever framed, creating the specter of concern about violence or danger. Respondent argues also that, following three years on paid administrative leave, he returned to a system with new administrators, new lesson place systems, and computer software.

In March 2014 the District prepared a Corrective Action Plan (CAP) for Respondent that provided, among other steps, for him to attend anger management sessions. The stated goals of the CAP included "exercise good judgment regarding interactions with and among students, as well as with staff members and administrators" and "plan appropriately for instruction." Respondent was summoned to a meeting and was told that he needed to follow the steps in the CAP to be able to return to work. With the help of the District's Employee Assistance Program ("EAP"), Respondent located a recommended therapist and attended several sessions with her. He also continued to see a therapist with whom he had begun sessions before the CAP was created.

In May 2014, following notice to Respondent, the Board of Education met in closed executive session to address Respondent's employment status. Respondent thereafter was sent to Rajeswari Muthuswamy, M.D., a psychiatrist, for a medical evaluation. That examination was conducted on May 21, 2014, and the doctor's report indicates that the examination resulted from a recommendation from the District's Employee Assistance Program (EAP). The recommendation was made for continuation of service through EAP to address interpersonal

conflicts and for Respondent to be permitted to resume "his work related activities after being cleared by EAP."

With the beginning of the 2014-2015 school year, Delvis Rodriguez was retained by the District as Director of Personnel and Evaluation.[3] Director Rodriguez testified that, immediately upon learning that a teacher was on long-term administrative leave, he reviewed Respondent's file and took steps to address the situation. In October 2014, Director Rodriguez wrote to Respondent regarding the above-referenced medical recommendation that he return to EAP to receive further treatment. He advised Respondent that information regarding such compliance would help the District assess his ability to return to work, and he requested that Respondent "provide copies of any documentation that serves as proof that you have been participating in and completed anger management counseling with EAP since the time of the request in May of 2014." The letter at one point included a typographical error and referred to a medical examination of May 21. 2004, rather than 2014, although later in the letter it referred to 2014. Respondent's then-attorney responded to Director Rodriguez, arguing that the request was out of date, since it referred to a medical report dated 2004 and noting that Respondent had worked from 2004 to December 2012. The attorney also noted that Respondent had been seen by a physician who had advised that his was "not a case of anger management." Counsel for the Board then responded, citing the May 21, 2014, findings and asking that, if Respondent had complied with the treatment and referrals, documentation of same be provided.

Director Rodriguez wrote to Respondent on January 29, 2016, confirming receipt of "documentation stating that you are able to return to work" and stating that he was expected to return to work on Monday, February 8, 2016, and would be assigned at the South Campus of the High School.

[3] At the time of hearing, Mr. Rodriguez had been promoted to Assistant Superintendent of Administration. During times relevant to this proceeding, however, he held the position of Director of Personnel and Evaluation. In the interest of clarity and brevity, he is referred to herein as "Director Rodriguez."

D. Return to Work

Respondent returned to work as assigned, on the South Campus, which was a location at which he had not previously taught. Within days, issues with coworkers and administrators began. On Saturday, February 20, 2016, Respondent sent an email to Director Rodriguez seeking to "initiate a complaint" against an English teacher he identified by name, noting that she was "Hispanic." (This teacher had been involved in the matter in 2012, cited above, in which a student alleged that Respondent had used inappropriate terms and comments in referring to his preferred music.) Respondent's email recounted an exchange in which Respondent had told another colleague that he would find and show her a video of a former student and that the English teacher, having begun a conversation with the co-teacher, stopped to tell Respondent "do not video me," which Respondent construed as an unfounded accusation. Later, alleged Respondent, she accused him of various acts associated with his administrative leave and called him "an animal." Respondent sent Director Rodriguez another email, that evening, offering to allow him to examine his cell phone and asserting that the English teacher's comments would not have been made had he been young, female, and Hispanic.

Director Rodriguez met with the English teacher and also met with Respondent, both of whom conveyed their accounts of the interactions. The English teacher submitted a detailed written report of her interactions with Respondent, denying the account Respondent had conveyed and describing the interaction as one in which Respondent had been on a "rant" and that "his behavior scared me." Based upon his exploration of the allegations, Director Rodriguez wrote to Respondent on March 18, 2016, thanking him for having raised the issue but stating that, having investigated the matter, he could not "say that there was any definitive harassment on her part." He noted that Respondent had asked only that Director Rodriguez have a conversation with the teacher, which he had done. He wrote that he would call upon Respondent's professionalism to ensure that both he and the other teacher are "cordial and amicable with each other during times you are asked to interact." Director Rodriguez also submitted a report to the Superintendent indicating that both teachers currently are in PLC together but that he would explore with the

Vice Principal the possibility of placing the teacher in a different PLC to avoid any uncomfortable interactions between the two.

Also in March 2016, only a few weeks after having returned to work, the Vice Principal met with Respondent to address a situation in which Respondent had appeared to have been asleep. Respondent referenced having PTSD but explained that he was not sure if that had caused him to doze off or if it was because of inactivity, which he attributed to lack of access to the computer system.

E. 2016-2017 School Year

For the 2016-2017 school year, Respondent continued his assignment at the High School, which had just come under the direction of a new Principal of the High School South and East Campuses, Ninth Grade Programs.[4] On October 5 and 6, 2016, she met with Respondent to review several performance issues. Respondent requested training with technology but also informed the Principal, as Respondent later commemorated in an email, that he had PTSD and that this condition made it impossible for him to respect supervisors.[5]

Training sessions were set up for Respondent with the District Instructional Leader. In addition, Director Rodriguez communicated with Respondent in October regarding his desire for accommodation, explaining that documentation of a disability that requires accommodation was needed before steps could be taken with regard to requested accommodations.

On November 25, 2016, Respondent sent to the Principal an email with the subject line "My well being." In it, he wrote: "In order for my mental well being and to overcome trauma. [sic] I am requesting the removal of the following personnel from the South Campus or from any building

[4] While the actions at issue involve at times several individuals holding the title of "principal," the content that follows uses, for economy of wording, the term "Principal" to refer to the Principal of the South Campus Ninth Grade. All others are specified by their full titles.

[5] Many months later, in August 2017, Respondent wrote a brief email to Director Rodriguez regarding the October 6, 2016, meeting. In it he confirmed the forgoing and stated that the Principal responded that she demanded respect. Respondent argued, in the email, "I consider this to be a threat to my mental well being and safety."

in which I will be present." He listed eight names. Among them were a Vice Principal, the Director of Buildings and Grounds, the English teacher referenced above, the Supervisor of Special Services, the Principal of the Adult School, and an attorney for the Union. The Principal testified that a number of the people identified were not assigned to the South Campus and several others were names she did not recognize. She forwarded the email to Director Rodriguez.

On December 16, 2016, the Principal and the Instructional Leader met with Respondent and a Union representative, with the intention of providing Respondent with a written reprimand regarding a failure to complete lesson plans. The Principal testified that, during that meeting, Respondent compared himself to a rape victim who was working for the rapist. He also explained that it was difficult for him to be in the building and that he had "flashbacks" sometimes when walking down the hall. He told them, "I want to do things to people; things I won't discuss here but I've been talking with my doctor." When the Instruction Leader asked Respondent if the remark was a threat, Respondent replied that it was not. The Principal and the Instructional Leader conveyed their concerns in emails to Director Rodriguez, recounting the Respondent's remarks. Respondent does not deny having made these comments but has cited them as notification of his need for accommodations and an effort to educate the administrators regarding PTSD.

When school resumed on January 3, 2017, Director Rodriguez notified Respondent by letter that he was being placed on paid.administrative leave. Respondent promptly was sent for medical evaluation by Dr. Muthuswamy, who had conducted the examination prior to Respondent's return to work in 2016. Dr. Muthuswamy wrote, with regard to Respondent's assertion of having developed PTSD from having been escorted out of the building in 2012, as follows: "From a strict diagnostic criterion, it is not considered a criterion for PTSD since it did not involve, 'The person was exposed to: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence,' as noted in [the Diagnostic and Statistical Manual of Psychiatric Disorders, 5th Edition]." The physician noted that Respondent acknowledged that his relationship with administrators was negative and that hostility gave rise to safety concerns. As

he denied any plans, thoughts or intent of harm, the physician recommended Respondent's return to work but recommended that he have ongoing therapeutic services, which Respondent had indicated he was undergoing through a therapist and a psychiatrist. Accordingly, Respondent was taken off paid administrative leave and was permitted to return to work.

On March 28, 2017, Respondent submitted a request for accommodations, but he did not supply medical documentation. Respondent testified that he did not convey his personal therapist's letter and diagnosis because he wanted first to see if he could handle working without accommodations. Yet, in October 2017, he was requesting accommodations. Some were addressed. Many were not options because of undue burden and would result in neglect of certain job responsibilities. Respondent was asked at some point by Director Rodriguez for documentation regarding Respondent's representation that he suffered from PTSD.

Respondent also told Director Rodriguez about his interaction with the Principal regarding a cross that she wore on a necklace. Respondent reported that his religion was special to him and that he felt that it was not "being shown the respect it deserves." He therefore told the Principal to remove the necklace. Respondent has asserted the Principal thereafter had written him up and had threatened him, which he viewed as discrimination against him on the basis of his religion. [6]

At the end of the school year, a CAP was put in place for Respondent, under the supervision of the Instructional Leader. The goals included developing and implementing appropriate modifications for students specific to both the lesson and the student, developing strategies for formative assessments throughout lessons, and updating gradebooks and submitting modifications to lessons on time. It called for monthly meetings with the Instructional Leader as well as classroom observations. Respondent signed the CAP document on June 23, 2017, noting, "Impossible to achieve – no special ed sup[port] + no mod[ification] poss."

[6] Respondent raised this issue again, more than a year later, when, on May 13, 2018, he wrote to the Superintendent, in an email bearing the title, "[The Principal] disrespects Christianity," as follows: "I am Christian and have instructed [the Principal] to remove the Cross (religious symbol) from her sweaty neck. She has not."

F. 2017 – 2018 School Year

During the next school year, Respondent resumed his assignment on South Campus. In October 2017, Respondent wrote to Director Rodriguez asking for a transfer. He wrote: "With all the evidence, complaints and lawsuits that I have been presented to your office in regards to [the Principal, the Assistant Principal ….] and the Hostile workplace they created why would you in God's name expect these people to train me? Please remove me from the situation and place me in a situation I can thrive and not fail." Dr. Rodriguez denied the request for transfer, assuring Respondent that the administrative team would be professional in their support. Respondent replied via email that they had not answered his questions or provided support "and you still have not provided me with the ways they have supported me in the past. You are placing people who don't like each other in a difficult situation, that should be very concerning for you. I see you as the problem and your lack of motivation to make this situation better for all."

Respondent also was resistant to the CAP and believed that it had not been properly imposed. On October 16, 2017, the Principal reminded Respondent that he was scheduled for a CAP Support Meeting that coming Friday and she reminded him of the required monthly meetings. She asked him to bring a copy of his lesson plans to the meeting. Respondent replied via email, as follows: "To Whom it may concern, Because I believe that my Administrators [sic] unethical behavior will lead to my termination I will not participate. Thank you." The Principal, in her reply, notified Respondent that she was forwarding his response to Human Resources. Respondent then wrote, two days later, "I do not see the purpose of working with a bigot who sees men as less than women." Respondent acknowledged at hearing that he perhaps should not have used the term "bigot," and he testified that he spoke with Director Rodriguez and apologized. A few days later, Respondent received a letter from Director Rodriguez cautioning him that use of the term was unprofessional and that "inflammatory comments such as these are not acceptable in the workplace." He wrote that the Principal and her administrative team have gone beyond the scope of their responsibilities in an effort to help him "acclimate to the culture and climate of the 9th grade program" but that he has resisted and had resorted to making unnecessary and unprofessional comments. In the letter, Director Rodriguez told Respondent

that his behavior must "cease and desist immediately" and that further negative comments toward school leaders or any co-worker would result in further disciplinary action. Respondent viewed the letter as retaliation for efforts to challenge actions that he felt were discriminatory on the basis of sex and disability.

With regard to the issue of disability and accommodation, Respondent had been making references to PTSD and expected accommodations since his return to duty, but he had not provided documentation of the diagnosis to the District, even though same had been requested. The District's only relevant information had been the results of the examination by the Board-selected psychiatrist who, citing the DSM, had noted that Respondent was not experiencing PTSD. Ultimately, however, in November 2017, Respondent provided Director Rodriguez with a document from his personal psychiatrist (the document was dated March 28, 2017, but Respondent at that time provided no explanation for not having provided the document earlier). The document confirmed that Respondent had been diagnosed with PTSD and outlined a series of modifications needed for his job. They included "restructure job to include only essential functions"; provide written as well as visual instructions; provide written checklist; provide a wall calendar; use a daily or weekly task list; allow to record messages; provide printed minutes of meetings; allow additional training time; make daily check or to do list; assign a mentor; modify attendance policy; day to day feedback."

On February 12, 2018, a written reprimand was issued by the Vice Principal for the East Building for failure to complete lesson plans for English and History classes. The reprimand indicates, as does the Vice Principal in the cover email, that Respondent had refused to meet formally with him and the Principal. It noted that the Principal, another Vice Principal, and a supervisor had met with Respondent in November 2017 to discuss lesson plans and modifications, and Respondent was shown how to modify objective and procedures, which is an important step in preparing plans for special education students.

On February 14, 2018, a technology coaching meeting was held for Respondent regarding accessing MS outlook email and uploading lesson plans, and an observation was conducted by a

Vice Principal. Respondent wrote to Director Rodriguez asserting that the Vice Principal had engaged in disability discrimination during the observation. He asserted that she had falsely accused him of not submitting lesson plans after he gave her a list of accommodations that require him only to perform the essential functions of his job. Respondent wrote, "She essentially looked at my Accommodations/Modification list and selected an essential function like lesson plans and lied about me furnishing them because I have a disability not because it was true." Director Rodriguez responded that he had not been aware that disability accommodations had been made regarding lesson planning, adding: "Lesson plans are expected to be submitted via google docs as every other teacher. Please make note of that." He also provided a longer email in which he stated that he had again reviewed the March 2017 request for accommodations.

G. May 2018

1. Truth or Dare

Matters that moved the District to proceed with these charges arose in May 2018. Central to these charges are allegations regarding the events of May 1, 2018, in the class to which Respondent was assigned. He usually was the cooperating teacher in this English class but, on May 1, the English teacher was absent and Respondent was supervising the Ninth Grade students for Periods 8 and 9 (from 1:33 to 3:00 p.m.) It is not clear exactly how many students were in the class, but the record indicates that it is likely that there were 18 students in the class. Respondent asserts that the class was larger than it should have been, and the District contends that Respondent allowed students who were not assigned to the class to enter and remain in the classroom during these two periods.

The main teacher had left activities for the students to do. Respondent recalls that it was a series of questions based upon their reading. Some students, Respondent testified, did not wish to perform the assignment and told him that they wanted to play truth or dare instead. Truth or dare, Respondent testified, is commonly played by the students and is incorporated in some sub-

lesson plans. In the game, he testified, dares might include things like saying something nice about the teacher, doing something crazy with their hair, etc. The students, he said, can make up their own questions or dares, if they are reasonable. He testified that he gave the students a list of questions to use for the game but that they were permitted to create their own. Respondent put on music and then walked around, he said, to help those students who were performing their assignments.

Three students from the class testified at hearing. One student had little recollection and, while aware of the game, had not participated or observed it. One male student expressed reticence about testifying because, he said, he was sorry that the situation had created problems for Respondent. He testified that it had been the students' fault, as they should not have been playing the game. The student recalled that, at the beginning of class, Respondent took attendance and handed out an activity sheet that involved reading a story. He said, however, that only a few of the students proceeded with the assignment. Most of the students, he said, were playing Truth or Dare, using a bottle to spin to identify the person who would have to either tell the truth or take the dare. He also noted that there were approximately three students participating who did not belong in the class but had simply walked in. Respondent has acknowledged that he was aware that other students in the past had asked to come in his class but he denied knowing that they were in his class on May 1.

The students who were working on the assignment were off to the side and the others had turned their desks into a circle for purposes of the game. Throughout the two periods, the witness said, Respondent was walking around the class and, when he came to stand near their desks, they did not stop the game. The dares to be performed by the students, this witness testified, were things like kissing a girl or hugging someone. As the game progressed, he testified, there were boys and girls kissing as part of the dare and also at least one girl took a dare to perform a lap dance with a boy and another girl performed a lap dance with a girl. This student believed that Respondent observed this activity, although he did not elaborate on why he believed this. He testified that Respondent said nothing. This student, with hesitance and expressing remorse, testified that he

had taken a dare to touch a girl on her breast. He did not think that Respondent had seen him do this. He testified that one other boy had taken a dare to "grab" a body part of a girl.

Another student from the class testified. She confirmed that there were students from outside their class in the room that day. She had chosen not to participate in the game, having observed, she said, that it was mostly the "popular kids" and, while she had been invited and was tempted, she declined, especially, she said, when she saw the things they were doing. This student, however, observed the game, which she said she found interesting. In fact, she lent the group her metal water bottle for use in spinning. The configuration of desks described by this witness was the same as that of the young man who also testified. One of the dares, she recalled, was for the student to lick the floor and another was to run around the hallway screaming (although she recalled that the student taking that dare just walked out and closed the door, appearing to leave, which prompted Respondent to ask who had left the room). Other dares, she said, were to kiss, to twerk, and to provide lap dances. The dares were, she said, "mainly sexualized things that I didn't want to get involved with, so that's exactly why I said no." She recalled the instance described above, when the male student touched the female student's breast. It was, this witness felt, consensual between the two children, as she would have said something if it had not been. She observed Respondent looking up from his phone to observe the activities, walking around, and going to the side of the room. This witness also recalled that, with one of the lap-dance dares, someone started playing club music on their phone, and Respondent instructed them to turn down the volume, which the students did. Then, she said, the girl "started dancing on" the male student. This witness recalled that the game was played "nonstop" for both class periods until the bell rang and everyone left, with someone indicating that they would continue the game at one of their homes.

After the class ended, another student who had been there told the Vice Principal what had happened, and an investigation was undertaken. Students were interviewed, separately, and written statements were taken. The Department of Children and Families was notified. Students, Respondent, and other employees cooperated with that investigation, which resulted in an investigative finding that neglect/inadequate supervision was not established.

2. Observation by the Principal

This student cited above, who had not participated in but recalled the details of the game, was a witness to the other event that forms a primary basis for the charges at issue. That event occurred on May 11 when the Principal entered the History class for which Respondent was the inclusion teacher. As recalled by the student, the Principal came to the classroom and Respondent "called the cops on her in class because he was getting quote, unquote harassed, and the police came up." She was, she testified, unnerved by the presence of police who had come up the stairs and into the classroom. As this was unfolding, she said, the regular teacher instructed the students to look at the board and to not watch what was happening. Respondent, she said, was loudly saying the school was harassing him.

The record contains an audio recording of the interaction, which the Principal made, she testified, because of Respondent's "unpredictable" behavior. The Principal entered the classroom to conduct what was to be a fourth observation of Respondent pursuant to the CAP. Moments after the Principal entered the classroom, Respondent approached her and asked why she was there. She responded only that he should continue with the classroom activities. He then raised his voice and told her to leave, saying:

> No, you need to leave. You need to leave. Get up and leave. That's go. I'm asking you to go out the door. Get your stuff and get out the door now. You are not coming into this classroom unannounced. Leave. I'll call the police on you. I will call the police on you for harassing me. Out the door. You are stopping this kid from getting an education. Out the door.

The Principal responded by telling Respondent, "Mr. Cinquina, do what you need to do," and he responded:

> We're not doing anything. We're going to wait for you to leave. Put that away. You need to leave. I don't think you've got that in your head. You need to leave. All right, take a seat. I'm going to call the police on you right now.

Respondent left the room and telephoned the police, and the Principal remained in the classroom. The regular teacher resumed instruction.

When the police arrived, they told the Principal that Respondent had complained that the past week he had been trying to teach but that she had been taking ten of his students out at a time to her office. The Principal explained that she was conducting an investigation of an unrelated matter but that she was in the classroom at that time to conduct Respondent's evaluation. The officers asked to speak to the Principal and Respondent together and, as they were gathering, Respondent called a nearby Union representative to join them. The Principal explained that she can enter any classroom and the officer noted to Respondent that the Principal obviously does observations. Respondent attempted to argue with the officer, saying that all observations for the year already had been completed and that the Principal was harassing him. Ultimately, the officer commented that if Respondent felt that it was not right, it was not a police matter, with which Respondent expressed agreement, but then continued to assert that the Principal was "impinging upon my freedom to do my job." The officers suggested to Respondent that this was a matter to take up with the Union. They left, and Respondent and the Principal returned to the classroom.

The Principal later that day forwarded the recording of the interaction to Director Rodriguez. Thereafter, Director Rodriguez placed Respondent on paid administrative leave, with written instructions not to report to his work location(s) until further notice.

The following day, Saturday, Respondent submitted to the Superintendent an email citing the Principal's conduct as "one of the most unfortunate examples of leadership. . . during my fourth observation." He questioned the basis for commencing the fourth observation and stated that, during the observation, the Principal "demonstrated to myself and the students unfortunately a level of incompetence, hippocracy [sic] and frankly childishness." He alleged that, during the observation, she had positioned herself with her back to the teacher, which he surmised was for the purpose of shielding her social media texting.

The next day, Sunday, March 13, Respondent wrote to Director Rodriguez, asking "Who is the person who contacted Dyfs? What involvement do you believe I have?" He then wrote to the Superintendent telling him that he had "instructed" the Principal to remove the cross from "her sweaty neck," noting that "She has not." This was followed by an email to the Superintendent, with copies to Director Rodriguez and the Principal criticizing the quality of the proofreading of the Principal's doctoral dissertation, with a link to access the paper on line. This was followed that afternoon by an email to the same recipients criticizing the focus of the Principal's dissertation, which he described as inquiring why "woman [sic] are leaving the teaching profession after five years." On Monday at 2:51 a.m., he again emailed, alleging that the Principal had "someone else tell her what to right [sic]" in her dissertation, as it appeared to him that she had failed to remove comments from the final draft. On Monday afternoon, he wrote to Director Rodriguez: "Btw if you would like to see the WORK my students completed on this so called period of abuse (lol)/investigation done with my assistance just let me know. Also if someone calls Dyfs on me I will sue you!"

Respondent's flurry of emails on Monday included a message to Director Rodriguez, as follows: "Consider the school notified that I plan on returning to work tomorrow." Director Rodriguez responded that Respondent was not permitted to return to the building until advised to do so. Respondent replied that he was going to come to the administration building the following day to pick up his credentials and would have a police escort. Director Rodriguez responded again, reminding Respondent that he was not permitted to enter any district building. This led Respondent to write that the District and the administrators are afraid of people with PTSD, that such people are not more violent "than anyone else" and, "You are being notified for the last time to return me to work immediately." He then forwarded that message to the Principal, Vice Principal, and a supervisor, stating "This is why you are about to be personally and collectively sued if I'm not returned to work tomorrow. It's a very good time for you to take care of yourselves."

III. ANALYSIS

In seeking the dismissal of Respondent, the District asserts four charges: unbecoming conduct; inefficiency; incapacity; and other just cause. Any one of these grounds, if established, could support dismissal under N.J.S.A. 18A:6-10. In support of all four charges, the District poses 114 assertions of fact that are common to all charges, with two additional assertions of fact relating to inefficiency, incapacity, and other just cause. The factual allegations incorporate information regarding the full range of performance evaluations and disciplinary actions that began soon after Respondent's employment in 2005. The facts associated with years 2005 through 2011, however, are addressed here only generally, for the Arbitrator finds that the central charge in this proceeding is that of unbecoming conduct, and the action sought by the District is warranted by the most recent developments, without reliance on any prior shortcomings or misconduct. Thus, other aspects of Respondent's service need be examined only as to his defenses to the charge of unbecoming conduct.

As to shortcomings associated with the content and timeliness of lesson plans, Respondent has asserted that, when he returned to work in 2016, the entire system had changed, requiring access to a computer and use of a program with which he was not familiar, and the administration, too, was populated with entirely different personnel. Respondent has noted that he had been accustomed to conveying hard-copy lesson plans. Also, as a special education teacher, his lesson plans were dependent upon those of the main teachers, so that he then could develop the appropriate modifications for each student, as envisioned by N.J.A.C. 6A:14-4.6(i). [7]

Respondent argues that the references in the record to failures to prepare proper and timely lesson plans were unjustified under the circumstances and were pursued pursuant to discriminatory motives and, thus, must be disregarded. For purposes of this analysis, the Arbitrator accepts Respondent's explanation for what the District has described as shortcomings in his preparedness and compliance, but she also notes that Respondent's pre-2012 employment

[7] Students in the District's special education programs are required, by regulation, to be "provided with modifications to the instructional strategies or testing procedures or other specialized instruction to access the general education curriculum in accordance with the student's IEP."

with District also was marked by documentation of late submission of lesson plans. While Respondent may have a legitimate explanation for what was happening in recent years, the record does indicate that similar issues existed before 2012 and under entirely different systems and administrators. Nonetheless, upon reviewing all the facts and arguments in this proceeding, the Arbitrator finds that this matter may be decided without findings regarding the alleged failure of Respondent to prepare and submit lesson plans as required or expected.

Similarly, while the District submits a detailed analysis of Respondent's performance evaluations throughout the years and while both parties rely to some extent upon the CAP plans (Respondent asserting that they were improperly imposed and implemented and the District arguing that Respondent failed to cooperate and comply), the Arbitrator finds that those issues need not be reached to resolve the charges.

Ultimately, the proofs adduced by the District establish through credible evidence far beyond a preponderance that Respondent engaged in multiple instances of unbecoming conduct and that those actions, standing alone, warrant dismissal from service. As a preliminary matter, however, the Arbitrator notes Respondent's argument that the District has created and perpetuated a campaign to demonize him, creating the impression that he is potentially violent and has posed threats of violence. The Arbitrator does not see the District's case as such, but she nonetheless wishes to address any such impression. After careful scrutiny of the extended direct and pointed cross examination of Respondent, of the pages of evidence documenting Respondent's actions, and days of testimony from administrators as well as students, the Arbitrator concludes that it is appropriate to dispel any suggestion that Respondent poses a risk to the safety of others. It was, however, appropriate for the District to be concerned and to take the steps it did for medical evaluations and to require EAP involvement. Respondent's frequent commentaries have contained ambiguities that could be construed as red flags, and all involved were justified in expressing concern. Yet through a detailed examination of the evidence, the Arbitrator notes that Respondent, even in his sometimes concerning and anxious flurries of emails, consistently has conveyed and exhibited a genuine, if sometimes oddly focused, concern for and caring about the students.

What is problematic and what the evidence shows, however, is that Respondent has a total disregard for the structure of administration and supervision necessary for an educational institution to fulfill its purpose. While having generous intent toward the welfare of the students, Respondent had demonstrated a continuing unwillingness to abide by supervisory structures, to accept responsibility for his specific obligations within the educational institution, and to adhere to fundamental standards of conduct that are essential for the efficient and effective functioning of the District. In short, Respondent has shown a remarkably poor judgment as to his responsibilities and a stunning disregard for the role of administrators and the standards of professionalism required of any educator.

These failings are shown through the objective evaluation of Respondent's actions, aside from any evaluation or interpretation applied by those with whom he has continually been in conflict. Respondent asserts that he was discriminated against on the basis of a disability, which he describes as PTSD sparked by his removal from school property in December 2012 and for which he argues he had been requesting but has been denied reasonable accommodation. Yet the record reveals that it was not until November 2017 that Respondent provided documentation of the disability and insight into the nature of the accommodations that were medically recommended. Further Respondent's requests and demands for accommodations for his then un-documented condition were understandably viewed by the District as unmanageable and questionable, such as Respondent's assertion that it was not possible for him to respond to supervision and his exhortation that eight people, including a lawyer for the Union and the District's Director of Buildings and Grounds, be removed from the buildings in which Respondent would be present. Ultimately, when presented with a list of potential reasonable accommodations prepared by Respondent's personal physician, the District did provide meaningful compliance and explained why they viewed other requested accommodations as being unduly burdensome. Accordingly, the record does not support a conclusion that Respondent was discriminated against through denial of reasonable accommodations.

The Respondent also has argued that he was discriminated against on the basis of disability by having been characterized as violent, but in those few instances in which the District responded as if a threat were posed, the actions were based upon justifiable concerns, such as Respondent's statement that he had thoughts of "doing things to people" and, later, his expression of irrational outrage and efforts to order the Principal out of the classroom when she sought to perform an observation. There is no evidence that, in dealing with Respondent's sometimes peculiar and concerning approaches to communication, the administrators at any time portrayed Respondent to the community of educators, administrators, and students as a danger. The Arbitrator sees nothing the record to indicate that the adverse employment actions at issue here were motivated by discriminatory animus based on disability.

Respondent also asserts that he has been subject to retaliation for asserting his rights with regard to disability and for highlighting practices that he alleges are discriminatory on the basis of sex and national origin. He contends that adverse employment actions, including these charges, are in violation of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-3(a). Respondent is correct in his argument that an employee is protected from retaliation when he discloses a policy or practice he reasonably believes to be in violation of law, even if the employee ultimately is wrong about the violation. The employee's belief, however, must be reasonable, and, based upon this record, the Arbitrator cannot conclude that Respondent's many oblique and some pointed references to what, to him, in moments of anger, appeared to be examples of sex or national origin discrimination were reasonable.

In his brief, Respondent also emphasizes the issue of religious discrimination that he contends was associated with his "instruction" to the Principal to remove her cross from "her sweaty neck." Respondent asserts that his complaint in this regard was based upon a perceived violation of the First Amendment/Establishment Clause by the wearing of a religious symbol in a public school. While this is a worthy effort by counsel to cast Respondent's actions and comments in a favorable and legally sound light, the evidence, including Respondent's own testimony, establishes that Respondent found the situation offensive to his personal religious sensibilities,

without regard to those of the Principal, and that he was not seeking to advance any First Amendment protections or restrictions relating to religious garb in public schools.

Ultimately, as noted above, the central elements of this case turn on Respondent's actions in May 2018, and those actions are so thoroughly based upon Respondent's choices and judgment and action that there can be no suggestion of any discriminatory ore retaliatory motivation in pursuit of these charges. The record associated with these two events amply establishes, by more than a preponderance of the credible evidence, that Respondent engaged in conduct unbecoming and that this conduct warrants dismissal from employment.

As both parties have noted in their briefs, there is no binding definition of "unbecoming conduct." Respondent argues that case law developed under N.J.S.A. 18A:6-10 show actions such as theft, assault, and fraud. that are far worse than any version of the allegations against Respondent, some of which resulted in penalties less than dismissal. While conduct unbecoming can be found to have included a litany of egregious acts that arguably are more serious than those of Respondent, the facts of record establish several startling and unacceptable actions and failings of profound significance. Looking to only the events of May 2018 and disregarding any assertions of prior misconduct, the Arbitrator must find that Respondent has been shown to have knowingly allowed children under his supervision to engage, during two classroom periods, in a game that led to boys and girls openly kissing, to girls performing lap dances for boys, and to one now chastened and regretful boy touching a female student's breast. Respondent acknowledged that he allowed the game to proceed but he has denied that any unwholesome "dares" were undertaken and, in the alternative, he asserts that, if they were, he was not aware of them.

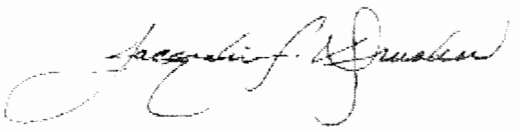
First, the direct and highly credible accounts of the students establish that these troubling actions indeed occurred. Moreover, the evidence establishes that Respondent must be regarded as having been aware of the nature of the students' interactions. The student witnesses, who expressed fondness for Respondent and thus offer accounts untainted by personal bias, also established that no attempt was made to hide the actions from Respondent. Moreover, the final

witness in this proceeding recalled that, with the commencement of one of the lap dances, Respondent instructed the students to lower the volume on the "club music" they were playing. He also was aware that a student left the classroom. It is implausible that Respondent would have been attentive to a student leaving the room but would have remained unaware of a girl gyrating on a boy's lap, students kissing, and other actions that continued for the duration of two class periods. The Arbitrator thus cannot disregard the powerful, compelling evidence establishing that Respondent was aware of these actions. Even if Respondent's assertions that he was unaware of any of this conduct were credited, however, he then must be found to have engaged in a woefully deficient level of supervision of these classroom activities. This action, standing alone, is, without question "unbecoming conduct" for an educator responsible for teaching and protecting 18 ninth graders.

Further, Respondent's reaction to the Principal's effort to conduct an observation on May 11, established by incontrovertible and powerful evidence, was disruptive and disconcerting to students and so contrary to the level of professionalism and decorum expected of a teacher that it is a profound instance unbecoming conduct warranting dismissal from employment. Respondent's actions constituted insubordination writ large, disrupted the teaching environment to the extent that the main teacher instructed students to avert their eyes, challenged the authority of the school's primary administrator in the presence of faculty and students, and drew law enforcement into a fracas caused by his own inability to find a professional, non-disruptive way to convey his displeasure with the situation.

Respondent has argued that unbecoming conduct generally requires intentional acts. See e.g., *In the Matter of the Certificate of Sandra Kearney*, 2005 WL 2261018, OAL DKT. No. EDE 03866-04 (August 22, 2005). Yet Respondent's actions with regard to the Principal were clearly, openly, and stunningly intentional. Further, given the level of awareness the evidence shows regarding the activities of the students on May 1, that, too, must be regarded as having involved an intentional and extraordinarily poor choice to allow such actions. Respondent has benefited from superb legal representation in his matter, but ultimately it is not possible to minimize the profound degree to which this conduct is unbefitting that of a teacher or to disregard the manner

in which Respondent has revealed an inability to adhere to fundamental standards of professional conduct required within an educational institution and to exercise the restraint and sound judgment essential for any educator. For these reasons the Arbitrator must conclude that the evidence of record establishes unbecoming conduct that warrants dismissal from employment.

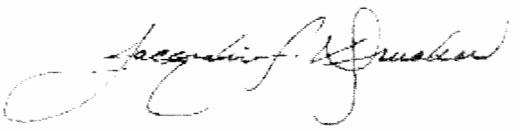


Dated: March 31, 2020

Jacquelin F. Drucker, Esq.
Arbitrator

AFFIRMATION

I, Jacquelin F. Drucker, Esq., an attorney admitted to the practice of law in the State of New York, hereby affirm under penalty of perjury that I am the duly appointed Arbitrator in the foregoing matter and that this document, which I have executed on this day, is my Award, issued in resolution of the foregoing matter and in compliance with all relevant and applicable laws.



Dated: March 31, 2020

Jacquelin F. Drucker, Esq.

110-20

Agency Dkt. No. 55-3/20

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of
Dawn Tardif, School District of the
Township of Florence, Burlington County.

For the Petitioner, Geoffrey N. Stark, Esq.

No appearance by or on behalf of Respondent, Dawn Tardif

This matter was opened before the Commissioner of Education on March 20, 2020, through tenure charges of incapacity certified by Donna Ambrosius, Superintendent of the Florence Township School District ("District"), together with supporting evidence against respondent, Dawn Tardif, a tenured custodian in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via email and overnight delivery, on February 28, 2020.

On March 3, 2020, the Commissioner directed the respondent, via regular and certified mail, to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent received a comprehensive Functional Capacity Evaluation on November 26, 2019. It was determined that the respondent is unable to perform the essential functions of her job with or without restrictions. Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her, the Commissioner finds that the District's charge of incapacity has been proven and warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2020
Date of Mailing: April 27, 2020

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

BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

between

The Lawrence Township School Board of Education,

Petitioner,

and

Jill Maria,

Respondent.

Agency Docket No. 54-2/10

MOTION TO DISMISS

Dr. Andrée Y. McKissick
Arbitrator

APPEARANCES:

For the Petitioner:
Jeffrey R. Caccese, Esquire
Comegno Law Group
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

For the Respondent:
Edward A. Cridge, Esquire
Melk O'Neill
51 East Broad Street
Hopewell, New Jersey 08525

STATEMENT OF FACTS

Respondent Jill Maria was employed as a sixth (6^{th}) grade, Special Education teacher by the Lawrence Township School District Board of Education for the last three (3) years. However, she was granted tenure on approximately September 1, 2005. The record reflects that on December 18, 2018, she was placed on administrative leave after the School District was told she had been arrested. The record further reflects that she had

been arrested on January 7, 2017 in Pennsylvania. In addition, she was stopped again on December 3, 2018 by police for a traffic violation. Subsequently, she was detained for a violation of her earlier plea agreement which required her to meet her probation officer as scheduled. The failure to comply with this agreement brought about a bench warrant for her arrest. In sum, the Respondent did not report either arrest, as required.

Based upon the foregoing, the Board of Education brought three (3) charges against Respondent Maria on February 22, 2019 upon the following grounds as set forth in NJSA 18A: 6-10:

> (1) Other Just Cause for tenure removal because Ms. Maria failed to report her arrest and conviction of the 2017 offense and, by the District's information and belief, also failed to report her 2018 detention as required by law;
>
> (2) Conduct Unbecoming by being insubordinate in refusing to answer Mr. Fry's questions on December 19, 2018; (b) having a prior disciplinary history that included insubordinate conduct with the District; and, (c) being untrustworthy in regard to her obligation to be truthful and her overall professional judgment.
>
> (3) Incapacity by virtue of the previously stated acts of nonfeasance and malfeasance.

The record further reflects that on March 13, 2019, the Board upheld these charges and suspended Respondent Maria without pay, pursuant to NJSA 18: 6-14. Subsequently, the Board delivered these charges accompanied by the Statement of Evidence, Certificate of Determination and Proof of Service upon Respondent Maria to the New Jersey Department of Education, Office of Controversies and Disputes. Thereafter, Arbitrator Colflesh, Esquire was appointed this case. A hearing was held on May 13, 2019 in Lawrence, New Jersey. An award was issued on July 22, 2019. Arbitrator Colflesh suspended Respondent Maria without pay or benefits "until the first day of the 2019-2020 school year" on July 22,

2019. In sum, the suspension was for one hundred and twenty (120) days without pay, as well as the withholding of adjustment salary increments. It is important to note that within Arbitrator Colflesh's award he also noted the following caveat:

> Nothing herein should be construed as denying the District the right to bring charges based on unbecoming conduct grounded in the conduct that led to Ms. Maria's arrest in January 2017. That conduct was not the subject of the instant charges, most likely because Ms. Maria refused to disclose it when questioned in December 2018, and the District's desire to promptly act on that refusal and the other allegations presented in the above charges.

Based upon this language, the Board of Education brought Amended Charges upon Respondent Maria. On March 14, 2020, Director Killough-Herrera appointed this Arbitrator to hear this dispute. A conference call was held on March 17, 2020 pursuant to this Motion to Dismiss which was received on March 13, 2020. The Amended Charges consisted of: Charge One, Unbecoming Conduct, Charge Two, Incapacity, and Charge Three, Other Just Cause. Details of these charges will be discussed in the Positions of the Parties and in the Findings and Discussion.

ISSUES

(1) Whether or not the Entire Controversy Doctrine (ECD) is applicable to these subsequent tenure Amended Charges?

(2) Should the Amended Charges, based upon identical fact situation in the prior arbitration hearing, should again be adjudicated?

POSITIONS OF THE PARTIES

It is the Board's position that the Amended Charges center upon the Respondent Maria's conduct which occurred well after the arbitration award issued on July 22, 2019. Most importantly, the Board asserts that the Entire Controversy Doctrine (ECD) is not implicated. Moreover, the Board vigorously argues that the Entire Controversy Doctrine does not bar the Board from pursuing the Tenure Charges related to any of the underlying conduct at issue.

Specifically, the Board points out the underlying conduct which resulted in the Respondent's arrests were not addressed in the Initial Charges. The Board further explains that the Respondent refused to provide the Board with details about the arrest. Thus, the Board maintains that it was not aware of the underlying facts that gave rise to the charges.

Most importantly, the Board strongly asserts that these Amended Charges were brought due to conduct that occurred well after the arbitrator's award on July 22, 2019. That is, Respondent Maria was interviewed several months later in September and October 2019. The Board further contends that it was during these interviews that Respondent Maria's history of drug possession, abuse and the usage of cocaine, methamphetamines and oxycodone, that this information was revealed. In addition, the Board further asserts that the Respondent's probation had been extended due to her failed drug test; in violation of the terms of her probation. It was also pointed out by the Board that the Respondent assured the Administration that she no longer used drugs or alcohol, but it was later learned that that was untrue.

In sum, the Board strongly argues that the Respondent's lack of professional judgment, deceptiveness and insubordination, in the Initial Charges, had not yet occurred. Moreover, the Board concludes that this delineated misconduct occurred approximately two (2) to three (3) months after the arbitrator's award on July 22, 2019.

Lastly, the District further contends that even if the Respondent's conduct had not occurred until after the award for the Initial Charges, the Entire Controversy Doctrine does not bar the Board from pursuing the Tenure Charges at issue in this proceeding. The Board cited several decisions, which it claims, supports these contentions that the Entire Controversy Doctrine cannot be utilized in a "wholesale" manner in its applicability to arbitration proceedings. Based upon the foregoing, the Board argues that the Respondent's motion to be dismissed must be denied.

On the other hand, the Respondent disagrees with the Board's assessment. In particular, the Respondent points out that the Initial Charges alleged that Respondent Maria engaged in unbecoming conduct by failing to report both arrests only. That is, the Respondent explains that the Board did not charge her with unbecoming conduct in her relationship with substantive behavior which was the underpinning events underlying those arrests. Specifically, the Respondent notes that Respondent Maria was not charged with unbecoming conduct for having committed an assault nor for being in possession of any controlled dangerous substance, as alleged in the criminal charges.

Contrary to the Board's position, the Respondent vigorously points out that the Board was well aware of precisely what Respondent Maria had been arrested for because it was in their possession through the docket report from Bucks County, Pennsylvania which detailed Respondent Maria's arrests, charges and disposition of the case. Moreover,

the Respondent asserts that the Board did have the right to charge her specifically for the assault and drug possession at that juncture, but failed to do so. However, this substantive unbecoming conduct was not included in the Initial Charges. Thus, the Respondent further asserts that the Board is now barred from doing so by the Entire Controversy Doctrine. Based on the foregoing, the Respondent reasons that this Motion to Dismiss is applicable to prevent relitigation and it must be granted.

FINDINGS AND DISCUSSION

After a careful review of the briefs in support of the Board's and Respondent's positions regarding the Motion to Dismiss, this Arbitrator finds that this motion must be granted, but without prejudice pursuant to the Board's right to pursue charges not barred by the Entire Controversy Doctrine (ECD) for the following reasons.

First, the Entire Controversy Doctrine is premised upon the concept that only one (1) action involving all claims and all parties should be adjudicated in a sole consolidated action, involving the same common nucleus of operative facts. Should a second action be brought, then it must be precluded. (See Cogdell v. Hospital Center at Orange, 116 NJ 7, 15-16 (1989); Aetna Insurance Co. v. Gilchrist Brothers, Inc., 85 NJ 550, 556-557 (1981); Bennun v. Rutgers State Union, 941 F2d, 165 (3rd); 502 US 1066, 117 Ed 2d 124, 112 S. Ct. 956 (1992).

Second, contrary to the Board's argument, the Entire Controversy Doctrine is applicable to administrative proceedings. In our situation, this arbitration involves the same identical parties and the charges evolved from the same forum and statute, the Tenure

Employees Hearing Law, NJSA 18A: 6-10, etc. Thus, this doctrine is applicable under these circumstances (see J.T. v. Dover Ed of Ed, No: EDS 00491-17, Agency Docket No: 2017-25390; Thorton v. Potamkin Chevrolet, 94 NJ 1, 5 (1983).

Although the Board, on the other hand, points to Yarborough v. State Operated School District of the City of Newark, 455 NJ Super 136 (2018), as being dispositive of the Entire Controversy Doctrine as being inapplicable, this Arbitrator must disagree. The Superior Court of New Jersey, Appellate Division found it "unnecessary to address the merits of both the trial court and the arbitrator" that the Entire Controversy Doctrine was inapplicable because of prior tenure hearings were not fully arbitrated. That is, the matter was dismissed regarding Plaintiff Yarborough's motion and argument for the Entire Controversy Doctrine. Specifically, that arbitrator dismissed the January 26, 2015 charges which invoked the Entire Controversy Doctrine determination. Moreover, that arbitrator found that "an [another] action regarding the identical facts [as in the October 9, 2014 matter] which would deny him [Yarborough] of his position a second time" should not be invoked. Thus, the premise of the Entire Controversy Doctrine argument was successfully utilized and analyzed by that arbitrator, not the New Jersey Superior Court who found it to be an unnecessary determination to address for the foregoing reasons.

Third, although the Board claims not to know of the underlying issues involving the arrests until September and October 2019, after Arbitrator Colflesh's issuance of the award on July 22, 2019, but this is simply not true. Specifically, let's examine Exhibit 4. This Exhibit comprises the "Bucks County Court of Common Pleas Court Summary." Within this summary is the following information: the prior arrest, dated January 7, 2017, the Bench Warrant Hearing, December 4, 2018. Most importantly, this summary

delineates the specific description of charges and the disposition: "Simple Assault (nolo contendere; Probation: 24 months; Possession of Controlled Substance (nolle prossed); Use/Possession of Drug Paraphernalia (nolle prossed); Harassment, Subject to Physical Contact (nolle prossed)." All of these charges were known prior to the arbitration hearing of Arbitrator Colflesh on May 13, 2019. Moreover, this information contained in this Exhibit was known to the Board prior to the certification of the Initial Charges on March 18, 2019.

Fourth, although the Board argues that the underlying causes of the two (2) arrests were not known nor analyzed at the adjudication, this is again incorrect. In the transcript between the parties on May 13, 2019, the Respondent's attorney at page 97 says the following in relationship to the underlying causes of the arrests:

> You've known it [this information] before 2019 before the charges were filed because it was all on the docket sheet. They [the Board] could have written a tenure charge that said we charge you with unbecoming conduct because she committed an assault .... They could have put all of that in a set of charges. It wasn't done. We are not here on that.

Thereafter, Arbitrator Colflesh responded as follows:

> I think Counsel [Respondent's attorney] is right. ...

On page 98 in the transcript on May 13, 2019, Arbitrator Colflesh followed with this remark, addressing the opposing counsel:

> But you did know because you did an investigation, you determined that in fact she [Respondent Maria] had been arrested and you had the dockets, you had Exhibit 5 at the time you filed the charges. It's attached to the charges.

Subsequent to this discussion in the transcript, this arbitrator ruled on the sole issue of: whether or not Respondent Maria engaged in conduct unbecoming by failing to report arrests and by her insubordinate behavior. Stated differently, he did not decide on the underlying substantive charges of: assault nor use or possession of drugs, the charges in the docket because those issues were not before him.

Fifth, the Respondent rightly notes that an arbitrator must respond solely to the issue requested. One cannot modify nor expand the issue (see Bound Brook Board of Education v. Ciripompa 228 NJ 4 (2017)). Thus, Arbitrator Colflesh correctly responded to this narrow issue, as delineated in the charges before him only.

Sixth, based on the foregoing, the Entire Controversy Doctrine is applicable under these circumstances. These underlying substantive issues based upon both arrests were known prior to the actual arbitration hearing, yet also analyzed and disallowed at the hearing, as noted. This doctrine precludes another hearing or an adjudication involving the same or related issues.

As to other issues that arose outside of these issues later discovered in the September and October 2019 interviews with Respondent Maria, not covered by this doctrine, that subsequent information could be the subject of future charges. Arbitrator Colflesh specifically addressed that option would be available to the Board in his caveat, mentioned in the Statement of Facts by this Arbitrator.

RULING FOR THE MOTION TO DISMISS

This Motion to Dismiss is hereby granted for the reasons stated herein. Accordingly, the Entire Controversy Doctrine is applicable to these Amended Charges pursuant to NJSA 18A: 6-10 which must be dismissed. That is, the Board knew before the Initial Charges were brought against Respondent Maria by way of the investigation the underlying substantive conduct connected to her arrests, before there was the subsequent arbitration, as noted by the transcript, dated May 13, 2019, and docket summary (December 4, 2018) attached to the Initial Charges. All subsequent, new information acquired from the September-October 2019 interviews may be brought by the Board, subject to their discretion, not covered by the Entire Controversy Doctrine.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE OF AWARD: April 18, 2020

Dr. Andrée McKissick
ARBITRATOR

C:\Jill Maria (NJ Tenure -M-D) April 2020.docx

New Jersey Commissioner of Education

Final Decision

N.J.-B., on behalf of minor child, I.T.,

Petitioner,

v.

Board of Education of the Township of Union, Union County,

Respondent.

Synopsis

Pro Se petitioner appealed the determination of the respondent Board that her child was not domiciled in Union and therefore not legally entitled to a free public education in the Township of Union School District (District). Petitioner further appealed the tuition assessment levied upon her for the time her child was deemed ineligible to attend school in the District. The Board contended that petitioner was domiciled in Irvington, not Union, and sought reimbursement in the total amount of $52,711.32, representing tuition for the entire 2018-2019 school year, including ninety-eight days of general education, eighty-two days of special education following the implementation of an IEP in the middle of the school year, transportation, behavioral intervention services, and counseling services.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1(a), public schools are free to any person over five and under twenty-five years of age who is domiciled within the school district; I.T. was enrolled in the Board's schools for the entirety of the 2018-2019 school year; petitioner testified that she had resided in Union during the relevant time period and that in order to obtain her New Jersey driver's license bearing the Lafayette Avenue address, she had to provide proof of residence to the Motor Vehicle Commission; petitioner further testified that because of her work schedule and childcare needs, I.T. sometimes stayed with relatives in Irvington overnight. The ALJ concluded that, based on her unstable living situation during the 2018-2019 school year, petitioner was domiciled for a portion of the year in Irvington, and a portion of the year in Union; petitioner was notified by the Board that she would be liable for $85 per day, or $15,321 for the entire school year; and that petitioner's liability to the Board is limited to the amount for which she had notice. The ALJ ordered petitioner to pay tuition to the Board in the amount of $8,341.76, representing the total amount of general education tuition claimed by the Board.

Upon review, the Commissioner concurred with the ALJ that the Board's ability to recover tuition from the petitioner is limited pursuant to *N.J.S.A.* 18A:38-1(b), which does not specify that assessed tuition be equal to the actual costs incurred by the district for educating a particular student; rather, it uses the measure of annual per pupil cost which is based on the district's overall costs and enrollment, and is not specific to any individual student. However, the Commissioner also found that the Initial Decision requires clarification regarding the exact amount of tuition owed to the District since the ALJ did not specify what portion of the school year petitioner resided in Union. Accordingly, the matter was remanded to the OAL for clarification of the precise time periods in which petitioner resided in Union and Irvington.

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.

112-20

OAL Dkt. No. EDU 03247-19
Agency Dkt. No. 23-1/19

New Jersey Commissioner of Education

Decision

N.J.-B, on behalf of minor child, I.T.,

Petitioner,

v.

Board of Education of the Township of Union, Union County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed.[1]

In this matter, petitioner challenged the Board's determination that she did not reside in the Union school district. After a hearing, the ALJ found that – based on her unstable housing situation during the 2018-19 school year – petitioner was domiciled for a portion of the year in Irvington and a portion of the year in Union. The Board sought tuition in the amount of $52,711.32, which included general education tuition, special education tuition, and related costs. The ALJ found that the notice sent to petitioner by the Board indicated that she would be liable for $85 per day, or $15,321 for the entire school year. The ALJ therefore concluded that petitioner's liability to the Board was limited to the amounts for which she had notice. The ALJ ordered petitioner to pay tuition to the Board in the amount of $8,341.76, representing the total amount of general education tuition.

[1] Petitioner did not file exceptions or a reply to respondent's exceptions.

In its exceptions, the Board argues that the ALJ did not consider all of its evidence in rendering the final decision, indicating that its hearing binder was not listed as one of its exhibits in the Initial Decision. The Board also contends that neither petitioner nor her witnesses were credible and that the ALJ erred in finding that petitioner resided in both Union and Irvington during the 2018-19 school year. Finally, the Board argues that there is no notice requirement for the amount of tuition due for a period of ineligible attendance and that costs can change during the pendency of a residency matter.

Upon review, the Commissioner concurs with the ALJ's conclusion that the Board's ability to recover tuition from petitioner is limited. *N.J.S.A.* 18A:38-1(b) provides that if a parent loses a residency appeal, the Commissioner shall assess tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance." The statute does not specify that the assessed tuition be equal to the actual costs incurred by the district for educating the student at issue. Instead, it uses the measure of annual per pupil cost, which is based on the district's overall costs and enrollment and is not specific to any individual student. Here, the annual per pupil cost to Union was $15,321. The Board's recovery is therefore limited to 1/180 of that amount for each day of ineligible attendance, or $85.12 per day.

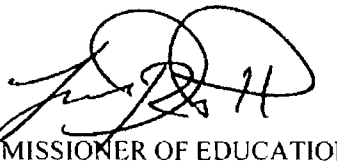
While concurring with the ALJ's primary finding in this matter, the Commissioner additionally determines that the Initial Decision requires clarification regarding the exact amount of tuition due to the school district. Specifically, while the ALJ found that petitioner resided in Union for a "portion of the year," the Initial Decision does not specify *which* portion of the school year.[2]

[2] The Board sought tuition at the general education rate for 98 days and at the special education rate for 82 days. The ALJ, in focusing on the Board's inability to recover special education costs, appears to have simply accepted the total general education tuition claimed by the Board and rejected the special education tuition and related costs. However, in order to properly calculate the amount due from petitioner, the Commissioner requires a finding of fact regarding the number of days of ineligible attendance. While the "portion of the year" in which the student was ineligible to attend may equal the same 98 days that the student was a general education student, the ALJ did not make such a factual finding.

Accordingly, the matter is remanded for clarification of the precise time periods in which petitioner resided in Union and Irvington.[3]

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this opinion.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 4/24/20
Date of Mailing: 4/27/20

[3] Additionally, the Commissioner remands this matter to allow the ALJ to clarify the exhibits considered in rendering the Initial Decision, including addressing the issue of the Board's hearing binder.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03247-19
AGENCY DKT. NO. 23-1/19

N.J.-B., ON BEHALF OF MINOR CHILD, I.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

N.J.-B., petitioner pro se, on behalf of I.T.

Afshan T. Ajmiri Giner, Esq., for respondent (Florio Perucci Steinhart & Cappelli, attorneys)

Record Closed: January 17, 2020 Decided: February 11, 2020

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Respondent Board of Education of the Township of Union (the Board) seeks reimbursement of tuition and associated costs from petitioner, N.J.-B., parent of minor

child I.T., in the amount of $52,711.32. This amount represents tuition for the entire 2018-2019 school year, including ninety-eight days of general education, eighty-two days of special education (an IEP was implemented in the middle of the school year), transportation, behavioral intervention services, and counselling services The Board asserts that petitioner and her children were not domiciled within the School District at any point during the period in question.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on March 6, 2019, for hearing as a contested case. An in-person settlement conference was conducted on July 31, 2019. The parties failed to reach an amicable resolution and the matter was set down for a hearing on October 29, 2019. The hearing was conducted, and the final submissions were received from the Board on December 3, 2019, and from the petitioner on December 30, 2019. A Certification signed by the business administrator for the district was received via regular mail on January 17, 2020, at which point the record was closed.

ISSUE

The issue in this matter is whether minor child I.T. is eligible to attend Union's public schools free of charge in accordance with N.J.S.A. 18A:38-1 and, if not, whether respondent's request for tuition reimbursement should be granted.

SUMMARY OF TESTIMONY

R.L.

R.L. is the sister of petitioner, N.J.-B. She resides at xx Headley Terrace, Irvington. R.L. testified that petitioner came to live with her for approximately one month from July to August of 2018, after which petitioner went with her two minor children to

live with their brother (Mr. R.J.-B.) at his home in Union. R.L further testified that petitioner had an older, adult-male son that had already been living with her for some time. R.L. stated that she rents a two-bedroom apartment and that the quarters were too small to accommodate petitioner, her two minor children, her adult son, plus R.L. and her family.

R.L. testified that the two minor children spent "a lot of time" at her home even after they moved to Union. She stated that the two minor children would sleep over her house from time to time, but she could not testify as to the frequency of the sleepovers.

N.J.-B.

N.J.-B. is the petitioner in the foregoing matter, and she testified on her own behalf. She testified that during the time period in question, she held two full-time jobs; one from 5:15 a.m. to 2:00 p.m. and another from 3:00 p.m. to 11:00 p.m. Due to these long working hours, she relied on help from her family to care for her minor children, including I.T. At times, I.T. would be at his aunt's house in Irvington and would already be asleep by the time N.J.-B. was done with work. N.J.-B. testified that instead of waking I.T. up and transporting him to Union, I.T. would spend the night in Irvington and she would sleep in Union and retrieve him from Irvington in the morning.

On cross-examination, N.J.-B. testified that a bus was provided by the district at some point during the 2018-2019 school year, but she could not state with specificity exactly when the bus was provided or the dates, if any, said bus service was utilized by I.T. She did note that at times, she would take I.T. to and from school and sometimes her brother would accompany the child to school.

Petitioner presented a driver's license issued by the New Jersey Motor Vehicle Commission on November 9, 2018, which reflected her address as xxx Lafayette Avenue, Union, N.J. See P-1. Same was admitted into evidence. N.J.-B. further

testified that she no longer resides in Union and her son, I.T., has not been enrolled in the Union School District since June of 2019.

Mr. R.J.-B.

Mr. R.J.-B. is the brother of the petitioner and the owner of xxx Lafayette Avenue, Union, N.J., where he resides with his family. Mr. R.J.-B. testified that his sister and her two young children came to live with him for a period of approximately one year, starting in August of 2018. He further testified that at times, petitioner and I.T. would not sleep at his home but would spend the night at his sister's house in Irvington. He could not approximate how frequently this would occur but noted that this would happen from time to time due to petitioner's work schedule.

On cross examination, Mr. R.J.-B. testified that his sister had received mail at his home during the period in question and continues to receive mail at the Union address from time to time even though she has since moved to West Orange.

John Matos

John Matos (Matos) appeared telephonically. He is a residency investigator for the Union Township Board of Education. He has been so employed by the district since January 22, 2015. Matos conducted an investigation during the 2018-2019 school year and compiled a report regarding the residence of I.T. See R-1. Mr. Matos testified that he commenced his investigation from October 9, 2018, to October 23, 2018, with a follow-up investigation from November 5, 2018, through the November 30, 2018. Matos began his investigation by surveilling I.T.'s purported Union Township address on Lafayette Avenue, Union. He testified that on the morning of on the morning of October 9, 2018, he witnessed several children exiting the subject address, but not I.T.

Matos subsequently conducted an afternoon surveillance on October 15, 2018, wherein he followed I.T. home after I.T. was dismissed from school early due to a

disciplinary infraction. Matos testified that he was contacted by the Board and notified that I.T. would be leaving school early that day. Matos further testified that he observed I.T. leaving the school accompanied by his mother (the petitioner). Matos followed them to xx Headley Terrace, Irvington. Matos testified that he remained at the Irvington address briefly to conclude his surveillance and returned early the next morning to observe. He witnessed I.T. leaving the premises along with his mother early the next morning. The pair proceeded to drive to the child's school in Union.

Matos testified that he performed a follow-up investigation later in the year, from June 6, 2018, to June 21, 2018, (with exception of June 17, 2018). He noted that at this time, I.T. had changed schools from Connecticut Farms School to Battle Hill Elementary School.

Matos testified that he had performed surveillance on I.T. for a total of eight weeks, excluding weekends, between October of 2018 and June of 2019. His report did not indicate, and Matos, himself, could not attest, to his specific observations for each day he performed surveillance on petitioner and I.T. Matos could only attest with specificity to the October 9, 2018, and October 15, 2018, dates. Matos did attest, however, that at all times relevant, he witnessed I.T. exiting and returning to xx Headily Terrace, Irvington and never witnessed the child exit or return to xxx Lafayette Avenue, Union. Matos further testified that he observed N.J.-B.'s vehicle, a black Acura, regularly parked outside the Irvington address, often overnight, and never observed the vehicle parked overnight at the Union address.

FINDINGS OF FACT

Having had an opportunity to consider all the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

1. Petitioner and her minor child, I.T., came to live at her sister's residence located at xx Headley Terrace, Irvington in July of 2018.

2. I.T. enrolled as a pupil in the Township of Union School District in September of 2018, where he remained throughout the 2018-2019 academic year (the time period reimbursement is sought.)

3. A letter dated October 31, 2018, was sent to N.J.-B. by the district informing N.J.-B. that she was found to be residing out of district and her child, I.T., was therefore not entitled to a free education in the district. The letter further informed N.J.-B. that she may be responsible for tuition of $85 per day, or up to $15,321 per year if, on appeal, she was found to be residing out of district while I.T. was enrolled as a pupil in the Union School District. See R-2.

4. An investigation was conducted by investigator John Matos regarding the residence of I.T. during the 2018-2019 school year. Mr. Matos surveilled I.T.'s purported Union Township address of xxx Lafayette Avenue, Union and conducted surveillance at xx Headley Terrace, Irvington.

5. Matos performed surveillance on I.T. and N.J.-B. between October of 2018 and November of 2018, after which Matos concluded that I.T. was, at all times relevant, living at xx Headily Terrace, Irvington and not xxx Lafayette Avenue, Union.

6. As of November 9, 2018, N.J.-B. held, and continues to hold, a New Jersey driver's license that shows her address as being xxx Lafayette Avenue, Union. P-1.

7. I.T. has not been enrolled in the Union School District since on or about July 1, 2019.

8. I **FIND** that petitioner, N.J.-B., had an unstable housing situation from July of 2018 to June of 2019 and, as a result, both petitioner and her son, I.T., spent substantial time at xx Headily Terrace, Irvington and xxx Lafayette Avenue, Union.

LEGAL DISCUSSION

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parents or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super. 419. 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

Petitioner has the burden of proof in a determination of residency ineligibility N.J.S.A. 18A:38-1. Here petitioner disputes the ultimate finding of the district and the corresponding investigative report that concludes that for a substantial time during the 2018-2019 school year, both N.J.-B. and I.T. were occupying the residence located at xx Headily Terrace, Irvington and that I.T. was regularly taken to the school from this out-of-district address.

Notwithstanding the above-cited investigation, N.J.-B. was able to produce a valid New Jersey State motor vehicle license that showed her address to be xxx Lafayette Avenue, Union. She also testified that she did, in fact, reside at that Union address at all times relevant and that in order to obtain the license, she had to provide proof of residence to the Motor Vehicle Commission. In addition, N.J.-B. produced two additional witnesses that testified that N.J.-B. was living with her son, I.T., at the Union address at all times relevant. In light of the above, I **CONCLUDE** that, based on her unstable housing situation during the 2018-2019 school year, petitioner N.J.-B. was domiciled for a portion of the school year at xx Headily Terrace, Irvington and a portion of the school year at xxx Lafayette Terrace, Union.

DAMAGES

Where the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A:38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

In the case at bar, the district is seeking an order against the petitioner assessing the tuition amount owed the district in the amount of $52,711.32. No testimony was offered at the hearing regarding this amount, but the Board provided the undersigned with a certification (R-3) itemizing the amount sought in their closing submissions. Based on the certification, the amount sought consists of general education tuition of $8,341.76 (prorated for ninety-eight days); special education tuition of $10,706.92 (prorated for eighty-two days); personal aid costs (including benefits) of $26,445.69 (prorated for eighty-two days); door-to-door transportation of $929.65 (estimated); behavioral intervention services of $6,050; and counseling services in the amount of $237.30.

In the notice sent to N.J.-B. by the district dated October 31, 2018, (R-2) it is clearly indicated that the amount petitioner would be liable for if she were found not to be domiciled in district, would be $85 per day or $15,321 for the entire school year. The notice makes no reference to special education tuition, related costs, or transportation expenses. At the hearing, no testimony was offered with regard to special education tuition/costs or transportation costs. Thus, I **FIND** petitioner had no notice of any charges or costs beyond the $85 per day and I, therefore, **CONCLUDE** that petitioner's liability for the 2018-2019 school year is limited to the $15,321 sought via the district's October 31, 2018, letter. R-2. In addition, since I have already found that petitioner was domiciled for a portion of the year in the district, I **CONCLUDE** that petitioner's liability to the district is limited to the amount of $8,341.76; which represents the total amount of general education tuition (pro-rated at $85 per day) certified to by the Business Administrator. R-3. Therefore, the Board is entitled to payment of tuition in the amount of $8,341.76 for the entire 2018-2019 school year.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner's child, I.T., was not a domiciliary in the Union Township Board of Education School District for a portion of the days sought and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $8,341.76.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and her child are not residents and domiciliary in Union, New Jersey, and were not domiciled within its school district during the 2008-2009 school year is hereby **AFFIRMED in part**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the total cost of audited tuition in the amount of $8,341.76.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

February 11, 2020

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 2/11/20

Date Mailed to Parties:

Id

APPENDIX

LIST OF WITNESSES

For petitioner:

R.L.

N.J.-B.

R.J.-B.

For Respondent:

John Matos

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 New Jersey Driver's License for N.J.-B.

For Respondent:

R-1 Investigation report by John Matos

R-2 Letter dated October 31, 2018, from Board to petitioner

R-3 District's Certification

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

April 27, 2020

VIA EMAIL

Edward A. Cridge, Esq.
Mellk O'Neill
51 East Broad Street
Hopewell, NJ 08525

James Rolle, Esq.
General Counsel
Trenton Board of Education
108 N. Clinton Avenue
Trenton, NJ 08609

Re: *In the Matter of the Tenure Hearing of Iain Partridge, School District of the City of Trenton, Mercer County. Agency Dkt. No. 72-3/20.*

Dear Counsel,

I have reviewed the materials filed in connection with respondent, Iain Partridge's motion to dismiss the above-captioned tenure charges. In light of this unpresented time, in accordance with *N.J.A.C.* 6A:3-1.16, I have determined to relax the procedural requirements contained in *N.J.A.C.* 6A:3-5.1.

Accordingly, the respondent's motion to dismiss is hereby DENIED. The respondent is directed to file an answer to the tenure charges within 15 days after the receipt of this decision. Thereafter, the matter will be referred to an arbitrator pursuant to *N.J.S.A.* 18A:6-17.1.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: State Law Library
Executive County Superintendent

113-20L

New Jersey Commissioner of Education

Final Decision on Remand

Luiz Vazquez,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Audley Bridges,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Rebecca Richardson,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Danaayaal Salaam,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Mary Repousis,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Synopsis

In this consolidated matter on remand, the petitioners – all tenured teachers – challenged salary reductions imposed upon them by the respondent Board as a penalty pursuant to the Board's policy regarding tardiness. Petitioners asserted that the reduction in pay violated their tenure rights. The parties filed cross motions for summary decision. An Initial Decision was issued by the Office of Administrative Law (OAL) in November 2019. Subsequent to a review of the case, the Commissioner remanded the matter to the OAL in February 2020 to allow the parties to submit reply briefs regarding their cross motions for summary decision.

On remand, the ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; all petitioners are tenured teachers and were reduced in salary without any hearing based upon the Board's Policy 3151 regarding tardiness; such action violated the requirements of *N.J.S.A.* 34:13A-24, as Policy 3151 was not negotiated with the appropriate collective bargaining unit; and the Board's action in reducing petitioners' salaries must be reversed. Accordingly, the ALJ granted the petitioners' motion for summary decision and denied respondent Board's cross motion.

Upon review, the Commissioner rejected the Initial Decision of the OAL and granted summary decision to the Board. In so doing, the Commissioner found, *inter alia*, that the docking of petitioners' salaries was consistent with the law, as *N.J.S.A.* 34:13A-24(c) provides that "[f]ines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of *N.J.S.A.* 18A:6-10," and this provision is not limited to minor discipline defined by a negotiated collective bargaining agreement. The Commissioner further found that, consistent with *Ferreiro v. Bd. of Educ. of the City of Elizabeth, Union Cty.*, Commissioner Decision No. 185-19 (July 22, 2019), the docking of petitioners' pay is the type of minor discipline contemplated by *N.J.S.A.* 34:13A-24; as such, the docking of petitioners' pay for excessive tardiness was not a violation of their tenure rights pursuant to *N.J.S.A.* 18A:6-10. The petition was dismissed.

114-20

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.

114-20

OAL Dkt. No. EDU 01933-20
(EDU 09004-19, 09007-19, 09009-19, 09096-19, and 09103-19 on Remand)
Agency Dkt. Nos. 127-6/19, 126-6/19, 125-6/19, 129-6/19, and 130-6/19

New Jersey Commissioner of Education

Final Decision on Remand

Luiz Vazquez,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Audley Bridges,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Rebecca Richardson,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Danaayaal Salaam,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

Mary Repousis,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

The record of this matter, the March 26, 2020 Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by petitioners have been reviewed.[1] This matter concerns a challenge by petitioners, who are tenured teachers, to the Board's decision to reduce their salaries pursuant to a Board policy regarding tardiness. The Administrative Law Judge (ALJ) found that the Board's action in reducing petitioners' salaries must be reversed because there was no collective

[1] This case was remanded to the OAL in February 2020 following the Commissioner's consideration of an Initial Decision dated November 25, 2019. The Commissioner remanded the matter to allow the parties to submit reply briefs regarding their cross motions for summary decision.

bargaining agreement addressing excessive tardiness; accordingly, the ALJ granted petitioners' motion for summary decision and denied the Board's motion for summary decision.

In its exceptions, the Board argues that the relevant statute specifically provides that fines for minor discipline do not constitute a reduction in compensation under the Tenure Act and that such fines are permissible. The Board further contends that the statute's plain language allows these fines even in the absence of a negotiated collective bargaining agreement. The Board cites to *Ferreiro v. Bd. of Educ. of the City of Elizabeth, Union Cty.*, Commissioner Decision No. 185-19 (July 22, 2019), which held that the docking of pay for excessive tardiness is the type of minor discipline contemplated by the statute. According to the respondent, the ALJ improperly relied on the fact that the petitioner in *Ferreiro* was subject to a negotiated collective bargaining agreement that addressed excessive tardiness as a reason to distinguish that matter from the one at issue here.

In reply, petitioners argue that fines for minor discipline are only permissible when derived from a collectively negotiated agreement. According to petitioners, because there is no agreement in place, the Board may only impose discipline that is not prohibited by law; here, because reductions in compensation are prohibited by tenure law, the Board cannot impose any fines.

Upon review, the Commissioner disagrees with the ALJ and concludes that the Board's action in docking the petitioners' salaries was consistent with the law. *N.J.S.A.* 34:13A-24(c) provides that "[f]ines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of *N.J.S.A.* 18A:6-10." This provision is not limited to minor discipline defined by a negotiated collective bargaining agreement. Furthermore, *N.J.S.A.* 34:13A-22 defines minor discipline as including "various forms of fines and

suspensions, but does not include tenure charges . . . or the withholding of increments . . . letters of reprimand, or suspensions with pay[.]" Consistent with the *Ferreiro* decision, *supra*, the Commissioner finds that the docking of the petitioners' pay is the type of minor discipline contemplated by *N.J.S.A.* 34:13A-24. As such, the docking of the petitioners' pay for excessive tardiness is not a violation of their tenure rights under *N.J.S.A.* 18A:6-10.[2]

Accordingly, the Initial Decision of the OAL is rejected; summary decision is granted in favor of the Board and petitioners' motion for summary decision is denied. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: May 11, 2020
Date of Mailing: May 12, 2020

[2] Because the Commissioner bases this decision on the provisions of *N.J.S.A.* 34:13A-24, there is no need to reach the question of whether petitioners waived their right to contest Board Policy 3151 regarding excessive tardiness.

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

115-20

Agency Dkt. No. 85-4/20

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of
Nicole Palazzo, School District of the
Township of Middlesex, Middlesex County.

For the Petitioner, Ari D. Schneider, Esq.

No appearance by or on behalf of Respondent, Nicole Palazzo

This matter was opened before the Commissioner of Education on April 9, 2020, through tenure charges of unbecoming conduct and other just cause certified by Fredrick D. Williams, Superintendent of the Middlesex Township School District ("District"), together with supporting evidence against respondent, Nicole Palazzo, a tenured teacher in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via hand delivery and certified mail, on April 7, 2020.

On April 29, 2020, the Commissioner directed the respondent, via regular to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent has a history of excessive absenteeism dating back to the

2001-2002 school year. The respondent has not reported for work since November 20, 2019 and she has failed to respond to the District's request for information concerning her whereabouts. Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her, the Commissioner finds that the District's charges of unbecoming conduct and other just cause have been proven and warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: May 22, 2020
Date of Mailing: May 22, 2020

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

116-20

New Jersey Commissioner of Education

Final Decision

Christopher Wong,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Petitioner appealed the July 2019 determination of the respondent, New Jersey Department of Education, Office of Student Protection (OSP), that he is permanently disqualified from any employment with a Department of Education contracting unit in the State of New Jersey. Petitioner was disqualified as the result of a 2014 guilty plea in New York State (NYS) to a charge of attempted unlawful surveillance in the second degree, a class E felony under NYS's Penal Law 110-250.45 sub 1; this offense mirrors invasion of privacy under New Jersey's *N.J.S.A.* 2C:14-9(b)(1). The respondent filed a motion to .dismiss the petition.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:7-7.1(c)2 requires permanent disqualification following a violation or attempted violation of any offense under N.J.S.A. 2C Title 14; petitioner submitted psychological evaluations purportedly showing that he is a minimal risk to recommit the acts at issue in this matter; petitioner has not presented any evidence disputing the criminal charges he pled guilty to in NYS; rather, petitioner seeks to have the Commissioner reject his mandatory disqualification based on the facts and circumstances of petitioner's individual situation and the documentation of his mental state following his commission of the crime; the Commissioner is, however, bound by the statutory language, which states that petitioner "shall be permanently disqualified." The ALJ concluded that the law is settled against the petitioner and denied his request for relief.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

116-20

OAL Dkt. No. EDU 14375-19
Agency Dkt. No. 205-8/19

New Jersey Commissioner of Education

Final Decision

Christopher Wong,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection

Respondent.

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

Upon review, the Commissioner concurs with the ALJ that petitioner is permanently disqualified from employment in any educational institution under the supervision of the Department of Education. Petitioner does not challenge the accuracy of his criminal history record but seeks only to present evidence of his individual circumstances. However, his disqualification is mandatory pursuant to *N.J.S.A.* 18A:6-7.1.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: May 20, 2020
Date of Mailing: May 20, 2020

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

117-20

State Board of Examiners Dkt. No. 1112-202
Agency Dkt. No. 3-5/18A

New Jersey Commissioner of Education

Decision

In the Matter of the Revocation of the Certificates of Andrea Giuffrida, State Board of Examiners

Order of Revocation by the State Board of Examiners, April 18, 2018

For the Respondent-Appellant, Sanford R. Oxfeld, Esq.

For the Petitioner-Respondent State Board of Examiners, Laurie Fichera, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

This matter was referred to the State Board of Examiners (Board) after the Point Pleasant Borough School District dismissed the appellant from her non-tenured position as a result of allegations that she had acted inappropriately toward several of her male colleagues. Following a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that the appellant's behavior toward her male colleagues constituted unbecoming conduct.[1] The ALJ recommended that the appellant's certificates be suspended for one year, and that she receive counseling on sexual harassment and professionalism in the workplace in order to address the seriousness of her offenses. Thereafter, the Board adopted the Initial Decision of the ALJ, but modified the penalty to include the revocation of the appellant's certificates. The Commissioner affirmed the Board's decision on appeal.

[1] The case was tried before ALJ John Schuster on April 15, 2013 and February 18, 2014 and the record closed on July 17, 2014. However, ALJ Schuster did not issue a decision before he retired in 2017. In April 2017, the case was transferred to ALJ Lisa James-Beavers, who subsequently issued an Initial Decision on October 13, 2017.

Appellant subsequently appealed to the Appellate Division of the Superior Court, which reversed the decision because the Initial Decision of the ALJ – on which the Board and the Commissioner relied – improperly made credibility findings based on transcripts alone, when the ALJ had not heard the testimony of the witnesses. The Appellate Division remanded the matter to the Commissioner to determine whether the redacted record, devoid of the evidence based on the ALJ's credibility findings, sufficiently supports the revocation of appellant's certificates.

Following the Appellate Division's decision, appellant submitted information to the Commissioner. She argued that her behavior since these events occurred in 2011 has been beyond reproach and should be considered as a mitigating factor. Appellant notes that the recipients of her actions did not view them as sexual harassment, and none of the conduct involved students. Appellant further contends that, because she has been unable to teach since the revocation in April 2018, a period of over two years, a sufficient penalty has already been imposed against her.

In reply, the Board argues that the redacted record supports the Board's decision to revoke appellant's certificates. Specifically, the Board points to testimony in which appellant admitted to kissing and hugging colleagues. The Board contends that appellant's good behavior since 2011 does not alleviate it of its responsibility to impose a penalty for her actions and urges the Commissioner to reaffirm its decision.

Upon review, the Commissioner is mindful of the standard of review for appeals from decisions of the State Board of Examiners, under which the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). At this stage in the proceeding, the only decision available for the Commissioner's review is one that is no longer valid. As there is no Board decision based solely on the redacted record or based upon a new record that includes appropriate credibility findings

from an ALJ who has heard the testimony, there is no longer a decision in this case for the Commissioner to review.

Accordingly, this matter is remanded to the State Board of Examiners for further proceedings consistent with this decision.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: May 20, 2020
Date of Mailing: May 21, 2020

118-20+

OAL Dkt. No. EDU 13273-16
Agency Dkt. No. 232-8/16

New Jersey Commissioner of Education

Corrected Final Decision

Board of Education of the Township of Piscataway, Middlesex County,

Petitioner,

v.

A.V. and S.V. on behalf of minor children, N.V. and T.V.,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, respondents are challenging the Board's determination that they did not reside in Piscataway from September to December 2010, and that the minor children were therefore ineligible to attend school in the district. The Administrative Law Judge (ALJ) found that petitioners did not meet their burden of demonstrating that they were residents of Piscataway from September to December 2010. Accordingly, the ALJ ordered tuition reimbursement in the amount of $8,830.08.

In their exceptions, respondents argue that the Board incorrectly handled the family's situation and did not focus on their homelessness in 2009. In reply, the Board contends that the evidence in the record, including the ALJ's credibility findings, amply supports the conclusion that respondents' children were not eligible for enrollment in the district.

Upon review, the Commissioner concurs with the ALJ's finding that respondents failed to sustain their burden of establishing that they were domiciled in Piscataway from September to December 2010, for the reasons thoroughly detailed in the Initial Decision. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during that time. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before her and make findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
>
> [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to disturb the ALJ's credibility assessments.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondents are directed to reimburse the Board in the amount of $8,830.08 for tuition costs incurred during the period in which N.V. and T.V. were ineligible to attend school in Piscataway.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: May 27, 2020
Date of Mailing: May 27, 2020

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

118-20

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Piscataway, Middlesex County,

Petitioner,

v.

A.V. and S.V., on behalf of minor children, N.V. and T.V.,

Respondent.

Synopsis

The petitioning Board of Education (Board) sought tuition reimbursement from the respondents for a period of alleged ineligible attendance by their children, N.V. and T.V., from September to December 2010. The respondents disputed the Board's allegations and claimed they were homeless.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1(a), public schools are free to any person over five and under twenty-five years of age who is domiciled within the school district; pursuant to *N.J.S.A.* 18A:38-1(b), in proceedings before the Commissioner, the parent or guardian bears the burden of proving, by a preponderance of the evidence, that the children are eligible for a free public education under the statutory criteria; if the evidence does not support the residency claim, the Commissioner shall assess tuition for the period of ineligible attendance; in the instant case, witnesses for the petitioning Board presented credible testimony and evidence establishing that N.V. and T.B. were domiciled in Raritan, not Piscataway, during the period at issue; the testimony of A.V. as to his family's residency for the same period was not credible or consistent; and although the V family had been homeless previously, they were not homeless during the period in question here. The ALJ concluded that petitioners did not meet their burden to show that they were residents of Piscataway from September to December 2010; accordingly, the ALJ ordered tuition reimbursement in the amount of $8,830.08.

Upon review, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. Respondents were ordered to reimburse the Board in the amount of $8,830.08. 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.

118-20

OAL Dkt. No. EDU 13273-16
Agency Dkt. No. 232-8/16

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Piscataway, Middlesex County,

Petitioner,

v.

A.V. and S.V. on behalf of minor children, N.V. and T.V.,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, respondents are challenging the Board's determination that they did not reside in Piscataway from September to December 2010, and that the minor children were therefore ineligible to attend school in the district. The Administrative Law Judge (ALJ) found that petitioners did not meet their burden of demonstrating that they were residents of Piscataway from September to December 2010. Accordingly, the ALJ ordered tuition reimbursement in the amount of $8,830.08.

In their exceptions, respondents argue that the Board incorrectly handled the family's situation and did not focus on their homelessness in 2009. In reply, the Board contends that the evidence in the record, including the ALJ's credibility findings, amply supports the conclusion that respondents' children were not eligible for enrollment in the district.

Upon review, the Commissioner concurs with the ALJ's finding that respondents failed to sustain their burden of establishing that they were domiciled in Piscataway from September to December 2010, for the reasons thoroughly detailed in the Initial Decision. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during that time. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before her and make findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
>
> [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to disturb the ALJ's credibility assessments.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondents are directed to reimburse the Board in the amount of $8,830.08 for tuition costs incurred during the period in which N.V. and T.V. were ineligible to attend school in Piscataway. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: May 22, 2020
Date of Mailing: May 22, 2020

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

119-20

COMMISSIONER OF EDUCATION, State of New Jersey

IN THE MATTER OF	:	
	:	Agency Docket No. 67-3/20
Borough of Elmwood Park School District Bergen County, New Jersey	:	
Adv.		
	:	**Final Award, by Consent [to a**
Elyss Frenkel, Tenured Teacher	:	**Settlement Agreement]**
	:	

Appearances by:
Frances L. Febres, Esquire
Cleary, Giacobbe, Alfieri, Jacobs LLC [for the School District]

Stephen P. Hunter, Esquire
Detzky, Hunter, & DeFillippo, LLC [for the Teacher]

Before Jay D. Goldstein, Impartial Arbitrator

FINDINGS and OPINION

Background;

On/about March 24, 2020, Acting Director Jennifer Killough-Herrera, Office of Controversies & Disputes of the New Jersey Department of Education [hereafter, the "Agency"] appointed this Arbitrator to hear and decide the above referenced tenure related matter. Due to certain operating restrictions forced upon the Agency because of the 'Covid-19' Pandemic; the "Agency" delegated its usual responsibility for transmittal of the official 'file' to the Arbitrator

to the Parties. Accordingly, by Conference call between the Arbitrator and Parties' Counsel [March 25, 2020; held for multiple reasons] an alternative method of providing an accurate, but duplicate, "Agency" file to the Arbitrator was achieved. Thus, the "Agency's" file transmittal task was accomplished. It was received in/ around March 27, 2020.

During the March 25th conference, several preliminary matters were addressed by the Arbitrator in accordance with his authority under P.L. 2015, c. 109. This included a 'Wavier' of the time limits imposed under the Act, being mutually agreed upon between the respective Parties 'Counsel. Also, a detailed discussion occurred relative to their schedule for completion of "Discovery"; as a condition precedent to holding in-person Hearing(s) as required under the Act.

Moreover, a schedule of Hearings to permit completion of "Discovery" was agreed upon and set as June 3, 4, and 5, 2020. Counsel for the Parties also agreed that this schedule would provide sufficient time to prepare for the Hearings and thus allow for a full and fair adjudication of the Teacher Tenure process. Notice of the above was transmitted to the Parties.

Another Conference Call was scheduled for May 13, 2020, in order to allow for a 'status' check, i.e., that all appropriate pre-Hearing discovery [requests/ responses] had been satisfied. In the meantime, receipt and review of the duplicate "Agency" file had occurred by Arbitrator. Notice of the above was transmitted to the Parties.

On April 3, 2020, the Arbitrator wrote Party's Counsel to confirm review of the Agency file and to ascertain the status of their progress in discovery proceedings. Also, to remind of the upcoming Conference Call scheduled for May 13, 2020.

Subsequently, on May 6, 2020, School Board Counsel, Attorney Febres wrote to advise that a settlement had been reached between the Parties jointly. Purportedly, the settlement process had been ongoing; and was only announced after the Arbitrator had written, on the same day, to the Parties seeking further status, as above.

In Consequence:

All of the above contributed to the process contemplated by the Act. Further, the extended time frame resulted in apparent settlement discussions between the named Parties during the hiatus between discovery and scheduled hearings.

Attorney Febres and subsequently, Attorney Hunter's contributions [correspondence and documentation] foreshadowed a successful settlement. Included were the initial pronouncement of, and a previously executed / notarized, "SETTL (E) MENT, SEPARATION AND MUTUAL RELEASE AGREEMENT" [hereafter, 'Settlement Agreement' or, 'Agreement']:

"... *the parties have reached an amicable resolution and have entered into* ***a settlement agreement*** *that is* ***subject to your review and approval.*** *Enclosed is such agreement. If you approve of the parties' settlement, please advise whether the Board may withdraw the charges that have been filed in this matter and whether this matter is deemed closed. If you have any questions or require additional information, ...contact me...* "

The complete and fully executed, "Settlement Agreement" [attached to the Arbitrator's transmittal of this, "**Final Award, by Consent**" document] was incorporated, along with several other documents referenced below, as attachments to this 'Award'. They include the following, as attached hereto, forwarded by Attorney Hunter and which are also referenced in the 'Agreement', as noted below:

"**Exhibit A**"; an irrevocable letter of resignation and retirement, executed by 'Elyss Frenkel' [Agreement. at Par. 1c.]

"**Exhibit "B**"; an irrevocable waiver of the right to consider the 'Separation and Release Agreement' for the full [i.e., 21 day] consideration period; executed by Elyss Frenkel [Agreement, at Par. 16, c.

"**Resolution #L5** Settlement Agreement"; a document reflecting adoption of and approval by, the "Elmwood Park Board of Education", executed by John DiPaola, Board Secretary.

As part of the requested review by the Arbitrator, certain aspects of the 'Agreement' raised inquiries and, discussed with Party Counsel, were promptly resolved. In relevant part of my consideration for this, "**Final Award, by Consent**" are the following, related portions:

"1. TERMS
a. Frenkel acknowledges that, at the time of this Agreement, she has been placed on leave since, at least, March 13, 2018 and placed on unpaid leave since, at least, January 23, 2019. Frenkel further acknowledges that, since being on unpaid leave, the Board has not been contributing to her pension through the Teachers' Pension and Annuity Fund ("TPAF").

b. As a result of this Agreement, the Board will continue Frenkel on unpaid administrative leave through and ending on June 30, 2020.

c. Simultaneous with executing this Agreement, Frenkel will submit an irrevocable letter of resignation effective July 1, 2020 (Exhibit "A"), which the Board shall immediately accept upon approval and execution of this Agreement.

d. Should Frenkel apply for retirement with the Teachers' Pension and Annuity Fund ("TPAF"), she shall provide the Board with any application that may require its input or response, as soon as practicable. In turn, the Board shall complete and submit its respective portion to the TPAF within seventy-two (72) hours, notwithstanding any technical or administrative difficulties that may be beyond its control.

e. In exchange for the promises and Releases set forth herein, the Board will pay Frenkel a lump sum payment of Fourteen Thousand Four Hundred Dollars ($14,400.00) which will hereinafter be referred to as the "Settlement Sum."

i. Frenkel acknowledges and agrees that she does not have any accrued, unused leave nor is she entitled to nor will she receive any financial payout upon separation from employment, other than the Settlement Sum.

ii. Within fifteen (15) days of this Agreement being fully-executed by all parties, and approved by the Commissioner of Education-assigned Arbitrator who has been assigned to the pending tenure charges to the captioned matter: IMO the Tenure Hearing of Elyss Frankel, School District of the Borough of Elmwood 3 Park, Bergen County, Agency Docket # 67-3/20, payment by the Board of the Settlement Sum shall be issued to Frenkel.

iii. Payment shall be issued without deductions for, and not limited to, pensions contributions, payroll taxes and/or health benefits contributions. Accordingly, the Settlement Sum shall be subject to IRS reporting using Form 1099.

iv. Frenkel shall be solely responsible for the payment of all taxes related to the Settlement Sum and shall indemnify and hold harmless the Board, including the Board's officers, employees, agents, representatives and insurers, for any amounts found due and owing to any tax authorities for any tax liabilities for which Plaintiffs may be or are found liable.

f. Following the full-execution of this Agreement **and approval of this Agreement by the assigned arbitrator to the tenure charges herein referenced,** the Board shall withdraw its tenure charges against Frenkel. Thereafter, it shall segregate the tenure charges from Frenkel's personnel file.

g. As a result of Frenkel's irrevocable resignation effective July 1, 2020, Frenkel's last day of employment with the Elmwood Park Board of Education shall be June30, 2020.

i. Accordingly, and unless otherwise agreed to in writing by the Board, Frenkel shall not be considered an employee of the Board following June 30, 2020.

ii. Frenkel further understands and agrees that by entering into this Agreement, she is voluntarily foregoing her tenure and seniority rights effective July 1, 2020.

h. All Board equipment and property in the possession of Frenkel, including, but not limited to communication devices, keys, identification cards, and/or equipment will be returned to the Board within five (5) days of executing this Agreement."

['Settlement Agreement', 'Exhibit(s) A and B' and the, 'Resolution #L5' documents; shall be known hereafter as, the "Settlement" package]

As stated above in covering correspondence and included within the terms of the "Settlement Agreement" document was an appropriate request for the Arbitrator's approval and to: *"advise whether the Board may withdraw the charges that have been filed in this matter and whether this matter is deemed closed."* [Par.1, f.] Further, and based upon prior conventions under the NJ Teacher Tenure Act, this Arbitrator continues the practice of incorporating the terms of the parties' settlement into an award, i.e., this "**Final Award, by Consent.**

Review and Approval of Settlement Reached and **Documentation Submitted:**

Consequently, the fully executed / notarized "Settlement Agreement", previously copied by Ms. Febres' to opposing Counsel [Stephen P. Hunter, Esquire] and several School District officials is now deemed to be approved after review by the undersigned Arbitrator and, along with the other documents referenced [i.e., the "Settlement" package] are incorporated herein.

All of the documents appear, by their terms, to describe an 'arms-length' transaction entered into without duress by either Party and with each of the principle signatories relying upon the advice of counsel. Moreover, Counsel for the Teacher confirmed his role in the above when he wrote to this Arbitrator, on May 18, 2020, "*This letter will also serve to confirm that Ms. Frenkel, consistent with Par. 9 of the Agreement has consulted with me, as her attorney, with respect to the Agreement and has reviewed with me all of the terms and conditions of this Agreement prior to execution of same*".

Further, the 'School Board' has demonstrated its part by providing a document, "***Resolution #L5***" which by its terms effectively, "*approves the settlement*

'Agreement'. Consequently, the entirety of these documents, including this "**Final Award, by Consent,** effectively completes the matter and thus terminates the Tenure charge proceedings against this Teacher.

Accordingly, the parties having negotiated a successful and amicable resolution of the charges pending and the documentation resultant thereto appear to be in the mutual best interest of maintaining ongoing and harmonious relationships in the Parties environment. The transaction also appears to be in the public interest and consistent with the settled law of the jurisdiction.

The 'Settlement' encompasses all outstanding issues of this matter, achieving School Board approval and thus, the approval of this Arbitrator after review of the entire matter. The Arbitrator has fully considered whether the settlement represents an appropriate resolution of the issues, taking into account the relevant law and the best interests of the parties. On the basis of that review the Arbitrator finds the Parties' settlement of their differences to be an appropriate compromise of their respective positions.

Taking all of the above into consideration, the following Decision under the form of a, "**Final Award, by Consent**" is issued:

DECISION

The underlying record of this '**Final Award, by Consent**' matter encompasses the entire, "Settlement" of Tenure charges filed against Tenured Teacher, Elyss Frenkel by the Borough of Elmwood Park School District. [Agency Docket No. 67-3/20] The documents covering the "Settlement" are referenced more specifically above here; and are included and incorporated herein as: the fully executed "Separation of Employment Agreement" [between Teacher and Board of Education], "Letter of Resignation" [by the Teacher, "Exhibit A"], Teacher's "Waiver" ["Exhibit B", and, "Resolution #L5 Settlement Agreement" [School Board's adoption / approval]

All of the above has been carefully reviewed by this Arbitrator. As a result, the Arbitrator believes and thus finds that this "Settlement" is consistent with established standards governing settlement of tenure matters in this jurisdiction. Moreover, the terms agreed to by the Parties are consistent and in conformity with the principles established by, "*In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846.*

Moreover, all terms of the "Settlement Agreement" and accompanying supporting documents referenced above shall be enforced and deemed enforceable by the Parties to them. Furthermore, upon 'segregating' these charges from the Teacher's personnel file consistent with the 'Agreement' this matter is concluded, and thus deemed final and binding. Consequently, this Settlement is hereby approved and the tenure matter discharged, subject to full compliance with the terms of all the "Settlement" documents referenced hereunder.

Dated: 20 May, 2020

Jay D. Goldstein,
Jay D. Goldstein, Impartial Arbitrator

120-20

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the Morris School District, Morris County,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that her child, S.F., was ineligible to receive a free public education in respondent's school district. S.F. divides her time equally between the Morris County School of Technology and the Morristown High School (MHS). The Board contended that S.B. and S.F. moved from Morristown to Boonton early in the 2018-19 school year, and from that point forward was ineligible to receive a free public education in the Morris School District. The Board filed a motion for summary decision, and a counterclaim for tuition. The ALJ issued an October 2019 Initial Decision finding that petitioner owed the Board tuition for a period of ineligible attendance from October 19, 2018 through June 30, 2019 totalling $11,290.05, plus $73.70 for each school going forward since the start of the 2019-20 school year. The Commissioner remanded the case to the OAL in December 2019, finding that additional information was necessary to accurately calculate the total amount of tuition due to the Board.

On remand, the ALJ found, *inter alia*, that: there are no material facts at issue herein and the case is ripe for summary decision; pursuant to *N.J.S.A.* 18A:38-1(a), public school is free to a minor who is domiciled within the school district; if a student is not domiciled within the school district, she is not entitled to attend district schools free of charge, and the Commissioner may assess tuition pursuant to *N.J.S.A.* 18A:38-1b; in the instant case, it is uncontroverted that S.B. and S.F. moved from Morristown to Boonton on September 30, 2018, but S.F. continued to attend MHS for the remainder of the 2018-19 school year; S.F. remains a student at MHS for the 2019-20 school year; and the respondent Board is entitled to tuition reimbursement for the period of S.F.'s ineligible attendance. The ALJ concluded that S.B. owes the Board $15,980.85 for the combined periods from October 19, 2018 through June 30, 2019, and September 1, 2019 through December 13, 2019.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision, with modification to reflect October 1, 2018 as the correct date upon which S.F. became ineligible to attend school in the district; further, the Commissioner noted that the technique used by the ALJ to calculate tuition due did not comply with *N.J.S.A.* 18A:38-1b, which requires that tuition be "computed on the basis of 1/180 of the total annual per pupil cost to the local school district multiplied by the number of days of ineligible attendance." Based on these modifications, the Commissioner directed petitioner to reimburse the Board in the amount of $16,611.15, plus $73.29 for each day beyond December 13, 2019 that S.F. remained enrolled in the district. 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.

120-20

OAL Dkt. No. EDU 17296-19
(EDU 05507-19 On Remand)
Agency Dkt. No. 60-3/19

New Jersey Commissioner of Education

Final Decision on Remand

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

Petitioner,

v.

Board of Education of the Morris School District, Morris County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed – mindful of the Commissioner's December 3, 2019 decision remanding this matter for calculation of tuition due to the Board.

In his December 3, 2019 decision, the Commissioner determined that the petitioner failed to sustain her burden of demonstrating that she was a domiciliary of Morristown for the majority of the 2018-19 school year, as she admitted moving to Boonton on or about September 30, 2018. Thus, the minor child was not entitled to a free public education in the District's schools, or at the Morris County School of Technology, which S.F. attended part time. The Commissioner explained that pursuant to *N.J.A.C.* 18A:38-1b, he shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the district, but noted that it was unclear which date – October 1 or October 19, 2018 – the

Administrative Law Judge (ALJ) used in his calculation of tuition. The Commissioner also found that additional information was necessary in order to calculate the total tuition owed to the Board, such as the number of school days on which the minor child attended school ineligibly during both the 2018-19 and 2019-20 school years. The Commissioner therefore remanded the matter to the OAL for calculation of tuition and supplementation of the record as warranted.

Upon review, the Commissioner finds that the minor child was ineligible to attend school in the district from October 1, 2018 to the present.[1] The total cost per day for S.F. to attend half-days at the Morristown High School and half-days at the Morris County School of Technology was $69.69 for the 2018-19 school year and $73.29 for the 2019-20 school year. As such, the Commissioner finds that the Board is entitled to reimbursement in the amount of $16,611.15 for the period from October 1, 2018 through December 13, 2019 ($69.69 per day for 170 days during the 2018-19 school year and $73.29 per day for 65 days during the 2019-20 school year), plus $73.29 for each day beyond December 13, 2019 that the minor child remains enrolled in the district's schools.[2]

In her exceptions, petitioner argues that according to school policy, the minor child was permitted to remain in the district for the remainder of her junior year free of charge and attend as a tuition student for her senior year. Petitioner also expresses her frustration with

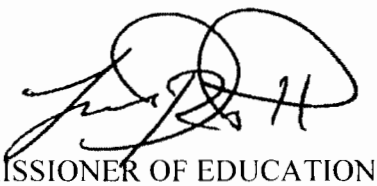
[1] The Initial Decision concludes that the minor child was ineligible to attend school in the district beginning on October 19, 2018, but also calculates the number of school days remaining in the 2018-19 school year beginning on October 1, 2018. Notwithstanding the ALJ's use of two different dates in his calculation of tuition, the Commissioner finds that the date the minor child became ineligible to attend school in the district should be October 1, 2018, as it is the first day following September 30, 2018, when petitioner admitted that she moved to Boonton.

[2] The ALJ calculated tuition for the 2018-19 school year by reducing the total annual tuition by 1/10, as the minor child was eligible to attend school for one month of the school year. (Initial Decision at 5). The Commissioner notes that such an approximation of tuition costs does not comply with *N.J.S.A.* 18A:38-1b, which requires that tuition be "computed on the basis of 1/180 of the total annual per pupil cost to the local school district multiplied by the number of days of ineligible attendance."

the process, including her disappointment that the District failed to resolve this matter by setting up a payment plan. The Commissioner does not find petitioner's exceptions to be persuasive. The minor child was determined to be ineligible for a free public education in the District's schools in the Commissioner's decision dated December 3, 2019, and the only issue remaining in this matter is the amount of the tuition owed by the petitioner. Whether the parties reached a settlement by way of a payment plan does not impact the Commissioner's calculation of tuition due to the Board.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, as modified herein. Petitioner is directed to reimburse the Board in the amount of $16,611.15 – plus $73.29 for each day beyond December 13, 2019 that the minor child remains enrolled in the district's schools – for tuition costs incurred during the time period for which S.F. was ineligible to attend school in the Morris School District. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: May 29, 2020
Date of Mailing: June 1, 2020

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

121-20+

OAL Dkt. No. EDU 15927-19
Agency Dkt. No. 261-9/19

New Jersey Commissioner of Education

Amended Final Decision

H.C., on behalf of minor children,
J.C., J.C., J.C., and J.C.,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner, and the reply thereto by the Board.[1]

Petitioner challenges the Board's determination that he did not reside in Elizabeth for the entire 2018-2019 school year and the beginning of the 2019-2020 school year, through November 1, 2020, and that his minor children were therefore ineligible to attend school in the district. The Administrative Law Judge (ALJ) found that petitioner did not meet his burden of demonstrating that he was a resident of Elizabeth during the relevant time period. Accordingly, the ALJ ordered tuition reimbursement in the amount of $69,440.

[1] The Commissioner issued a decision in this matter on June 1, 2020, which stated that the parties did not file exceptions to the Initial Decision. After receipt of the Commissioner's decision, petitioner filed a motion to re-open this case because he had not received the Initial Decision and was therefore unable to file exceptions. By order dated July 17, the Commissioner re-opened this matter to consider the exceptions filed by petitioner.

In his exceptions, petitioner argues that his family lived in Elizabeth for ten years before being forced to move out when a new landlord increased their rent on short notice, so they moved in with his wife's mother. He alleges that they looked for a residence in Elizabeth, but prices were too high. Petitioner notes that he worked in Elizabeth and has paid taxes there. Petitioner also submitted copies of utility bills showing the address of his new residence in Elizabeth.

In reply, the Board argues that petitioner submitted documents that were never entered into evidence. Moreover, the Board contends that the documents do not overcome H.C.'s own testimony that he did not reside in Elizabeth during the relevant period of time, an admission which he made again in his exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain his burden of establishing that he was a domiciliary of Elizabeth for the entire 2018-2019 school year and the beginning of the 2019-2020 school year, through November 1, 2020. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during that time. Pursuant to *N.J.A.C.* 1:1-18.4(c), evidence not submitted at a hearing shall not be submitted as exceptions. As the documents submitted with petitioner's exceptions were not submitted at hearing, the Commissioner did not consider those documents. The Commissioner does not find the remainder of petitioner's exceptions persuasive, given his admission that he did not reside in Elizabeth during the relevant time period.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in Elizabeth. Therefore, the Board is entitled to tuition reimbursement in the total amount of $69,440 for the 2018-2019 school year and the beginning of the 2019-2020 school year, through

November 1, 2020, during which time petitioner's minor children were ineligible to attend school in respondent's district.[2]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $69,440 for tuition costs incurred during the time period in which J.C., J.C., J.C., and J.C. were ineligible to attend school in Elizabeth. The petition of appeal is hereby dismissed.

IT IS SO ORDERED. [3]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision:
Date of Mailing:

[2] The tuition is calculated as follows:

J.C. and J.C. (second grade and fourth grade): $14,245 for 2018-2019 plus $2,928.18 (37 days at a per diem rate of $79.14) for 2019-2020 = $17,173.18 per child

J.C. (eighth grade): $14,243 for 2018-2019 plus $2,927.81 (37 days at a per diem rate of $79.13) for 2019-2020 = $17,170.81

J.C. (tenth grade): $14,867 for 2018-2019 plus $3,055.83 (37 days at a per diem rate of $82.59) for 2019-2020 = $17,922.83

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

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of

KEVIN CUSHING

and

SCHOOL DISTRICT OF THE CITY OF ORANGE

ESSEX COUNTY, NEW JERSEY

Agency Docket No. 209-8/19

AWARD OF ARBITRATOR

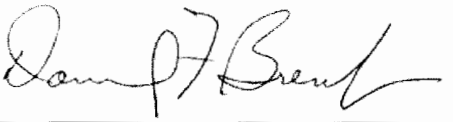
The undersigned Arbitrator, having been designated pursuant to NJSA 18A:6-16, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the tenure charges brought by the School District of the City of Orange against the Kevin Cushing cannot be sustained. The evidentiary record mandates that the annual rating of Respondent Cushing's teaching and job performance in the 2017-2018 School Year as Partially Efficient be discounted as a basis for revoking his tenure because of substantial procedural flaws that rendered the annual rating arbitrary and that materially affected the rating. Respondent Cushing's annual rating of Partially Efficient for the 2018-2019 school year shall remain valid and undisturbed.

Respondent Cushing shall be entitled to another year of employment by the School District of the City of Orange as a teacher, subject to a new Corrective Action Plan to be developed collaboratively with Respondent before the commencement of the 2020-2021 school year. This CAP shall be tailored to Respondent's teaching assignment for the 2020-2021 school year. Respondent's specific grade level and school assignment shall be conveyed to Respondent not less than thirty calendar days before the first day that Respondent is scheduled to report back to work at the beginning of the school year so that he can adequately prepare for such assignment. Respondent Cushing shall be afforded ample support as contemplated by the TEACHNJ statute, including periodic personal coaching specific to his assignment on an ongoing basis by supervisors and master teachers.

The Arbitrator hereby retains jurisdiction to resolve any dispute that may arise regarding the implementation of this Award or the remedy ordered pursuant to this Award.

May 26, 2020



Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 26th day of May, 2020 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2021

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of

KEVIN CUSHING

and

SCHOOL DISTRICT OF THE CITY OF ORANGE

ESSEX COUNTY, NEW JERSEY

Agency Docket No. 209-8/19

Pursuant to NJSA 18A:6-16, the undersigned was appointed as Arbitrator in the above-entitled matter by the Department of Education Office of Controversies and Disputes on August 30, 2019. Hearings in the above-entitled matter were held at the Administrative Offices of the Orange Board of Education in Orange, New Jersey on November 5, 2019, January 13, 2020, and February 24, 2020. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. Both parties submitted post-hearing briefs, and the record was declared closed on April 12, 2020.

APPEARANCES

For the Orange Board of Education:

Jessika Kleen, Esq., of The Machado Law Group

Kyle Ulscht, Esq., of The Machado Law Group

Glasshebra Jones-Dismuke, Executive Director of Human Resources

Dr. Myron Hackett, Principal, Park Avenue School

For the Respondent, Kevin Cushing:

Ronald J. Ricci, Esq., of Ricci Fava, Esqs.

Maryssa P. Geist, Esq., of Ricci Fava Esqs.

Kevin Cushing, Respondent

ISSUE SUBMITTED

What shall be the disposition of the tenure charges against Kevin Cushing?

RELEVANT STATUTORY PROVISIONS

NJSA 18A:6-17.2-- Considerations for arbitrator in rendering decision.

23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

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

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

NJSA 18A:6-17.3 Evaluation process, determination of charges.

25. a. Notwithstanding the provisions of N.J.S.18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:

(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S.18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.18A:6-117 et al.).

18A:6-119 Definitions relative to the TEACHNJ Act.

3. As used in sections 12 through 17, 19 through 21, and 24 of P.L.2012, c.26 (C.18A:6-117 et al.):

"Corrective action plan" means a written plan developed by a teaching staff member serving in a supervisory capacity in collaboration with the teaching staff member to address deficiencies as outlined in an evaluation. The corrective action plan shall include timelines for corrective action, responsibilities of the individual teaching staff member and the school district for implementing the plan, and specific support that the district shall provide.

"Evaluation" means a process based on the individual's job description, professional standards and Statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, conducted and prepared by an individual employed in the district in a supervisory role and capacity and possessing a school administrator certificate, principal certificate, or supervisor certificate.

"Individual professional development plan" means a written statement of goals developed by a teaching staff member serving in a supervisory capacity in collaboration with a teaching staff member, that: aligns with professional standards for teachers set forth in N.J.A.C.6A:9-3.3 and the New Jersey Professional Development Standards; derives from the annual evaluation process; identifies professional goals that address specific individual, district or school needs, or both; and grounds professional development activities in objectives related to improving teaching, learning, and student achievement. The individual professional development plan shall include timelines for implementation, responsibilities of the employee and the school district for implementing the plan, and specific support and periodic feedback that the district shall provide.

"Ineffective" or "partially effective" means the employee receives an annual summative evaluation rating of "ineffective" or "partially effective" based on the performance standards for his position established through the evaluation rubric adopted by the board of education and approved by the commissioner.

NATURE OF THE CASE

Kevin Cushing (hereafter, Respondent) has been employed by the Orange School District (hereafter, the Employer or the District) since the 2007-2008 school year. He was subsequently granted tenure, and successfully taught without incident until the 2015-2016 school year, following which he was rated Ineffective. As a result, the District was obligated under applicable New Jersey Education law to provide Respondent Cushing with an appropriate Corrective Action Plan (CAP) for the 2016-2017 school year. Respondent met with his District supervisors to create a Corrective Action Plan applicable to the teaching assignment he had been given for the 2016-2017 school year. This plan, developed in collaboration with Respondent, was designed to address his documented performance shortcomings and to improve his classroom teaching and administrative compliance. Shortly after the beginning of the 2016-2017 school year, Respondent applied for and was granted a leave of absence pursuant to the Family Medical Leave Act. He did not teach for the District for the balance of the 2016-2017 school year.

When the Respondent returned to work at the beginning of the 2017-2018 school year, he was assigned immediately before the opening of school to teach a kindergarten class for the first time in his career. The CAP implemented by the parties a year earlier was "carried over" into

the 2017-2018 school year. At the end of the 2017-2018 school year, the annual evaluation produced by the Respondent's supervisors and District administrators was based on their collective evaluation using the Danielson Rubric to calculate an Annual Summative score of 2.41. This score categorized Respondent Cushing as a Partially Effective teacher for the 2017-2018 school year.

The District concluded that the Respondent had "failed to make appropriate progress towards the goals outlined in his CAP. As a result, Respondent's CAP was again carried over into the 2018-2019 school year." According to the District, Respondent's performance deteriorated during 2018-19, resulting in an Annual Summative Score of 2.08, which also mandated an annual rating of Partially Effective. Respondent did not exercise his right to submit a written rebuttal of the allegations underlying his Partially Effective rating in 2017-2018 or in 2018-2019. Because he received Partially Effective ratings in two consecutive school years, the District filed tenure charges dated August 2, 2019 pursuant to NJSA 18A:6-17.3(a)(2).

After the tenure charges were filed, the Respondent asserted that the charges were improperly predicated on animus created because the Respondent had spoken out repeatedly at Orange Board of Education meetings, publicly describing the flaws he saw in the manner in which

educational services were provided to the District's students and protesting the stagnant wage rates paid to teachers. The District denied these allegations, contending that the two consecutive annual summative evaluations were consistent with the rating of Ineffective that the Respondent had received in the 2015-2016 school year, and were based solely on the number of formal observations mandated by the statute, properly augmented by periodic informal evaluations of his teaching performance. The District also cited multiple written and oral admissions by the Respondent in interviews and other interactions with District supervisors expressing his recognition that his job performance was substandard. Mr. Cushing did not deny having made these remarks.

The undersigned Arbitrator was appointed to adjudicate the propriety of the tenure charges and to evaluate Respondent's assertion that the tenure charges were inaccurate and unfounded. Hearings were held in the above-entitled matter on November 5, 2019, January 13, 2020 and February 24, 2020 at the Administrative Offices of the Orange Board of Education. The parties submitted sixty-five joint exhibits. Respondent Cushing submitted seventeen exhibits, and the District submitted one additional exhibit.

In assessing whether the criteria set forth in NJSA 18A:6 for revoking tenure have been satisfied by the District, and thus determining that Respondent Cushing's tenure should be revoked and his employment terminated, the Arbitrator thoroughly examined and carefully considered all of these exhibits, the testimony adduced at the three arbitration hearings, and the arguments propounded during the arbitration hearings and presented in the parties' post-hearing briefs as the basis to apply the applicable statutory criteria.

DISCUSSION AND ANALYSIS

The documentary evidence and testimony submitted by the District chronicling the Respondent's shortcomings in the two years at issue, 2017-2018 and 2018-2019, demonstrated persuasively that the Respondent's performance during the three evaluations mandated each academic year by New Jersey statute accurately portrayed his teaching performance during these evaluations as inadequate. Although the Respondent achieved tenure in the District and thereafter taught elementary grades 3 and 5 without incident until the 2015-2016 school year, his performance during periodic formal evaluations conducted in 2017-18 and 2018-2019 was insufficient to satisfy the District's reasonable teaching standards.

The District further established that Respondent did not adequately comply with reasonable District requirements that he submit detailed lesson plans in a timely manner. Nor did Respondent avail himself of the ongoing professional education materials available to him and his colleagues until well into in the 2018-2019 school year. Respondent also had persistent attendance issues.

As a consequence of his annual evaluation of Ineffective for 2015-2016, the Respondent was placed on a Corrective Action Plan (CAP) for 2016-2017. Shortly after the beginning of the school year, the Respondent was granted a leave of absence in order to attend to a family situation. His approved leave extended to the end of the school year.

Almost immediately before he returned to work in September 2017, Respondent was told that, for the first time in his teaching career, he would be assigned as a kindergarten teacher. Respondent testified credibly and without refutation that he was told of his new kindergarten assignment only days before the beginning of the 2017-2018 school year; that he was assigned to teach his class in an empty classroom, completely devoid of appropriate furniture and kindergarten teaching or supplemental materials; and that he struggled to locate and obtain the necessary materials to furnish his classroom well after the school year began. The evidentiary record established persuasively not only that

Respondent was expected to assume a wholly foreign area of specialized teaching at the kindergarten level, but also that the Respondent was not provided materials, meaningful peer or supervisory support, or supplemental in-person coaching to help him succeed in this new and challenging assignment at the beginning of the year or on a continuing basis throughout the school year.

District officials testified that the Corrective Action Plan that had been implemented at the beginning of the 2016-2017 school year, under which the Respondent had ostensibly worked for only a few weeks, was simply "rolled over" into the next school year. No effort was made to tailor the plan to his new and unprecedented kindergarten assignment or to recast the support and guidance necessary to comply with the minimal levels of appropriate resources and remedial coaching or supervisory support tailored for a tenured teacher on a CAP. These arbitrary and capricious omissions materially and adversely affected Respondent's teaching performance, especially early in the school year when he foundered coping with inadequate orientation or assistance, insufficient age-appropriate equipment and resources, cursory ongoing supervisory support, and professional development coaching and modeling that was sparse at best. The first two of the mandatory three formal observations occurred in October and November 2017.

Read in isolation from the other documents and testimony comprising the evidentiary record, the annual evaluations of the Respondent's teaching performance for the two contiguous school years at issue in the instant matter at first appear to substantiate the District's conclusion that Respondent failed to respond to the remedial intervention provided by the District under the Corrective Action Plans implemented after the 2015-2016 school year, which commenced in September 2016 and was subsequently carried over without material alteration or updating after Respondent's protracted leave of absence, into the 2017-2018 school year. Although Respondent failed to achieve a satisfactory level of job performance, the reality of the Respondent's situation is more complicated and nuanced, requiring additional scrutiny to achieve a comprehensive and accurate analysis of the record to determine if the annual ratings form a valid basis to revoke Respondent Cushing's tenure.

While the District was entitled to require that Respondent work an additional year under an appropriately crafted Corrective Action Plan in 2017-2018 because he was absent for almost all of the 2016-2017 school year, the District did not engage in meaningful collaborative dialogue with Respondent to modify or create a Corrective Action Plan reasonably tailored for a novice kindergarten teacher. Nor did the District provide

sufficient or meaningful ancillary professional development support to Respondent at the outset or throughout 2017-2018.

Whether his assignment to a specialized kindergarten teaching position, for which Respondent was technically qualified on paper by virtue of his K-6 elementary teaching license, and the subsequent failure to provide access to appropriate materials, furniture, and supplies were retaliatory need not be definitively addressed, as the pertinent statutory criteria mandate analysis of whether the assistance provided under a properly formulated and administered CAP satisfied the fundamental balance between providing a Partially Efficient teacher on a CAP with remedial aid and relevant coaching and the dire consequence of losing tenure if teaching performance does not achieve the requisite level of competence after ample, sustained and focused coaching and feedback.

The substantial defect in not redesigning the holdover Corrective Action Plan implemented in 2017-2018 and not providing in-person guidance and remediation by a supervisor and/or a master teacher with expertise in teaching kindergarten created an adverse material impact on Respondent's teaching performance throughout 2017-2018. Simply rolling over a Corrective Action Plan to a subsequent year with a radically different teaching assignment, coupled with the minimal assistance to a teacher acclimating to an unfamiliar role, materially exacerbated the

ineffectiveness of a teacher assigned at the last minute to teach kindergarten. The absence of a reformulated CAP and accompanying meaningful in-person support must be considered together with the circumstances raised by Respondent when he finally disputed the propriety of the decision by the Orange School District to terminate his employment following the 2018-2019 school year.

Several aspects of Respondent's defense must be addressed in order to separate perceived mistreatment from potentially material improper factors, and thus focus the statutory and factual analysis on the crucial relevant elements underpinning the outcome of the instant case. During Respondent Cushing's employment by the Orange School District as an elementary school teacher since 2007, he was moved from grade or subject assignment to a different assignment and from school to school almost every year of his employment. Respondent testified that he was moved ten times in ten years. This lack of continuity may have impeded his achieving proficiency in teaching a particular grade level upon which Respondent could build from year to year. However, the Respondent's contention that his reassignment from school to school and from grade level to grade level constituted retaliation for his critical and disparaging public comments at School Board meetings regarding the manner in which the District was administered, his allegation that teachers were underpaid, and his assertion children were not adequately

served by the District was not supported by a preponderance of credible evidence linking them to the annual summative ratings, withholding of increments, or the District's decision to file tenure charges to Respondent's activism.

Respondent correctly asserted that he has a legally guaranteed right to express his opinions publicly without fear of retaliation. Respondent was entitled to convey directly to the Board of Education his observations about the manner in which children were educated in his school based on his front-line experience. However, as the old aphorism says, "You catch more flies with honey than with vinegar."

The wisdom of his making these public criticisms is irrelevant to the outcome of the instant case, as there is no evidence of direct official retaliation in response to Respondent's admitted candor. Although Respondent's contention that he was repeatedly moved, assigned to empty classrooms without adequate supplies, and left to fend for himself accurately described his circumstances over several years, the evidentiary record did not support a finding of a causal relationship between his earnest critical comments at School Board meetings and subsequent actions, or failure to act, by District administrators.

The record established that the District retained and exercised the managerial prerogative of re-assigning not only Respondent, but also other teachers, to fill vacant positions at different grade levels as the District's needs changed from year to year. Nevertheless, the lack of continuity in grade and building assignments, plus the absence of meaningful support under the 2017-2018 CAP admittedly tainted the Respondent's attitude towards his Employer. These challenges were exacerbated by the absence of adequate advance notice of changes in his teaching assignment, particularly being assigned for the first time as a kindergarten teacher; his shuffling annually among job assignments and schools within the District; and a District's failure to devise or implement suitably supportive and relevant remedial Corrective Action Plans reasonably designed to identify and rectify Respondent's manifest shortcomings as a teacher.

Respondent's testimony describing the manner in which he handled his frustrations after he returned from his extended leave of absence in 2016-2017 provided a reasonable basis to characterize the Respondent as a wounded teacher who did not adequately cope with the professional challenges he confronted. His resentful attitude leached into his teaching performance, adversely affecting his attendance and sapping the vigor of his preparation and performance, particularly in

2018-2019. Respondent's frustration was credibly described by District witnesses and recorded in the written evaluation forms in evidence.

Mr. Cushing did not dispute the accuracy of the District's portrayal of his comments at post-observation conferences or during meetings to review his annual evaluations, particularly in 2018-2019. This evidence supported the District's portrayal of Respondent as substantially less effective than he was earlier in his career teaching in Orange.

Respondent admitted that he floundered as a kindergarten teacher for much of the 2017-2018 school year and that he did not assertively seek more assistance. Teaching kindergarten requires specialized skills and experience significantly different from teaching elementary grades such as third and fifth grades. Thrown with only a few days notice into an empty classroom without prior opportunity to prepare himself during the summer for teaching kindergarten; left to scrounge for furniture, books, and educational resources to furnish his empty room; Respondent essentially was abandoned by his school and District administrators at the beginning of the 2017-2018 school year while he sought to accumulate the resources and skills necessary to be an effective kindergarten teacher. Even if not demonstrably retaliatory, these circumstances constituted capricious and arbitrary action to the demonstrated material detriment of Respondent in the performance of

his duties in 2017-2018 as reflected in his annual summative evaluation. These circumstances have been established clearly and convincingly by the testimony end the evidentiary record in the instant case.

NJSA 18A:6 requires school districts to evaluate teachers periodically with a minimum number of observations and to predicate the evaluation of a teacher's performance in annual summative scores derived by applying approved rubrics. Tenured teachers on a CAP must be evaluated formally three times during a school year in which a CAP is in effect. The District did evaluate Respondent three times in each of the two school years at issue-2017-2018 and 2018-2019.

The District defended its evaluation of the Respondent in the 2017-2018 school year as complying with the statutory requirements regarding assistance and evaluation. Careful perusal of the documents in evidence, including sixty-five documents placed in evidence by the District, including domain by domain examination of Respondent's pedagogic skills and teaching performance, supports a conclusion that the District reasonably applied the proper Danielson rubric and accurately computed a score based on the three observations performed by District administrators during the 2017-2018 school year and the 2018-2019 school year. Respondent's tepid responses during pre- and post-evaluation conferences, and the Respondent's repeated failure to

exert himself sufficiently to submit timely lesson plans or to participate in the available professional educational resources provided by the District throughout the school year to all teachers was reasonably considered in the summative evaluations, which were based primarily on Respondent's performance during his three annual observations.

Respondent Cushing is culpable for his failure to protest the absence of suitable intervention and coaching by master teachers and supervisors on an ongoing basis or to document the paucity of supplies and other resources with which he was provided. Furthermore, the interval between initial formal observations in October 2017 and 2018 and subsequent follow up observations many months later contributed materially to the Respondent's anger and dismay at his professional circumstances, particularly during the 2018-2019 school year, during which his attitude and attendance further declined.

This analysis, however, would be incomplete without also focusing on the reciprocal obligations imposed by the TEACHNJ Statute (NJSA 18A:6-119) on both school districts and teachers in formulating and implementing a collaboratively derived Corrective Action Plan providing a yearlong remedial program of support and guidance. The District secures the right to revoke tenure not simply by accurately recording three observations or sitting briefly with a teacher to formulate

a CAP outlining a theoretical plan to guide and remediate a teacher's previous inefficiency and manifest teaching deficiencies. More support and involvement is required to satisfy the threshold for revoking an experienced teacher's tenure other than for proven misconduct or conduct unbecoming.

The District admitted that it simply "rolled over" the Corrective Action Plan formulated for the Respondent at the beginning of the 2016-2017 school year and applied it again at the outset of the 2017-2018 school year, when the Respondent was assigned to teach kindergarten for the first time. This new teaching assignment required training to apply a substantially new set of pedagogical skills. Simply providing training videos and general reference works would not cure the patent defect of failing to implement a valid CAP under which Respondent's rehabilitation and remediation were to occur and thereafter to provide Respondent with reasonable coaching and support.

The District's summative annual evaluation of the Respondent's performance in 2017-2018, his first year as a kindergarten teacher, can be accepted as an accurate reflection of his teaching proficiency during the three observations. However, given the substantive and material adverse impact of the procedural defects in the implementation of a valid CAP, the summative annual score did not provide an accurate, fair, and

not arbitrary or capricious annual summative evaluation justifying rating Respondent Cushing as Partially Effective for 2017-2018.

Moreover, the TEACHNJ Statute provides two other standards that the District failed adequately to address. NJSA 18A:6-23 explicitly contemplates special circumstances. Testimony adduced at the arbitration hearing demonstrated clearly and convincingly that the Respondent was left to forage for supplies, to learn a new kindergarten curriculum and associated pedagogic techniques, and to deal for the first time in his career with the challenge of teaching a grade level where incoming students included many children who could not read. He did this without advance notice sufficient to study the kindergarten curriculum and absorb age appropriate techniques during the summer in order to prepare for substantially different duties. His resulting lack of preparedness to achieve the core goals of the Orange School District's kindergarten curriculum impaired his attempts to learn as he went along, especially given the evidence that the Respondent was not supplied with ongoing coaching by a master teacher.

Unrefuted testimony that Respondent sought help to provision his classroom, and documentation describing the cavalier manner and timing with which the mandated annual evaluations were conducted unambiguously supported a conclusion that the circumstances under

which the Respondent taught during the 2017-2018 school year, particularly regarding the first evaluation early in the school year and the substantial intervals between his receipt of meager useful feedback, particularly from January to May 2018, qualified as special circumstances. The CAP requirement cannot be satisfied by ignoring Respondent's changed circumstances. The manner in which the CAP was implemented and administered created a substantial procedural defect with clear material impact regarding Respondent's Partially Effective annual evaluation rating in 2017-2018 that cannot be ignored or discounted. The District's failure properly to consider these factors constituted additional arbitrary and capricious action that further supports the Arbitrator's determination that the totality of circumstances established by the evidentiary record outweighs an annual summative score that technically was correctly computed.

The rightful paramount concern of parents, professional educators, and citizens at large is that school children not be deprived of a thorough and efficient education by teachers who have objectively demonstrated their inability to perform successfully in this highly specialized and critical profession. Teachers such as the Respondent may achieve tenure and thereafter deteriorate in their job performance over a period of years. The Legislature addressed this circumstance by imposing a balanced system of evaluation and by further providing a process for removing

tenured teachers whose job performance declined to the detriment of their students. The TEACHNJ Act, NJSA 18A:6 created clearly defined mechanisms for weeding out inadequate tenured teachers.

A tenured teacher whose performance is judged Partially Efficient based on the application of an approved rubric for two consecutive years may have tenure revoked if the District not only evaluated the teacher with reasonable objectivity, but also implemented and supervised a Corrective Action Plan, collaboratively constructed with the teacher in each school year, that was reasonably designed to identify and address the tenured teacher's shortcomings and to provide relevant periodic assistance and guidance. This standard has not been met in the instant case.

The third element of the legislated process permitting revocation of tenure is that the procedural integrity of the mandated professional observations and evaluations and of the CAP development and implementation be assessed by an objective impartial professional arbitrator charged with independently determining whether arbitrary and capricious actions by a school district materially interfered with a fair evaluation of a teacher's performance or the provision of requisite CAP remediation.

A Corrective Action Plan that is not specifically designed to address and foster improvement in a tenured teacher's current teaching assignment during each academic year at issue cannot satisfy the requirement that tenured teachers be alerted to the specifics of their unacceptable performance, that they actively and repeatedly be afforded meaningful and appropriate guidance by professional teacher educators, and that they be provided ample timely feedback so that the teacher can improve his or her classroom performance. By simply "rolling over" a Corrective Action Plan based on the Respondent's teaching assignment in the 2016-2017 school year to govern his evaluation in his new and unfamiliar kindergarten assignment at the beginning of the 2017-2018 school year without revamping, supplementing and adjusting the Corrective Action Plan to support him while teaching kindergarten for the first time, the District acted in an arbitrary and capricious manner.

The District's assertion that any experienced teacher with a K-6 license should be able to step into a kindergarten class without prior notice and teach effectively was unpersuasive, as the skills described in testimony offered both by Respondent and by District witnesses, and the detailed observation documents in evidence, established the specialized pedagogical skills necessary to organize individuated lessons suitable for kindergarten students and to select and present materials for effective teaching in accordance with elaborately detailed standards of pedagogy

and sequences of teaching techniques particular to kindergarten level students described by District testimony.

The Arbitrator does not dispute the evaluators' scoring of their observations. A teacher who is provided with adequate corrective action--more than just a written plan and three evaluations--and who still cannot achieve a reasonable level of improvement through the course of the school year does not deserve to continue imposing an adverse impact on the lives of the children entrusted to the teacher's care. Conversely, a school district cannot assign a teacher to a novel and unfamiliar situation, as different from the teacher's prior experience as kindergarten is from other elementary grades, and essentially abandon the teacher to the vagaries of periodic observations halfway through the school year or near the end of the school year without meaningful coaching or other rehabilitative efforts.

To do so was arbitrary and capricious as contemplated under applicable statutory criteria. Respondent essentially was left on his own to create a suitable kindergarten classroom environment, to familiarize himself with the curriculum, and to adapt to the novel demands of teaching kindergarten without specialized training or on-the-job experience. Moreover, the District failed to offer Respondent a master teacher or learning supervisor to visit him in his classroom and offer

assistance, to review his lesson plans other than for timeliness and sufficiency, or to provide the level of supplemental assistance contemplated on a regular basis as the predicate for implementing a valid CAP and thereafter for declaring a tenured teacher unfit for future service. Thus, the rating of Partially Efficient for 2017-2018 cannot stand.

This situation was compounded after the District changed the Respondent's assignment for the 2018-2019 school year to second grade, again without sufficient prior notice to the Respondent for him adequately to prepare materials and curriculum for his new assignment. Removing Respondent following a substandard year as a kindergarten teacher was not demonstrably arbitrary or retaliatory. Respondent's new assignment afforded the District an opportunity to re-craft a valid Corrective Action Plan and to re-evaluate Respondent throughout the course of the 2018-2019 school year to determine whether his tenure should be revoked.

The evidentiary record, including Respondent's testimony, confirmed the District's assertion that Respondent was not without fault in exacerbating his teaching situation during 2018-2019. Respondent's attendance record, his spotty compliance with deadlines for submitting lesson plans, and his flagging dedication to improving his craft fell short

of the District's reasonable expectations. In his testimony, the Respondent earnestly and candidly described his bitterness about the manner in which he had been treated by the District and its administrators over the recent past and the impact of these circumstances on his professional performance. For reasons that appear to be a mixture of personal and professional, the Respondent was unable to rally his enthusiasm and to revamp his attitude sufficiently for him to participate as an equal partner in the formulation and implementation of the Corrective Action Plan for 2018-2019 or to achieve an Effective rating.

His testimony describing the reasons that his lessons plans were late, that he did not partake of the requisite level of professional education reasonably expected of teachers in the Orange School District until relatively late in the school year, and that he did not properly utilize his preparation periods provided ample evidence of an unprofessional attitude that cannot be countenanced by the District or ignored by the Arbitrator. Respondent Cushing may have ample reasons he views as justifying his response to the multiple assignments and chronic lack of meaningful support, but his job performance in the 2018-2019 school year, when he was assigned for the first time as a second grade teacher, was not unreasonably analyzed and scored by the District.

The TEACHNJ Statute provides that tenure may be revoked by a teacher who has properly been evaluated as Partially Efficient for two consecutive years of teaching performance. The Respondent's evaluation for the 2015-2016 school year is not at issue in the instant case. The Respondent left early in the 2016-2017 school year for approved leave to deal with a family situation.

The analysis of the District's evaluation regarding Respondent's performance as a kindergarten teacher during the 2017-2018 school year set forth above mandates disqualification of the District's evaluation for 2017-2018. However, the District's evaluation of Respondent's performance in 2018-2019 as Partially Effective was reasonable and accurate. Thus, the Respondent must be deemed to be a teacher who has demonstrated Ineffective or Partially Effective performance in alternate school years.

Given this conclusion, the Respondent is entitled by application of the standards set forth in TEACHNJ to one additional year of employment during which he shall be provided with a teaching assignment far enough in advance for him to prepare materials, study curriculum, and ready himself to be an effective teacher during the 2020-2021 school year. Respondent Cushing is hereby placed on notice not only that an evaluation as Inefficient or Partially Efficient during the

2020-2021 school year will result in the revocation of his tenure, but also that he is expected to participate fully in formulating a valid Corrective Action Plan for the 2020-2021 school year; to ask for and accept help from his colleagues, including master teachers and supervisors; to provide feedback by advising building or District supervisors if he feels the resources committed to him pursuant to the new CAP are not consistently being provided in a timely manner. Moreover, Respondent is hereby placed on notice that his attitude should be manifestly and consistently professional as he interacts with colleagues and students, complies with applicable deadlines, and seeks to improve his job performance to an acceptable level.

The District must unequivocally meet its obligation to provide continuing meaningful coaching, supervision, and guidance under a Corrective Action Plan for 2020-2021 so that the Respondent can ascertain and satisfy applicable standards of effective teaching and assure the thorough and efficient educational experiences that all the children of Orange School District so richly deserve. To achieve this goal, both parties will need to adjust their conduct.

Based on the evidence submitted, the tenure charges against the Respondent Kevin Cushing cannot be sustained. The evidentiary record mandates that the summative annual rating of Respondent's teaching

and job performance in the 2017-2018 School Year as Partially Efficient be discounted because of substantial procedural flaws that render the annual rating arbitrary and that materially affected the rating. Respondent Cushing's rating of Partially Efficient for the 2018-2019 school year shall remain valid.

Respondent Cushing shall be entitled to another year of employment as a teacher, subject to a new Corrective Action Plan to be developed collaboratively with Respondent before the commencement of the 2020-2021 school year. This CAP shall be tailored to Respondent's teaching assignment for the 2020-2021 school year. Such specific grade level and school assignment shall be conveyed to Respondent not less than thirty calendar days before the first day that Respondent is scheduled to report back to work at the beginning of the school year. Respondent Cushing shall be afforded ample support as contemplated by the TEACHNJ statute, including coaching by supervisors and master teachers specific to his assignment on an ongoing basis.

The Arbitrator hereby retains jurisdiction to resolve any dispute that may arise regarding the implementation of this Award or the remedy ordered pursuant to this Award.

May 26, 2020 Daniel F. Brent, Arbitrator

`NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of The Tenure Charges Proffered by

THE CITY OF LINWOOD BOARD OF EDUCATION, ATLANTIC COUNTY

"Petitioner"

-against-

KIMBERLEY PESCHI

"Respondent"

Pursuant to the TEACHNJ Act

Agency Docket No. 76-4/17

APPEARANCES

FOR PETITIONER

COOPER LEVENSON
William S. Donio, Esq.
Kasi M. Gifford, Esq.

FOR RESPONDENT

MELLK O'NEIL
Edward A. Cridge, Esq.

BEFORE: Earl R. Pfeffer, Arbitrator

BACKGROUND

These proceedings emanate from an incident in the cafeteria of the Belhaven School in Linwood, New Jersey, on February 9, 2017. Belhaven music teacher, Kimberley Peschi ("Respondent"), while on lunch duty, lifted her right foot to initiate contact with the chair of a 12 year old 6th grade boy, M.M., who had rocked backwards while eating at a school cafeteria table and talking with his friends.[1] The child then fell to the floor. It is the nature of that contact, whether it caused M.M.'s fall, his impact with the floor, and Respondent's actions in the wake of that incident that are in dispute. The District maintains the contact was intentional, forceful, unnecessary, excessive and punitive, and constituted conduct unbecoming a school teacher, in particular because it endangered the child and in fact caused him injury, embarrassment and humiliation. Respondent insists her contact with M.M.'s chair was meant simply to right it from an unsteady and dangerous position, and that he rolled sideways off the chair as he lost his balance when Respondent inadvertently "tapped" the chair's back instead of the seat, which she had intended merely to push forward.

Following an investigation of the incident, Michelle Cappelluti, Ed.D., Interim Superintendent for the Linwood Board

---

[1]Student witnesses are referred to herein solely by their initials.

of Education ("Board" or "School District"), by Certification sworn on March 24, 2017, filed a Statement of Charges and Specification Regarding the Employment of Kimberley Peschi, A Tenured Faculty Member Within the Employ of the City of Linwood Board of Education ("Tenure Charges" or "Statement of Charges" or "Charges and Specifications") against Respondent, and same were served by Board Secretary (and School Business Administrator) Terri J. Weeks, along with fifteen (15) day Notice the Tenure Charges and any Response timely received from Ms. Peschi would be presented to the Board.

The Board, thereafter, met in Executive Session during a special meeting convened on April 12, 2017, and as stated in a Certificate of Determination sworn to by Weeks pursuant to N.J.S.A. 6A:3-5.2 for the purpose of transmitting the Tenure Charges to the Commissioner of Education, "[t]he Board determined by a majority vote of its full membership that there is probable cause to credit the Statement of Charges and the Certificate of Superintendent Michelle Cappelluti in support thereof and, that such charges are sufficient, if credited, to warrant dismissal of Kimberley Peschi." As further stated by Weeks in the Certification of Determination, the Board suspended Respondent without pay pending disposition of the Tenure Charges. The Certificate of Determination along with the Statement of Charges were thereupon submitted to the Commissioner of the New Jersey

Department of Education pursuant to N.J.S.A. 18A:6-11, and served upon Respondent's counsel.

By correspondence to the Department of Education's Bureau of Controversies and Disputes on April 17, 2017, Respondent, through her attorneys, asked that the Tenure Charges be held in abeyance and the tenure hearing be stayed pending resolution of criminal charges against Ms. Peschi arising from the same incident. Respondent cited Ott v. Board of Ed'n of the Twp of Hamilton, 160 N.J. Super. 333 (App. Div. 1978) in support of her request. By letter dated April 18, 2017, the Bureau of Controversies and Disputes advised the parties this matter had been placed in abeyance.

Thereafter, following a criminal trial in Linwood City Municipal Court, and a subsequent appeal by way of trial *de novo* before the Atlantic County Superior Court, Law Division, the criminal charges were resolved in Respondent's favor, and pursuant to a request from Respondent the Office of Controversies and Disputes restored the Tenure dispute to active status on May 14, 2019. On May 15, 2019, Respondent filed her answer to the Tenure Charges.

Thereafter, and following a review of the Charges for sufficiency, the matter was referred to arbitration before me pursuant to N.J.S.A. 18A:6-16. By letter dated May 28, 2019, I was appointed to hear and decide the dispute.

The parties subsequently presented to me various pre-hearing issues, most notably, upon motion by the Board, unopposed by Respondent, I issued an Order on July 18, 2019, to the New Jersey Department of Children and Families ("DCF"), in particular its Institutional Abuse Investigation Unit ("IAIU"), directing same to supply to me for *in camera* review a complete copy of its files and records pertaining to its investigation of Ms. Peschi and the incident at Belhaven Middle School on February 9, 2017, which is the subject matter of these Tenure Charges. On or about August 12, 2019, I received DCF's response to my Order and on October 21, 2019, following my review of same, I forwarded the redacted IAIU records to counsel.

Also pertaining to document production in this case, the parties jointly presented to me for signature a Consent Confidentiality Order which I and counsel signed on or about July 24, 2019. Said Order set forth the parties' joint agreement on the use of certain Board files and records, as well as files and records maintained by IAIU, in connection with the February 9, 2017, incident, in particular the confidentiality of those files and records and their use solely for the prosecution and defense of the Charges and Specifications (and any related administrative appeal).

Following the resolution of these and other pre-hearing matters, hearings before me were convened at the Offices of

Cooper Levenson in Atlantic City, New Jersey, on October 28, October 30, November 11, November 22 and December 16, 2019. At the hearings, which were transcribed, the parties each presented evidence and argument in support of their respective positions.[4] All witnesses were sworn. Following completion of the proceedings, the parties on February 12, 2020, submitted post-hearing briefs. Following my receipt of same, the arbitration record was closed.

DISCUSSION AND FINDINGS

The Charges and Specifications

The Charges and Specifications consist of three (3) numbered Charges containing fifty-eight (58) unnumbered Specifications (which I have numbered sequentially for ease of reference in this Decision) spelled out in five (5) pages of text. The gravamen of the allegations is the Board's contention Respondent, on February 9, 2017, while she was assigned to monitor student lunch in the Belhaven cafeteria, "intentionally and purposefully pulled down with her foot and leg, the back of a cafeteria chair in which [M.M.] was seated, causing him to suddenly, unexpectedly and violently fall to the floor." The Charges allege the incident, which was captured on a school cafeteria security video ("the

[4] Citations herein to the hearing transcripts are denoted as "[hearing date] at [page]," e.g., "10/28 at _____."

video") and also witnessed by M.M.'s peers as well as staff, caused him to "suffer physical injury, personal embarrassment, and public embarrassment."

The Tenure Charges base the wrongfulness of Respondent's conduct in the school cafeteria on February 9, 2017, upon allegation she breached multiple Board policies and regulations, as well as New Jersey law. Charge 1 asserts she violated Board Policy No. 3281, and recites same in Specification 11. Policy No. 3281 states, in relevant part:

> **INAPPROPRIATE STAFF CONDUCT**
>
> **The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protec the well-being of all pupils attending the school district.**
>
> **In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. In appropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.**
>
> **The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.**

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils. . . .

* * *

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate of conduct unbecoming a school staff member.

School personnel, compensated and uncompensated (volunteers), are required to report to their immediate supervisor or Building Principal any possible violations of this Policy. . . .

Charge 1 includes the allegation in Specification 8, that Respondent, after "intentionally and purposefully" pulling M.M.'s chair to the floor with him seated in it, failed to help him get up, declined to render first aid, provide care or apologize, and told him she had pulled his chair down to the ground with him in it to teach him a lesson. Charge 1, Specification 9 alleges she explained, "that's what happens when you lean back in your chair." Charge 1, Specification 11, recites Board Regulation No. 3281 for its definition of "Inappropriate Staff Conduct," which

includes "corporal punishment." According to Specification 9, that comment "demonstrates the willful and malicious intent" of Respondent's acts towards M.M.

Charge 1, Specification 12, alleges that when Respondent on February 9, 2017, the day of the incident, was asked to explain why she had raised her leg and used her foot to bring down M.M.'s chair while he was seated in it, thereby knocking him "suddenly, unexpectedly, and violently" to the cafeteria floor, she answered, "it was a joke gone bad." Charge 1, Specification 13 alleges that the following day, February 10, 2017, after she was shown school security video, she claimed she did not knock M.M. to the floor, "but rather he fell when she went to right his chair, and he lost his balance."

According to Charge 1, Specifications 14, Respondent, with or without training, could not believe it would ever be appropriate discipline, regardless of the infraction, "to pull a child's chair down to the cafeteria floor with the child seated in it." Specification 15 asserts her intentional and purposeful act of knocking M.M. "suddenly, unexpectedly, and violently" to the cafeteria floor "was inimical to the welfare and emotional well-being of the District's Students." Specification 16 alleges her actions were "inimical to the public's confidence and trust in the District."

Charge 2 repeats most of the factual allegations set forth

in the various specifications contained in Charge 1, and asserts that Respondent's act of intentionally and purposefully raising her leg and using her foot to pull down the chair on which M.M. was seated and thereby knocking him "suddenly, unexpectedly, and violently to the Cafeteria floor which caused him injury," constituted corporal punishment prohibited under New Jersey Law, N.J.S.A. 18A:6-1, and Board Policy No. 3217, "Use of Corporal Punishment."

N.J.S.A. 18A:6-1, recited in Charge 2, Specification 9, states:

> **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 amount of force as is reasonable and necessary:**
>
> **(1) to quell a 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) for the protection of persons or property;**
>
> **and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. . . .**

Board Policy No. 3217, recited in Charge 2, Specification 10, states:

> **The Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open**

defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching.

Teaching staff members shall not use physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils.

A teaching staff member who:

1. Uses force or fear to discipline a pupil except as such force or fear may be necessary to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil, to act in self-defense, or to protect persons or property;

*** * ***

4. Punishes pupils by means that are cruel or unusual;

will be subject to discipline by this Board and may be dismissed.

Charge 3, repeats most of the factual allegations set forth in the various specifications of Charges 1 and 2, and alleges same constituted violations of Board Policy No. 3280, Liability for Pupil Welfare, which provides, in pertinent part:

Teaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct. All teaching staff members of this district shall be governed by the following rules in order to protect the well-being of pupils and to avoid any assignment of liability to this Board of Education or to a staff member personally in the event a pupil is injured.

The Superintendent shall prepare such regulations as may be required to enforce the following rules:

1. **A teaching staff member must maintain a standard of care fo supervision, control, and protection of pupils commensurate with the member's assigned duties and responsibilities.**

The Positions of the Parties

Position of the Board

The Board argues "[t]his is a straightforward case." It contends the hearing evidence, which is undisputable, demonstrates Respondent, while on lunch duty on February 9, 2017, crossed from the 7th grade side of the cafeteria, to which she was assigned, over to the 6th grade side where, upon reaching the table where M.M. and his friends were conversing and eating, she encountered M.M. leaning back in his chair and, rather than verbally cautioning him to bring the chair upright or, as she had done with another student that very lunch period, gently push the chair forward to a safe position, she instead intentionally, inappropriately, dangerously and without warning "stomped down" on the exposed backrest of the chair, causing M.M. to fall violently to the ground and injure his head on the floor.

According to the Board, Respondent engaged in this "egregious action" to punish M.M. for leaning back in his chair and teach him a lesson. She made no effort to help the child up from the ground, and showed no interest in providing him care or concern, but simply walked away, later that day not even asking him how he was feeling when she passed him in the school hallway

as he was applying an icepack to his head. The Board argues Respondent's intentional act of corporal punishment and inappropriate staff behavior violated Board policies and New Jersey law, and was conduct unbecoming a public school teacher in this State. It insists she should be terminated from her position as a teacher in the School District.

In its brief, the Board observes that the entire incident was captured by a cafeteria security camera, and the resulting video recording ("the video") substantiates the intentional, inappropriate, unjustifiable and punitive nature of Respondent's actions. It also highlights the testimony of its witnesses and of Respondent, which it argues supports her culpability for the charged misconduct as well as her dismissal.

The Board recalls the testimony of two former Belhaven staff members, Lauren Muffley, at the time a substitute counselor at the school, and Ashley Popa, at the time a substitute mathematics teacher, both of whom were on duty in the cafeteria and nearby M.M.'s table when Respondent walked over to push down the child's chair and cause him to fall backwards to the floor. The Board asks that I credit Muffley's recollection that she observed Respondent, during the February 9, 2017, 6th and 7th grade lunch period, walk over to M.M.'s table, "put her foot on the front of the back of the chair [on which M.M. was sitting and leaning back] and kind of stomped the chair to the ground . . . and then

walked out of the room." 10/28 at 94.

The Board asks that I also credit Popa's memory that M.M. was leaning back in his chair despite being told "a couple of times . . . to sit right," and then was "pushed" and "kicked" out of his chair. 10/28 at 155. Both Muffley and Popa credibly described Respondent as visibly upset, according to the Board, citing 10/28 108-110, 165-66, and Popa remembered Respondent, after pushing M.M.'s chair to the ground, said, "that's why we don't lean back," and then walked away. 10/28 at 164.

Popa's recollection of that statement, which the Board argues demonstrates Respondent's punitive intention, is consistent with M.M.'s memory that Respondent told him, while he was still on the ground, "that's why chairs are for sitting in, not leaning in." 11/11 at 63. The Board notes that although Muffley, in her hearing testimony did not recall such a statement, 10/28 at 108, she confirmed her entry in a contemporaneous email to Principal Speirs, written approximately fifteen (15) minutes after the incident, P-11, in which she reported that M.M. told her that Respondent had said to him after she put her foot on the back of his chair and pulled him to the ground, "[t]hat's why you don't rock back in your chair." Id. The Board further notes that L.C., a student who was seated at M.M.'s lunch table when the incident occurred, testified that Respondent told the entire table of children words to the effect,

"that's why you shouldn't lean back in your chairs." 10/28 at 196.

The Board additionally highlights Muffley's recollection there was no disturbance or threat which might have required Respondent to push M.M. and his chair to the floor. 10/28 at 106-7. So, too, according to the Board, Muffley and Popa each recalled that Respondent simply walked out of the cafeteria without apologizing to M.M., or offering him help.

The Board argues that the incident was appropriately investigated before Cappelluti decided to suspend Respondent the following day, February 10, 2017. Speirs, it points out, credibly recalled that she obtained a copy of the video as soon as she became aware of the incident from Muffley's email, and then, upon Cappelluti's direction, she met with Respondent and her Union representative in the afternoon of February 9th, after having reviewed the video. According to the Board, Respondent's sole explanation for her actions was that the incident "was a joke gone bad," a comment which Speirs documented in a memo to Cappelluti the following day. P-17. That memo, the Board argues, confirms Respondent's failure, even the following day, February 10, 2017, to show remorse or provide a meaningful explanation that might justify her actions. Speirs noted that Respondent explained for the first time on February 10, 2017, that the video shows she was merely seeking "to right M.M.'s

chair," and he then "lost his balance." P-17.

The Board argues that Respondent's action of pushing M.M. and his chair to the cafeteria floor was not remotely part of her training. The Board asserts Respondent was trained on how to handle student disciplinary issues and was aware of the appropriate actions available to her, and it stresses Speirs' testimony that Respondent did not assert the occurrence of any events or the existence of any conditions which might have justified a physical intervention. 10/30 at 52. The Board highlights Cappelluti's testimony Respondent received training on all of the policies and regulations it alleges, in the Tenure Charges, that she violated. 10/30 at 173. See also 11/11 at 10 and P-23.[3]

With regard to the testimony of M.M., the Board stresses his recollection that on February 9, 2017, while he was at a lunch table leaning back in his chair he "felt a pushing force in the back of [his] chair bringing it down." 11/11 at 62. The Board notes M.M.'s memory he was confused, angry and surprised because

---

[3]Cappelluti's February 17, 2014, letter, P-23, detailing to Peschi her responsibility each year to review District Policies 3280, 3281 and 3217, although obviously written after the subject incident, asserts the Board's determination Respondent was familiar with those policies and their mandates. The letter invited Respondent to contact Cappelluti if she had any "questions or concerns," and there is no record evidence any were raised. Indeed, Respondent does not contend in this proceeding that she did not know and/or understand her obligations under the law, policies and regulations which she is alleged in the Charges to have violated.

he had no idea why Respondent had pushed him down. It recounts his testimony, "I didn't even know what happened because it happened so fast." 11/11 at 64. The Board recounts his recollection Respondent did not offer to help him up, and simply chastised him, as noted above, "that's why chairs are for sitting in, not leaning in." 11/11 at 63. It further recites his testimony that when he passed Respondent in the hallway later that day, she avoided eye contact and again refused to apologize. 11/11 at 64. Indeed, the Board highlights Respondent's admission she saw M.M. in the hallway, as he recounted, and he was applying an icepack to his head, but she nevertheless made no inquiry about his welfare. 12/16 at 94-95.

The Board emphasizes Respondent's testimony that she went to M.M.'s table on February 9, 2017, because the students were throwing food and was "simply going to yell at them." 11/11 at 153. She testified she observed M.M. rocking back in the chair and "I figured if I just pushed him back up I can kill two birds with one stone by pushing him up and still handling the table and, you, which is instinctive." 11/11 at 154. She did not verbally correct M.M. because she "was yelling at the rest of the table." Id.

The Board details many portions of Respondent's testimony on cross examination:

- immediately after the incident, Respondent wrote an email to Speirs complaining about disciplinary issues in the

cafeteria, but made no mention of the incident involving M.M. P-15

- she testified she did not mention the M.M. incident because she does identify students by name in such emails, 11/11 at 159, but then she was shown an email she wrote to Speirs on January 10, 2017, in which she complained about two (2) students by name. P14.

- Respondent repeatedly denied M.M.'s claim, corroborated by Popa, that she chastised him that it would be the last time he would lean back in his chair, or words to that effect, but then was confronted with a memo she wrote to herself on February 10, 2020, in which she records that she told M.M., "this was probably going to be the last time he didn't keep his chair flat on the floor." P-27.

- Respondent, rather than acknowledge her wrongdoing and accept responsibility for pushing M.M. and his chair to the cafeteria floor, cast blame on M.M. for being overly dramatic and on Muffley for making a big deal about the incident and giving M.M. an icepack. P-27.

- Respondent's testimony that it was "instinctive" for her to use her foot to right a chair in which a child is leaning backwards, 12/16 at 36-38, is refuted by the fact she gently corrected with her hands a different child who at 11:50 a.m. on February 9, 2017, was leaning back in his chair, just minutes before Respondent used her foot to push M.M. to the floor.

- the video evidence is inconsistent with Respondent's contention she sought to push M.M. forward to a safer position in his char, and rather shows clearly a forceful, downward push by Respondent with her right foot on the top of the back of M.M.'s chair.

According to the Board, the legal issues are as straightforward as the facts in establishing Respondent's culpability for conduct unbecoming a teaching staff member, corporal punishment and otherwise inappropriate behavior, and it insists she should be terminated. Conduct unbecoming a teacher, according to the Board, "includes a broad range of behavior that

impacts a teacher's ability to perform his duties and otherwise renders him unfit to have the responsibility for the custody and care of students." Citing State Bd. of Exam'rs v. Charlton, 96 N.J.A.R. 2d (EDE) 18; In re Certificate of Fargo, 91 N.J.A.R. 2d (EDE) 1. It asserts "conduct unbecoming" is an "elastic" phrase which includes, "conduct which adversely affects the morale or efficiency" of the public entity, or "which has a tendency to destroy public respect for public employees and confidence in the operation of [public] services." In re Emmons, 63 N.J.Super. 136, 140 (App. Div. 1960).

According to the Board, the "touchstone" of the charge of conduct unbecoming "is a teacher's fitness to discharge the duties and functions of his position," and it may be demonstrated by a single incident if sufficiently flagrant. Citing Redcay v. State Bd. of Ed'n, 130 N.J.L. 369, 372 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944). "Relevant factors in the equation of whether revocation or termination or something less is appropriate," according to the Board, include the nature and gravity of the offense, any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect that the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." Citing In re Fulcomer, 93 N.J.Super. 404, 422 (App. Div. 1967).

The Board contends the gravity of Respondent's actions on

February 9, 2017, "are apparent to anyone who watches the security video." According to the Board, "Respondent walked from the complete opposite side of the cafeteria to a table of students she was not in charge of, and intentionally lifted her leg off the ground and stomped M.M.'s chair, sending M.M. to the floor. Respondent did not offer to help M.M., she did not help M.M., she simply made a 'snarky' remark, shrugged her shoulders and left the lunchroom before her lunch duty was over." The Board insists Respondent was not provoked and has shown no signs of remorse, and in fact sought to conceal that her stated purpose at the time was to teach M.M. a lesson about what can happen if he leans back in his chair.

The Board argues that the harm and injurious effect of Respondent's actions on the proper administration of the school cannot be debated. All the witnesses to the incident were shocked, no less the child who suddenly and surprisingly found himself falling to the floor where he painfully hit his head. Instead of offering M.M. an apology and lending him assistance, Respondent chastised him, the Board points out. According to the Board, Respondent was irritated with the misbehaving students, and annoyed at the fact Popa was not correcting their behavior, and she then took her frustration out on M.M., intentionally pushing him to the floor. The forcefulness of her actions, shown on the video, according to the Board, reveals her intention was

to pull M.M. to the ground, and her lack of regard for his safety and welfare is shown by her lack of concern in the wake of the incident. As noted by the Board, Respondent's only apparent concern when she wrote to Speirs right after the incident was that there should be a shorter lunch period because of the students' tendency to misbehave.

The totality of Respondent's conduct, the Board argues, establishes her violation of the prohibition in N.J.S.A. 18A:6-1 on corporal punishment. Likewise, the Board argues, Respondent on February 9, 2017, violated Board Policies 3281, 3217, 3280 and Board Regulation 3281. There was no justification for pushing M.M. to the cafeteria floor. So, too, it asserts, she exposed M.M. to bodily harm by her inappropriate resort to force. Her actions were cruel and unusual, wholly inappropriate, and subject her properly to dismissal, according to the Board. It asserts her termination "is the only way to guarantee the health, safety and welfare of current and future District students."

Position of Respondent

Respondent, on the other hand, insists the Board's proofs and arguments in support of the Tenure Charges fail to establish unbecoming conduct or other just cause for discipline, and fall far short of justifying Respondent's removal from her tenured teaching position. Respondent points out that conduct unbecoming which must be specifically pled in the tenure charges served upon

a teacher, "is a broad term which may include any conduct which adversely affects the morale or efficiency of the public entity, or has a tendency to destroy public respect for government employees and confidence in the operation of government services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It requires more than simple negligence, according to Respondent. Citing IMO Certificates of Featherson, OAL Dkt. No. EDE 05829-05, Agency Dkt. No. 0405-177, 2006 N.J. AGEN LEXIS 163, Adopted, Bd. of Examiners, Ord. of Dismissal No. 0405-177. And if conduct unbecoming is charged as a neglect of duty, Respondent asserts it "implies nonperformance of some official duty imposed upon a public employee, and not merely the commission of an imprudent act." Citing Burlap, Camden County Dept. of Corr., OAL Dkt. No. CSV 10834-12, Agency Dkt. No. 2013-231, 2013 N.J. AGEN LEXIS 64.

Respondent adds that conduct unbecoming does not mandate a teacher's removal. Rather, it points out, "the law requires the arbitrator to evaluate a number of relevant factors in determining whether removal, or a lesser penalty, is appropriate." Respondent Brief at 9. Citing In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974) and In re Young, 202 N.J. 50, 66 (2010), Respondent asserts "[t]he fundamental question when imposing penalty is whether the teacher may be returned to his position without harm or injurious effect on the proper

administration of the school district," and "[t]]he touchstone of the determination lies in the teacher's fitness to discharge the duties and functions of her position." Respondent identifies the four "relevant factors" enumerated in In re Fulcomer, and which it argues must be evaluated by the arbitrator: (1) the nature and gravity of the offense; (2) the impact on the teacher's career; (3) any extenuating or aggravating circumstances; and (4) the harm or injurious effect the conduct may have had on the proper administration of the school system.

According to Respondent, progressive discipline is generally applied to findings of unbecoming conduct, even though a single "flagrant incident" may be sufficient to sustain termination. Citing West New York v. Bock, 38 N.J. 500 (1962); In the Matter of Arnold Borrero, City of Newark, 2009 WL 3816616 (N.J. Admin). And citing Elkouri and Elkouri, How Arbitration Works, 7th Ed., 15-40, Respondent asserts, "[i]t is said to be 'axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." She contends, again based on Elkouri and Elkouri, that "[i]n less serious cases, arbitrators are very likely to change or modify an employer's discipline if it is excessive, disproportionate to the offense, inconsistent with principles of progressive discipline, punitive rather than corrective, or inconsiderate of mitigating circumstances." And, she adds, "[e]ven in serious cases, such as theft, mitigating

circumstances . . . and a long, discipline-free record may render termination too harsh a penalty."

Thus, according to Respondent, even unjustified physical contact with a student does not mandate removal from tenure. Even in such serious cases, she argues, factors which must be considered include "[t]he circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, [her] attitude and the prognosis for [her] continued effective performance and usefulness in the school system. . . [E]ach such matter must be judged in light of all the circumstances." Quoting IMO Tenure Hearing of Eddie Lee Harrell, 1979 S.L.D. 479, citing IMO Tenure Hearing of Ostergren, 1966 S.L.D. 185, 188.

Thus, Respondent argues that in cases where a teacher's contact with a pupil "is not of a punitive nature," the matter is less serious and requires "a more measured response in terms of penalty." Citing Board of Ed. of City of New Brunswick v. Murphy, 92 N.J.A.R.2d (EDU) 527. She points out that the appropriate penalty for a teacher who slapped an eight year old, special education student in the face was a suspension, rather than removal. IMO Tenure Hearing of Edith Craft, Commissioner of Ed. Dec. No. 366-11. She argues "[r]emoval of a tenured teacher is a draconian penalty, not always warranted even in the face of significant misconduct."

Respondent contends that a teacher's wrongful actions, even those involving inappropriate physical contact with a student, may not mandate removal where they are not cruel, premeditated or vicious. Based on her review of numerous tenure cases, Respondent alleges "conduct far more serious or potentially dangerous than anything alleged by the Board in this case" has not warranted removal from tenure. Respondent Brief at 12-14. She asserts, "[i]n light of these well-established principles . . . it is clear that neither [her] actions, nor the totality of the circumstances as per Fulcomer, . . . warrant the draconian penalty of removal from her tenured teaching position.

Respondent argues, as well, that I must consider her nearly two decades of service, during which she "has been a pillar of the Belhaven Middle School Community, and her community at large." Respondent Brief at 15. She recites with specificity her record of "outstanding evaluations, letters of support and commendation, service awards, and letters of appreciation." See Respondent Brief at 15-21, and references the positive character appraisals provided on her behalf in the criminal trial. Respondent Brief at 21-22, citing R-8 at 92-105.

Specifically with respect to the issues before me, and in support of her argument these proceedings have been unfair, Respondent contends she did not receive meaningful predisciplinary due process. The procedural due process rights

that were violated cannot properly be minimized, she argues, given her property interest in her public employment position. As a "vested employee," she asserts she "cannot be terminated without the opportunity to respond to the employer's reasons for dismissal and to rebut the charges on which the dismissal is based." Respondent Brief at 23.

Acknowledging that these arbitration proceedings have afforded her the protections under the Tenure Employees Hearing Law ("TEHL"), N.J.S.A. 18A-6-10 et. seq., Respondent contends her due process rights were lessened during a pre-disciplinary process that denied her a full opportunity to present her side of the case before the Board's position "may have hardened." Respondent Brief at 23. According to Respondent, Cappelluti made up her mind to suspend and charge her solely upon watching the video, and without having given her an opportunity to "tell her side of the story." Respondent Brief at 24. Respondent contends the Board's haste in reaching its conclusions about what happened in the Belhaven cafeteria during lunch on February 9, 2017, "discredits its ferventness in these proceedings," and the fact it now is being sued by M.M.'s parents in connection with the incident, "can only amplify its desire to portray [Respondent's] actions as willful and malicious - thereby absolving itself of any legal responsibility in connection with M.M.'s civil suit." Id.

In any case, Respondent argues, the Board's evidence does not prove "[t]he gravamen of the tenure charges," which is that she intended to knock M.M. out of his chair, that she did so with malicious intent, that her actions constituted corporal punishment or that she caused M.M. physical injury, personal embarrassment and public embarrassment. Respondent Brief at 25.

Respondent does not dispute what can be seen on the video: that while M.M. was leaning back in his chair during lunch on February 9, 2017, she approached him from behind and placed her foot on the chair, and the chair together with M.M. then fell to the ground. Respondent Brief at 25. What the video does not prove, she argues, is the Board's claim she intended to knock M.M. to the floor. In fact, she argues, she has "always maintained" she only placed her foot on the chair in an effort to push it and M.M. to an upright position. Respondent insists the Board has not proved she had a different intention, and in fact, she contends that the Board, in order to prevail in this case, must prove what it charged, "that [Respondent's] purpose in knocking M.M. to the ground was to willfully and maliciously inflict corporal punishment upon him." Respondent Brief at 25-26. "This the Board cannot do," she argues. Id. at 26.

Preliminarily, Respondent argues the video should not have been admitted into evidence. She recites and incorporates into her brief an application she filed on July 25, 2019, asking that

I deny a Board motion to allow the use in these proceedings of the video. In its motion, the Board had pointed out the use of the video in the tenure hearing was possibly contrary to an Order issued in the criminal case by Honorable Timothy P. Maguire, J.M.C. Respondent, through counsel, opposed the Board's motion, asserting, "the appropriate course of action would be for the Board to direct its application either to Judge Maguire, or to the Atlantic County Superior Court, which last exercised jurisdiction over Ms. Peschi's criminal case." When Respondent joined the Board in fashioning a Consent Confidentiality Order for me to enter for the purpose of regulating the use of the video as well as ensuring the confidentiality of the video and other records and files identified therein, she reserved her objection to use of the video in this case without authorization from Judge Maguire or a court of appropriate jurisdiction.

In any case, Respondent argues, the video is not dispositive of the issues of conduct unbecoming and corporal punishment that are before me pursuant to the Tenure Charges. She observes, in particular, reciting Judge Rauh's May 10, 2019, decision finding her not guilty of simple assault, R-1, "[r]easonable neutrals can, and have already expressed divergent opinions on the nature of precisely what is depicted in [the video]." Respondent Brief at 27. She quotes from Judge Rauh's decision, and although acknowledging it "may not be binding," argues "it is well-

considered and persuasive. Certainly it belies the Board's assertion, repeated at least 9 times in the Board's opening statement, that this is a 'straightforward case.'" Respondent Brief at 28.

Respondent, further, contends, the witness testimony in this arbitration, does not compel a different outcome from the criminal trial verdict. Regarding the testimony of student witnesses L.C. and A.M., along with the testimony of M.M., Respondent notes Judge Maguire's observation in the Municipal Court trial that these same students gave "at time contradictory" and "somewhat rehearsed or coached" testimony. R-17 at 15. She contends that 18 months after that trial, and nearly 3 years removed from the incident in question, those concerns continue and must prevail. She asserts the testimony of the three (3) students "has little, if any, value." Respondent Brief at 28. Respondent argues none of them have specific knowledge of her intent, and most likely their testimony is from viewing the video, rather than from first hand knowledge of what actually occurred.

According to Respondent, the testimony of staff members Muffley and Popa is equally unhelpful. Indeed, while Muffley testified she saw Respondent's foot contact the inside of the back of M.M.'s chair, Popa, who was much closer, recalled Respondent made her contact with the top of the seat. Respondent

Brief at 32. Neither observed an injury, Respondent argues.

Respondent's hearing testimony, in contrast, has been consistent, is first hand, and is reliable, she argues. She admits she "instinctively" put her foot on M.M.'s chair, but insists she did not have any intention to push it, or M.M., to the ground. Indeed, she testified she did not approach the table because of how M.M. was seated, but rather to "yell at" the other students at the table who were throwing food and otherwise being rowdy. In the process she noticed the dangerous position of M.M.'s chair and reflexively attempted to right its position. As she did so, the chair rocked backwards, causing her foot to come into contact, inadvertently, with the backrest. Respondent Brief at 33-34. She insists that the fact she used her foot rather than her hand in making the correction to M.M.'s position proves nothing about her intent. Respondent Brief at 38.

Respondent contends that she immediately asked M.M. if he was alright, and repeated her question when he did not answer. He told her he was "okay." Respondent Brief at 34. In short, Respondent argues, the incident was an accident, and the fact she may have told him in the wake of his fall, "guess you won't do that again," is neither surprising nor incriminating. She asserts it is the kind of lighthearted comment "[e]very parent has benignly and unthinkingly said to a child, following an unserious mishap." Respondent Brief at 35.

Respondent has consistently and credibly maintained that she did not see the incident as serious because she had not attempted to hurt M.M., and in fact he did not appear to be hurt or upset. Respondent insists it was entirely reasonable she minimized the incident and did not remove M.M. from the cafeteria. Respondent Brief at 36. She insists her possible insensitivity in writing in a memo that Muffley was "making a big deal about the incident," P-27, and thus "babying" M.M. is not a chargeable offense. Respondent Brief at 36. It certainly does not establish the intentionality and malice the Board has charged, she argues. Id.

Nor is there relevance to the fact she did not apologize to M.M., and thereby show, purportedly a quantum of remorse required to rebut the Board's claims about her malicious purpose. Not only was she not charged with failing to apologize, and not only was she specifically instructed against contacting M.M. or his family, but, she insists, she "did not intend to knock M.M. out of his chair and, frankly, has nothing to apologize for," as she did not believe M.M. was injured or was otherwise in any distress. Respondent Brief at 40.

Respondent insists I evaluate the evidence from her perspective. She was "stunned" at Speirs' allegation she intentionally had attempted to hurt M.M., id. at 37, just as she is incredulous that her reaction, "oh my gosh, this is like a bad

joke," has been misrepresented and misconstrued as her having said it was all a "joke gone bad." Id. Respondent remains dismayed at how she instantly went from being a respected educator to a pariah. Id. She argues there is nothing in her history that even suggests problems with classroom or student management, self-control or anger, issues which would have manifested had they existed. Respondent Brief at 39. She is an experienced teacher who has disciplined students effectively and within existing guidelines over the course of her multi-decade career, she argues. There is nothing in her prior record which might support a conclusion she would overreact to a student leaning back in his chair by intentionally knocking him to the floor. Respondent Brief at 39.

In short, Respondent asks the Tenure Charges be dismissed and she be reinstated to her position with all lawful back pay, benefits and emoluments.

Opinion

The Video

Preliminarily, I address Respondent's argument the video is inadmissible under the Consent Order entered by Linwood Municipal Court Judge Timothy Maguire on August 16, 2017, ("Municipal Court Order"), and should be stricken from the arbitration record. I reject the argument. I find it is without merit, for several reasons.

The video was generated by the Board's security equipment at Belhaven School on February 9, 2017. The video was and remains the property of the Board. Although the Municipal Court Order might on its face appear to bind the Board to the limitation, stated in the Order, that "the Security Video and any and all copies thereto will only be used by the Parties for their prosecution and defense [of] the above-captioned litigation," in the context of the criminal case and of the obvious circumstances under which the Board agreed to release the video to the Atlantic County Prosecutor and to Ms. Peschi based upon their agreement to be bound by certain court ordered confidentiality stipulations, it is plain to me upon my careful review of the Municipal Court Order, as amended by Judge Maguire, that the Order regulates the use of the video by the Atlantic County Prosecutor and by Ms. Peschi, and not by the Board.

To uphold Respondent's objection to the Board's use of the video in this Tenure Hearing without authorization from Judge Maguire, I would have to conclude that the Board, in agreeing to provide the video to the prosecution and defense in the Matter of New Jersey v. Peschi, and in insisting that the prosecution and defense agree to maintain the confidentiality of the video under terms satisfactory to the Board, gave up its control of the video and its right to use the video as evidence in a disciplinary proceeding under the Education Law, N.J.S.A. 18:6-10. There is

nothing in the Municipal Court Order which takes away that right, and Respondent has not identified any law or precedent which give a Municipal Court authority to limit the Board's ability to use its own security video as evidence in a tenure hearing. If Respondent had an identifiable legal right to preclude the use of the video in her Tenure Hearing without the imprimatur of Judge Maguire, it was her obligation to raise that right to Judge Maguire, rather than wait until after the completion of these proceedings.

The Charges

Turning to the Charges and Specifications, I find, based upon my careful review of the hearing record and the arguments of the parties, that Respondent is culpable for the misconduct and violations alleged in Charges 1, 2 and 3.

With respect to **Charge 1**, I find Respondent did engage in conduct unbecoming a teaching staff member in violation of Board Policy No. 3281, when she exposed M.M. to unnecessary harm, when she intentionally, and purposefully, pulled down with her foot and leg, the back of a cafeteria chair in which M.M. was seated, causing him suddenly, unexpectedly, and violently, to fall to the cafeteria floor in front of his peers and Board staff, and suffer physical injury, personal embarrassment, and public embarrassment among his peers and Board Staff. I find that by said conduct, she also violated N.J.S.A. 18A:6-1 and Board Policy No. 3217,

"Use of Corporal Punishment," as alleged in **Charge 2.** I further find that by said conduct, she violated Board Policy No. 3280, "Liability for Pupil Welfare," as alleged in **Charge 3.**

My conclusions are drawn substantially from my careful and detailed viewing the video. I watched and re-watched the incident dozens of times, at regular speed and frame-by-frame. Each viewing led me to the same conclusion. Respondent walked up to a spot just behind the cafeteria chair in which M.M. was seated while he was leaning back and balancing himself on the chair's back supports, with the front supports suspended in the air. The top of the backrest of the chair was approximately two (2) feet above the ground. (A frame-by-frame analysis shows that M.M. was rocking very slightly, but so slightly it is only perceptible in the frame-by-frame analysis.) When Respondent reached a spot behind and just to the left of the chair, she bent her right leg at the knee and raised her right knee to a point where her right foot was higher than the back of M.M.'s chair. Respondent then placed her raised foot on the top of the backrest of the chair and in one very quick and forceful motion, she pushed the backrest of the chair to the floor, which caused M.M. to fall backwards onto the floor.

The video shows that Respondent's right foot makes contact with the backrest of M.M.'s chair at 12:04:19.723. Her downward push extends until 12:04:20.324, at which point M.M.'s chair back

hits the floor. The video frame at 12:04:20.657 shows M.M.'s legs and feet straight up in the air, which convinces me he landed on his back when he hit the floor, as he testified. His contact with the floor was hard, I find, as it took substantial force to cause M.M. to roll back and flip over so his legs and feet were pointing straight up. At 12:04:20.791 he has rolled over onto his side.

At 12:04:21.124, M.M. is still rolling on the floor as Respondent stands over him watching. At 12:04:21.926, M.M. starts to bring himself up as Respondent leans down from her waist. At 12:04:23.060, he has sat up, but is still on the ground looking up at her. At 12:04:24.862, M.M. has begun to right the chair and has lifted himself up onto one knee. Respondent continues to stand next to him with her arms firmly at their sides. There is no hint of any motion by her to help him up.

At 12:04:27.131, M.M. is standing and bringing his chair all the way up. Respondent moves closer to him, but her arms still remain at their sides. At 12:04:28.398, as M.M. brings his chair all the way up and prepares to sit back in it, Respondent turns to her left and begins to walk around to the other side of the table where, at 12:04:34, she stops to face and address the other children at M.M.'s table. At 12:04:34.873 Respondent is gesturing with the palms of both her hands facing up, as she

looks at the children at M.M.'s table. At 12:04:36.341, she leaves that table. At 12:04:40.345 Respondent is turned towards Muffley, and gesturing with her palms up as she walks sideways off camera.

I watched the video very closely from 11:47:42 a.m. until 12:06:43 p.m. It corroborates hearing evidence that Respondent was assigned to lunch duty on the 7th grade side of the cafeteria. In fact, she has no apparent interaction with the 6th grade side (except to retrieve what appear to be paper towels) until she crosses through the opening in the barrier between the 7th grade side and the 6th grade side at 12:04:15, approximately four (4) seconds before she engages contact with M.M.'s chair.

Respondent testified she crossed over to the 6th grade side to address misbehavior she observed at M.M.'s table. 11/11 at 152. She stated she saw children throwing food and observed one of the children at M.M.'s table get out of his seat, throw a bag of chips on the floor and stomp on it. 11/11 at 152. She recalled that as she approached M.M.'s table, she was yelling at the children seated at that table on account of their misbehavior. 11/11 at 153-54. She testified that M.M.'s position in his chair was not the reason she approached the table. 11/11 at 153.

In fact, the video corroborates that testimony, as it shows that M.M.'s chair is upright at 12:04:14.051, the point at which

Respondent first crosses over to the 6th grade side. The video further shows that it is after Respondent crosses to the 6th grade side, the moment she recalls she had decided to walk over to M.M.'s table to correct their misbehavior, that he leans back in his chair. This is at 12:04:15.052.

The video evidence persuades me Respondent's contact with M.M.'s chair, when she placed her foot on the top of the backrest and pushed it squarely to the floor, was not an accidental occurrence. Her movement is fluid and deliberate. There is nothing in the movement of her right leg or any other part of her body which suggests she lost her balance or for some other reason inadvertently ended up pushing M.M.'s chair to the floor instead of pushing the back of the chair forward. Her actions appear purposeful. The video shows her purpose was to push the chair's backrest down rather than to push the back of the chair up so M.M. would not fall.

Respondent's purpose is further revealed, I find, by the fact there is nothing in her body language which indicates an effort to help M.M. up, which is not what one would expect if a teacher has just accidentally knocked a child to the floor, which is what Respondent contends happened here. If a teacher has inadvertently caused a child to fall backwards from his chair onto the floor, especially if the fall is forceful, as it was here, I would expect to see at least some reaction by the teacher

revealing she did not intend to cause the fall or was concerned about the welfare of the child. Minimally I would expect to see her extend a hand to help him up. But here, Respondent offered no such assistance. She has never claimed she gave him any. This evidence persuades me that knocking M.M. and his chair to the cafeteria floor is precisely what she wanted to do.

In ruling that her actions were intentional, I am not making a finding they were premeditated. On the contrary, the video evidence, combined with Respondent's testimony she was disciplining the children at M.M.'s table and "yelling" at them when she noticed M.M. leaning back in his chair, persuades me she acted impulsively against M.M. while she was angry at other children.

Respondent used the word "instinctive" to describe her impulsivity. 11/11 at 154. Regardless of which word best indicates her internal process, the fact remains that when she saw M.M. leaning back in his chair, she abandoned her capacity to respond in a professional, responsible, proportional and safe manner, as she had done earlier that lunch period when, at 11:50:58, on the 7th grade side, she encountered a child leaning back in his chair and she gently righted the chair with her hands. P-29.

Respondent's lack of candor about the incident, in particular her claim she did not intend to push the back of the

chair to the floor, and her persistent denial, until confronted with her memorialization of the incident, P-27, that she told M.M. when he looked up at her from the floor that he now will have learned his lesson about leaning back in his chair, persuades me she has not been honest about her level of anger, and even the existence of rage, she experienced when, while yelling at other children, she saw M.M. leaning back in his chair.

Respondent's lack of candor about the purposefulness of her action, in particular the fact she immediately blamed M.M. for the incident as she explained to him her purpose in knocking him over was to teach him a lesson, persuades me that M.M. is the more credible recounter of the event, and that he has honestly and accurately recalled that Respondent never asked him if he was hurt, or needed any help.

I thus further believe M.M.'s testimony that he was hurt and embarrassed. At 12:06:43 on the video, he is shown, as he is being escorted from the cafeteria by Muffley, wiping his eyes with the right sleeve of his sweater or shirt. At 12:06:44, he continues to wipe his eyes. This corroborates Muffley's testimony M.M. was crying when she approached him after the incident. The evidence persuades me M.M. was crying as he left the cafeteria because he was hurt and embarrassed, as he claims, by Respondent's purposeful and punitive act of pushing him and

his chair to the ground without warning. Indeed, I find it is preposterous for Respondent to claim that when M.M., who was then 12 years old, walked the hallways of the school, in front of other children, with an icepack applied to his head, he was being dramatic. I am convinced he was using the icepack because his head hurt and he was seeking to relieve the pain.

Respondent insists her recollection of the incident as a mere accident is truthful, and her version, at the very least, as Judge Rauh found, is "plausible." Her contention that she inadvertently "tapped" M.M.'s chair and never intended for him to fall to the floor, 11/11 at 156, is only plausible if I ignore what is undeniable: her failure immediately, or even at all, to help M.M. up from the floor; her failure to ask him if he was hurt; her failure to ensure he received a medical evaluation; her comment revealing her purpose was to teach him a lesson; her failure to report the incident to Speirs; her ongoing dissimulation about what happened and the her actions in the wake of the incident to conceal it; the fact that the incident happened while she was angry and "yelling" at other children; that earlier, when she was not disciplining and "yelling" at children, and encountered another child similarly leaning back in his chair, she responded by gently righting the child to an upright position; that she did not inquire how M.M. was feeling even when later that day she saw him with an icepack, because she

believed he was being dramatic; that she believes a teacher, like Muffley, who gave personal attention to a 12 year old child who had fallen backwards to the floor after being pushed down by another staff member, was coddling the child.

Indeed, Judge Rauh, in finding insufficient proof (albeit under a criminal law standard) that Respondent had intention to push M.M. and his chair to the ground without regard for the child's welfare, apparently did not consider these important factors relevant to Respondent's purposefulness or lack thereof. His decision does not consider Respondent's failure to respond to M.M.'s fall with care and support, and that she walked away without offering him any help or showing concern about anything other than the lesson about proper chair use he shall have learned from the experience.

What is undeniable is Respondent's lack of any reaction to a child tumbling hard to the floor with sufficient force it upended him and caused him to land on his back. Although Respondent is certain M.M. did not hit his head, what possible justification did she have for not helping him up and at least asking him if he was hurt? She now of course realizes she had none, and has claimed here she asked him if he was "okay." If M.M.'s fall was an accident, as Respondent contends, I would expect she would have responded at the time as if she inadvertently had just caused a child to accidentally flip over onto the floor, and thus

show concern. Respondent instead, explained to M.M. the lesson she was seeking to teach him when she flipped him over, and she walked away.

Respondent's actions, I find, were unprofessional, irresponsible, dangerous, punitive, purposeful, and amounted to prohibited corporal punishment. Her actions constituted conduct unbecoming a teacher.

As alleged in Charge 1, Respondent violated Board Policy No. 3281. She failed her responsibility to protect M.M.'s health, safety and welfare. She failed to conduct herself at the highest level of professional responsibility when she flipped a child out of his chair, told him she did so to teach him a lesson, and then walked away without providing him any care or support, and then failed to report the incident. By her treatment of M.M. on February 9, 2017, Respondent engaged in inappropriate conduct unbecoming a school staff member which is prohibited under the Policy. Her admitted punitive purpose in flipping M.M. out of his chair to teach him a lesson about the dangers of leaning back in chairs, constituted corporal punishment prohibited under Board Policy No. 3281, as edified by the definition of "inappropriate staff conduct" set forth in Board Regulation No. 3281.

By imposing corporal punishment upon M.M., Respondent violated N.J.S.A. 18A:6-1 and Board Policy No. 3217, as alleged in Charge 2. There is not even a scintilla of evidence that

Respondent needed to upend M.M. as a reasonable and necessary use of force, as spelled out in N.J.S.A. 18A:6-1. He was not disturbing or threatening anyone; he did not have a weapon; he was not threatening anyone's person or property; he was not being disobedient. The proscription in Policy No. 3217 could not be clearer: no teacher may resort to force in her treatment of a pupil, even pupils who are openly defying authority (which was not the case with M.M.), as "[e]ach pupil is protected by law from bodily harm. . . Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils." Plainly, within this proscription, Respondent fairly could not possibly have determined there was justification to push M.M. and his chair to the floor.

Respondent likewise violated Board Policy No. 3280, as alleged in Charge 3. She failed to discharge her responsibility towards M.M. with the highest level of care and prudence. Instead of prioritizing M.M.'s safety, which she might have done by protecting him from falling as he leaned back in his chair, she intentionally caused the very thing she should have been protecting him from, falling backwards and exposing himself to possible serious injury.

Penalty

This record persuades me that Respondent's actions towards M.M., although impulsive, were nevertheless punitive, and that she has demonstrated a lack of professionalism and maturity that might have allowed her to reflect upon her actions, understand them, and give credible assurance she has the ability to exercise her good judgment, restraint, proportionality and adherence to governing rules and regulations the next time she might be angered by and yelling at children.

I thus do not see this incident through the same lens as Judge Rauh, as a very brief event which reveals little about Respondent's state of mind. Her actions against M.M. were undertaken with no evident consideration of the immediate danger they presented to M.M., and the possible cerebral and neurological damage, perhaps permanent, he potentially could have suffered by a surprise move by which caused him to flip backwards, without warning, onto his head. Respondent has effectively admitted she lacked the capacity, while on duty charged with the care and safety of children, properly and responsibly to assess those risks.

Disturbingly, Respondent testified she considers a teacher, like Muffley, who offered comfort to a child who had just been flipped out of his chair by another teacher to be "overreacting." She unambiguously stated her view that M.M. should have accepted

her mistreatment of him, instead of crying, complaining of pain, and otherwise being "dramatic." In short, even now she shows no remorse for her inappropriate, unjustified, punitive, irresponsible and dangerous treatment of M.M. on February 9, 2017. Even now, years removed from the incident, Respondent demonstrates her inability and refusal to understand the seriousness of her misconduct.

No parent who entrusts their child to the care of the School District should expect that if their child does something unsafe, like lean back in his chair, a school staff member will punitively teach him a lesson by having him actually experience the very danger that the unsafe action creates.

I hasten to add these would be serious charges if the allegations were only that Respondent observed a child who was leaning back in his chair lose his balance, fall forcefully onto his back and head, do nothing to assist the child, ignore the possibility of a serious injury, chastize the child for his unsafe conduct and then walk away. The actual wrongdoing is far worse where as here Respondent intentionally pushed the child to the floor, and is aggravated further by her lack of candor and refusal to acknowledge the gravity of her wrongdoing.

I have deliberated carefully on whether Respondent here might properly be penalized with a consequence less serious than dismissal. In doing so, I have considered whether she has

provided sufficient assurance she knows the wrongfulness of her misconduct, understands the unacceptable risks it presented, recognizes the circumstances, thinking and emotions which prompted her to lose her ability to act in an appropriate and proportionate way when she saw M.M. putting himself at danger. I must be persuaded that Respondent will not again act impulsively to punish a child, as she did here, unconcerned about the obvious dangers and grave risks of physical harm her decision to flip a child over had created, like the very real risks of brain injury and paralysis.

True, Respondent made her decision to push down on M.M.'s chair almost instantaneously, but as an experienced teacher, she had enough time even in that instant to reflect upon the impropriety and danger of her impulse, and control it. Indeed, Respondent has admitted that what she did here was make a "choice." 12/16 at 51. In this proceeding, she has not presented evidence to convince me she has the awareness, or even the capacity, if again angered and forced to "yell at" children in a disciplinary setting, to control her violent impulses.

For all of the above reasons, I find the appropriate penalty for Respondent's conduct unbecoming and act of corporal punishment against M.M. when she pushed him and his chair to the floor on February 9, 2017, is dismissal.

AWARD

1. Respondent Kimberley Peschi is culpable for the violations and misconduct alleged in the Charges and Specifications, in particular, as discussed hereinabove, she engaged in conduct unbecoming a teaching staff member and committed corporal punishment in violation of Board Policy and Regulation, and of New Jersey Law.

2. For the reasons stated, her penalty for engaging in said misconduct and violating the law, policies and regulations indicated shall be the termination of her employment.

June 1, 2020.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

On this 1st day of June 2020, before me personally came and appeared EARL R. PFEFFER, Arbitrator, to me known and known by me to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed before me this 1st day of June 2020.

Notary Public

JOYCE L RUDIN
My Comm. Exp 10-26-2022
NOTARY PUBLIC
No. 50070820
NEW JERSEY

124-20 **New Jersey Commissioner of Education**

Final Decision

Board of Education of the Delaware Valley Regional High School District, Hunterdon County,

Petitioner,

v.

Board of Education of the Hunterdon County Vocational School District, Hunterdon County and Board of Education of the North Hunterdon-Voorhees Regional High School District, Hunterdon County,

Respondents.

Synopsis

Petitioner, Delaware Valley Regional High School District, sought an order relieving it of the obligation to pay for the tuition and transportation costs for its students to attend the respondent, Hunterdon County Vocational School District's (HCVSD) Biomedical Sciences Academy (Academy). Petitioner contended that its high school provides an equivalent biomedical sciences program which has been approved as a Career and Technical Education (CTE) program, and which has the same Classification of Instruction Code (CIP) as HCVSD's Academy, however is not an approved vocational school and has not applied for such status.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case and the matter is ripe for summary decision; the two issues to be determined, 1) whether the approval for a CTE program is equivalent to being an approved vocational school, and if this relieves the petitioner from the obligation to pay for students to go to the respondent vocational school, and 2) whether the location of the vocational school at a regional high school disqualifies it from receiving students and tuition from the petitioning district; *N.J.S.A.* 18A:54-20.1(a) requires school districts to pay tuition for student who are accepted into a county vocational school, and the statute makes no distinction regarding the location of the program; the location of the HCVSD's Academy on the campus of North Hunterdon-Voorhees Regional High School is irrelevant because it is a separate, approved vocational school with its own school code; *N.J.S.A.* 18A:38-15, which provides districts with discretion to pay the tuition for their students to attend another district that offers a course of study not offered by the home district, does not apply here because *N.J.S.A.* 18A:54-20.1(a) already creates the mandatory obligation to pay; further, petitioner is not exempt from *N.J.S.A.* 18A:54-20.1(a) because its approved CTE program in biological sciences is not the equivalent of a vocational school.

Upon review the Commissioner concurred with the ALJ that petitioner is required to pay tuition costs for its students to attend HCVSD's Academy pursuant to *N.J.S.A.* 18A:54-20.1(a). Finding petitioner's exceptions to be without merit, the Commissioner adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

124-20

OAL Dkt. No. EDU 13276-19
Agency Dkt. No. 191-8/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Delaware Valley Regional High School District, Hunterdon County,

Petitioner,

v.

Board of Education of the Hunterdon County Vocational School District, Hunterdon County and Board of Education of the North Hunterdon-Voorhees Regional High School District, Hunterdon County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Delaware Valley Regional High School District Board of Education (petitioner), and the reply thereto filed by the respondent, Hunterdon County Vocational School District Board of Education (HCVSD).[1]

Petitioner seeks an order declaring that it is not required to pay tuition or transportation costs for its students to attend HCVSD's Biomedical Sciences Academy

[1] Respondent North Hunterdon-Voorhees Regional High School District Board of Education also filed exceptions to point out that the Initial Decision failed to make conclusions with respect to its motion to dismiss but contends that in granting HCVSD's motion for summary decision, the ALJ intended to dismiss the petition as to both respondents. The Commissioner agrees.

(Academy). By way of background, HCVSD operates six vocational schools in Hunterdon County, including the Academy, which is located in a leased classroom on the campus of respondent North Hunterdon-Voorhees Regional High School District Board of Education (North Hunterdon-Voorhees). Students who attend the Academy take classes that are provided either directly by HCVSD, or pursuant to a contract between HCVSD and North Hunterdon-Voorhees. Petitioner operates a Career and Technical Education (CTE) program in biomedical sciences that has the same classification of instructional program (CIP) code as HCVSD's biomedical sciences CTE program, but has not been approved as a vocational school.

The Administrative Law Judge (ALJ) found that petitioner is required to pay tuition and transportation costs for its students to attend HCVSD's Academy, even though the Academy is housed at another regional high school. *N.J.S.A.* 18A:54-20.1(a) requires districts to pay tuition for their students who are accepted into a county vocational school, and the statute makes no distinction regarding the location of the program. Despite petitioner's arguments, the ALJ found that the location of the Academy on the campus of North Hunterdon-Voorhees is irrelevant because it is a separate vocational school with its own school code and is approved by the Department. The ALJ also found that *N.J.S.A.* 18A:38-15 – which provides districts with the discretion to pay the tuition for their students to attend another district that offers a course of study not offered at the home district – does not apply to this matter because *N.J.S.A.* 18A:54-20.1(a) already creates the mandatory obligation to pay. Moreover, petitioner is not exempt from *N.J.S.A.* 18A:54-20.1(a) because its approved CTE program in biomedical sciences - while considered a vocational-technical program - is not the equivalent of a vocational school.

In its exceptions, petitioner argues that the ALJ erred by concluding that *N.J.S.A.* 18A:54-20.1 requires petitioner to pay tuition for its students to attend the Academy. Petitioner

maintains that the plain language of the statute only requires tuition payment when a student attends a CTE program that is housed on the campus of "any of the schools of the county vocational school district," which does not include programs that are located at another high school. (Petitioner's Exceptions at 4). Instead of *N.J.S.A.* 18A:54-20.1, petitioner argues that *N.J.S.A.* 18A:38-15 - which gives districts the discretion to pay tuition when students attend programs at another school - should apply. Petitioner further argues that the Academy can hardly be considered a "school," as it is just a four-course CTE program, and all other aspects of education are provided by North Hunterdon-Voorhees.

Petitioner also contends that the ALJ erred in finding that it does not operate a vocational school. Petitioner maintains that since it has an approved CTE program, it meets the definition of "vocational school" for the purposes of *N.J.S.A.* 18A:54-20.1(a). Further, the Department's regulations "strongly indicate" that approval of a CTE program is also approval to operate a vocational school. For example, *N.J.A.C.* 6A:19-2.1(c) authorizes boards of education to apply the terms "career and technical" or "vocational-technical" to their schools or programs once they have been approved. (Petitioner's Exceptions at 12-13). Petitioner also relies on the unpublished Appellate Division decision in *Board of Education of the Bergen Vocational and Technical School District v. Board of Education of the Ramapo-Indian Hills Regional School District*, No. A-3572-04, 2006 *N.J. Super. Unpub. LEXIS* 355 (App. Div. Mar. 6, 2006), to support its argument that obtaining a CIP code is the functional equivalent of an approved vocational school. Accordingly, petitioner maintains that because it operates a vocational school, it should be exempt from the obligation to pay tuition under *N.J.S.A.* 18A:54-20.1(a).

Finally, petitioner argues that HCVSD does not have the authority to operate a vocational school in another district's high school. Petitioner claims that *N.J.S.A.* 18A:54-20,

which sets forth the powers of a county vocational school board, does not permit a county vocational school to admit students beyond the capacity of its campus and send those students to a vocational program at an existing high school. Although *N.J.S.A.* 18A:54-20 permits vocational schools to lease school buildings, petitioner maintains that the statute does not contemplate leasing a classroom for a CTE program and contracting with an existing high school for the remainder of the classes. Accordingly, petitioner urges the Commissioner to reject the Initial Decision and declare that petitioner is not required to pay tuition for students attending the Academy.

In reply, HCVSD contends that the Initial Decision should be affirmed in its entirety. HCVSD disagrees with petitioner's argument that the location of the Academy at North Hunterdon-Voorhees or the provision of non-CTE classes by that high school means that the Academy is not a vocational school. HCVSD emphasizes that the Academy is a separate and distinct school with its own school code that is run by HCVSD. HCVSD maintains that it was expressly permitted to open the Academy in a local school as it was created pursuant to a grant by the Commissioner, and - at that time - the Legislature encouraged vocational schools to establish programs in existing facilities. *N.J.S.A.* 18A:6-132 *et seq.* HCVSD further argues that the ALJ correctly concluded that the petitioner does not operate a vocational school. A CIP code for a CTE program is not the same as operating a vocational school, which requires separate approval by the Department. Accordingly, petitioner is obligated to pay for its students to attend the Academy, pursuant to *N.J.S.A.* 18A:54-20.1(a).

Upon review, the Commissioner agrees with the ALJ that petitioner is required to pay tuition costs for its students to attend the HCVSD's Academy. *N.J.S.A.* 18:54-20.1(a) provides:

> The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes.

As the Academy is one of the schools of the county vocational school district, the petitioner is obligated to send any of its students who are accepted into the program and pay for their tuition. Petitioner does not fall into the exception outlined in *N.J.S.A.* 18A:54-20.1(a) because it does not operate a vocational school since it has never applied or been approved to do so. Operating a CTE program is not the same as operating a vocational school. Additionally, the location of the vocational school program in a regional high school does not violate the statute. Accordingly, there is no basis for petitioner to be discharged of its obligation to pay the tuition costs for its students to attend the Academy.

The Commissioner does not find petitioner's exceptions to be persuasive as they substantially reiterate arguments that were already addressed by the ALJ. The plain language of *N.J.S.A.* 18A:54-20.1, specifically the use of "any of the schools of the county vocational school district," does not support petitioner's interpretation that the tuition requirement only applies to vocational schools that are located on their own campus and not those that are housed on the campus of another high school. Instead, the plain language applies to any vocational school and does not differentiate between programs based on their location. Further, *N.J.S.A.* 18A:38-15, does not supersede petitioner's obligation to pay tuition for its students to attend vocational

schools under *N.J.S.A.* 18A:54-20.1. Contrary to petitioner's arguments, the Department's regulations do not establish that the approval of a CTE program is the same as an approval to operate a vocational school.[2] Finally, the Commissioner disagrees with petitioner that HCVSD did not have the authority to create the Academy.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: June 8, 2020
Date of Mailing: June 11, 2020

[2] The case petitioner relies on, *Bergen Vocational and Technical School District, supra,* is unpublished and not precedential, but nevertheless fails to establish that maintaining a CIP code for a CTE program equates to operating a vocational school.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 13276-19
AGENCY REF. NO. 191-8/19

DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION,
Petitioner,
v.
HUNTERDON COUNTY VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION AND NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL, BOARD OF EDUCATION,
Respondents.

Stephen R. Fogarty, Esq., for petitioner, Delaware Valley Regional High School District, Board of Education (Fogarty & Ohara, attorneys)

Richard A. Vex, Esq., for respondent, Hunterdon County Vocational School District Board of Education (Vex Law, attorneys)

Teresa L. Moore, Esq., for respondent, North Hunterdon-Voorhees Regional High School, Board of Education (Riker, Danzig, Scherer, Hyland, and Perretti, attorneys)

Record Closed: January 17, 2020 Decision: April 24, 2020

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

Respondent, Hunterdon County Vocational School District ("HCVSD"), operates six schools in Hunterdon County, New Jersey. Respondent operates Career and Technical Education Programs ("CTE programs") at each of its six schools. Two of HCVSD's CTE schools are located at its campuses, Central Campus and Bartles Campus. Respondent operates three HCVSD Academies at other locations in Hunterdon County. These Academies are: The "Biomedical Sciences Academy" ("BSA"), the academy at issue, located at the North Hunterdon High School in a leased and remodeled classroom; The Environmental Sustainability & Engineering Academy located at Hunterdon County Educational Services Commission; and The Computer Science and Engineering Academy located at a leased space at both Delaware Valley Regional High School and Voorhees High School.

Each of respondent's Academies include non-CTE academic and other required courses provided pursuant to contract with a local high school or regional high school other than HCVSD. The BSA offers a four-year, full-time curriculum, and all CTE classes and all academic and other classes are provided either directly by HCVSD or pursuant to contract with the local comprehensive school district. In May 2019, the New Jersey Department of Education ("DOE") approved petitioner Delaware Valley Regional High School ("DVRHS") to operate a CTE program in biomedical sciences. DVRHS's newly approved biomedical sciences CTE program was assigned the CIP code of 260102. The BSA's CTE program CIP Code is identical to DVRHS's biomedical sciences CTE program CIP Code. However, DVRHS is not an approved vocational school, and has not applied for such status with the State Department of Education.

The petitioner filed an action seeking to be relieved of the obligation to pay for students at DVRHS's BSA program on the grounds that they provide an equivalent biomedical program which has received CTE approval. In addition, the petitioner argues that because the BSA program is housed at a different regional school, and not a vo-tech school, they are not obligated to pay tuition for their students under the statute.

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case. The respondent filed a motion for summary decision on October 15, 2019. Petitioner filed opposition to the motion and a cross-motion for summary decision on November 18, 2019. The respondent North Hunterdon-Voorhees Regional High School filed a motion to dismiss this matter, as they have no relationship, contractual or otherwise with the petitioner, and merely house the program at issue in one of their regional high schools. Oral Argument was heard on January 13, 2020, and the record closed on that date.

FINDING OF FACT

1. Respondent, HCVSD, operates six vocational schools in Hunterdon County, New Jersey.

2. HCVSD operates Career and Technical Education Programs at each of its six schools.

3. Two of HCVSD's CTE schools are located at its campuses, Central Campus and Bartles Campus.

4. HCVSD operates three Academies at other locations in Hunterdon County.

5. The Biomedical Sciences Academy is located at the North Hunterdon-Voorhees Regional High School in a leased classroom.

6. The Environmental Sustainability & Engineering Academy is located at Hunterdon County Educational Services Commission.

7. The Computer Science and Engineering Academy is located at leased space at both Delaware Valley Regional High School and North Hunterdon-Voorhees Regional High School.

8. Each of respondent's Academies include non-CTE academic and other required courses provided pursuant to contract with a local high school or regional high school other than HCVSD.

9. The BSA offers a four-year, full-time curriculum, and all CTE classes and all academic and other classes are provided either directly by HCVSD or pursuant to contract with the local comprehensive school district.

10. In May 2019, the New Jersey Department of Education ("DOE") approved petitioner Delaware Valley Regional High School ("DVRHS") to operate a CTE program in biomedical sciences.

11. DVRHS's newly approved biomedical sciences CTE program was assigned the CIP code of 260102.

12. The BSA's CTE program CIP Code is identical to DVRHS's biomedical sciences CTE program CIP Code.

13. DVRHS is not an approved vocational school and has not applied for such status with the State Department of Education.

LEGAL ARUGMENT AND CONCLUSION

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.

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). In this matter, there are no genuine issues of material fact. The respondent has a vocational program in Biomedical Sciences that it houses at a regional high school in its district. The petitioner has students attending this program and pays their tuition pursuant to N.J.S.A. 18A:4-20.1(a). The petitioner recently received CTE approval for a program in Biomedical Science. However, the petitioner does not operate a vocational school and has not applied or received approval to run a vocational school.

There are two issues before me on this motion. The first is whether the approval for a CTE program by the petitioner school district is analogous to approval for a vocational school, thus relieving them of the obligation to pay for students to go to the respondent vocational school. The other issue is whether the location of the vocational program at a regional high school disqualifies them from receiving students and tuition from the petitioner.

1. **Issue: Does the housing of a vocational program by HCVSD preclude them from collecting tuition for students attending the program?**

The petitioner has argued that the fact that HCVSD houses its Biomedical Academy in a regional high school renders null DVRHS's obligation to pay tuition for its students attending the academy. Petitioner argues that the plain language of the statute does not compel regional high schools to pay the tuition for students who attend a vo-tech program that is held at another regional high school, and that N.J.S.A. 18A:54-

20.1(a) only mandates tuition payments to situations where the student attends the vo-tech school's campus. However, the language of the statute makes no such distinction, nor can such an interpretation be implied by the language, case law or statutory intent. N.J.S.A. 18A:54-20.1(a) states:

> The board of education of each . . . regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the . . . regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district.

The program at issue is run by the respondent vocational school, which has received approval by the state to run the program. There is nothing in the statute which would mandate where the program is to be held.

Petitioner has argued that the fact that the respondent's Biomedical Academy is hosted at another regional high school negates petitioner's obligation to pay the tuition of its resident students attending the Biomedical Academy. The plain language of the statute contradicts this understanding. N.J.S.A. 18A:54-20.1(a) states:

> The board of education of each . . . regional school district in any county in which there is a county vocational school district shall send to **any of the schools** of the county vocational school district each pupil who resides in the . . . regional school district and who has applied for admission to and has been accepted for attendance at **any of the schools** of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district . . . The provisions of this section shall not apply to the board of education of a . . . regional school district **maintaining a vocational school** or schools **pursuant to article 2 of chapter 54 of Title 18A** of the New Jersey Statutes.
>
> [N.J.S.A. 18A:54-20.1(a) (emphasis added).]

The statute states that the board of education of each regional school district shall send resident pupils to **any of the schools of the county vocational school district** for

each resident pupil who has applied to and been accepted for attendance at **any of the schools of the county vocational school district**. N.J.S.A. 18A:54-20.1(a) (emphasis added). There are three important features of the language of this provision. First, it is important to note that the regional school district must send their students to any of the schools of the county vo-tech school district, as noted by the mandatory language "shall." This shows that regional school districts have no discretion to prevent their resident students from attending any of the schools of the county vocational school district. The regional school district must send their resident students to those schools. Next, the provision makes clear that the regional school district must send those students to "any" of the schools of the county vocational school district. There is no specification that the pupils must be restricted to attending only classes hosted at some main campus. There is no mention of a campus, main school, headquarters, or any narrowing language that would support petitioner's argument. Instead, the broad language "any" was used, implying that of the many schools within a county vocational school district, the regional schools must send their pupil to whichever of those schools to which their resident pupils were accepted for attendance. Finally, the provision includes the word "schools," plural, implying that it was contemplated that county vocational school districts may have multiple schools. Again, the word "schools" is not clarified or modified except by "of the county vocational school district."

The petitioner also argues that allowing county vo-tech schools to collect tuition for students taught in non-campus locations, such as a local regional high school, is contrary to legislative intent. Specifically, petitioner argued that reading the statute to allow tuition payments to county vo-tech schools for students attending vo-tech classes at other regional high schools would encourage a county vo-tech school "to scavenge for empty classroom space in nearby high schools to increase its tuition revenue." Petitioner pointed to N.J.S.A. 18A:38-15 for support to show that the Legislature intended local school districts to have to pay the tuition of students attending vo-tech courses hosted at another regional high school. N.J.S.A. 18A:38-15 provides that a local school board has discretion to pay the tuition of a resident student wishing to take a course of study at another high school if the home district does not offer the course of study. N.J.S.A. 18A:38-15. Petitioner argued this provision's discretion should be carried over to a

student attending another regional high school for the vo-tech courses hosted there if the home district does not offer the course of study. Also, petitioner goes as far as to say that DVRHS would not need to pay tuition under the N.J.S.A. 18A:38-15 because it offers instruction in the same vo-tech course of study as the other regional high school. In sum, petitioner argued that the home district should have discretion to pay tuition for a resident student who takes vo-tech courses taught by a county vo-tech school at a different regional school district, and even applying that standard, petitioner would not have to pay the tuition because petitioner offers the same course at the home district. However, the statute in question is not discretionary and the analogy to the N.J.S.A. 18A:38-15, is not appropriate.

Petitioner's final argument is that HCVSD has no statutory authority to accept students beyond the capacity of its schools and send those students and an instructor to a high school operated by another school district. Petitioner relies upon N.J.S.A. 18A:54-20, which outlines the powers of vo-tech schools, for the lack of authority to set up the relationship present in this case. HCVSD responds that the Biomedical Science Academy is a properly approved vo-tech school and the fact that it is hosted on the North Hunterdon-Vorhees Regional High School campus is irrelevant. First, respondent HCVSD argued that its Biomedical Sciences Academy located at the North Hunterdon-Voorhees Regional High School ("disputed vo-tech school") is a separate and distinct vocational school operated by HCVSD. Moreover, the disputed vo-tech school was specifically approved by the DOE, has a separate school code, the classes are hosted by HCVSD, attending students receive their diploma from HCVSD, and those students are counted on roll with the HCVSD by the DOE. Accordingly, the disputed vo-tech school is duly authorized under the relevant statutes and regulations, and the location of the program at a local school does not vitiate the obligation to pay tuition.

2. Is the approval of a CTE program in Biosciences by the petitioner the equivalent of maintaining a vocation school pursuant to N.J.S.A. 18A:54-5?

DVRHS argues that it qualifies for the exemption under N.J.S.A. 18A:54-20.1(a), since DVRHS operates its own program that is the same as the one operated by HCVSD. However, such an exemption is permitted only where there is an approved vocational school in the district. The DOE's approval of a career and technical education program ("CTE program") is not the equivalent to the DOE's approval of a school district operating a vocational school. The exemption from tuition payments is limited to regional school districts which maintain a vocational school pursuant to N.J.S.A. 18A:54-5 and -6 found in N.J.S.A. 18A:54-20.1(a). Having a CTE approved program is not the equivalent of operating a vocational school. Moreover, discretionary obligation under N.J.S.A. 18A:38-15 is not mirrored in the vocational statute, and the language in the vocational status is clear.

Petitioner argues that approval for a CTE program is equivalent to approval to operate a vocational school under N.J.S.A. 18A:54-5 and -6, relying upon N.J.A.C. 6A:19-2.1(c) for support of this equivalence. N.J.A.C. 6A:19-2.1(c) provides:

> A district board of education shall not apply the term "career and technical" or "vocational-technical" to any of its schools, programs, or programs of study unless those schools, programs, or programs of study are approved by the Department and meet the general requirements included in the approved State Plan for Career and Technical Education.
>
> [N.J.A.C. 6A:19-2.1(c)]

Petitioner interprets this regulation to mean that a district board of education, if permitted to refer to its school as vocational-technical once it obtains program approval, should then be considered a vo-tech school pursuant to N.J.S.A. 18A:54-20.1(a). However, before a vocational school can be established, "the location and rules for management of the school, the course or courses of study to be pursued therein, and all changes in such courses shall be approved by the commissioner, subject to the advice and consent of the

state board. N.J.S.A. 18A:54-6. No such approval was obtained by the petitioner Board of Education and they are not recognized or approved as a vocational school.

The petitioner's CTE program is not a vocational school for the purposes of N.J.S.A. 18A:54-20.1(a) and the two programs are not "the same" per that statute. The statute requires that a local school district is only exempt from making tuition payments for its students attending a county vo-tech school if the local district is operating its own vo-tech school established pursuant to N.J.S.A. 18A:54-5 and -6. N.J.S.A. 18A:54-6 requires that the location and rules for the management of vo-tech school, the course or courses of study, and all changes in such courses shall be approved by the Commissioner of Education, subject to the advice and consent of the state board, before the local district can establish a vo-tech school. N.J.S.A. 18A:54-6; petitioner never sought or attained approval from the Commissioner of Education to operate a vo-tech school. Moreover, the establishment of a CTE program within a regional high school does not equate to the establishment of a vocational school. See Bd. of Educ. of Bergen County Vocational and Tech. Sch. Distr. v. Bd. of Educ. of Ramapo-Indian Hills Regional High Sch., EDU 7891-03, Final Decision (October 13, 2004). And, although there seems to be some movement by the NJDOE away from designated vo-tech schools to in-district CTE programs, there has been no change in the law regarding the establishment of same.

The language of the statue provides that a regional high school that may apply the term "career and technical" or "vocational technical" to any of its schools, programs, or programs of study only if the school, program, or program of study is approved by the Department and meet the general requirements included in the approved State Plan for Career and Technical Education. N.J.A.C. 6A:19-2.1(c). Petitioner does not have an approved "school." Petitioner only offers an approved "program." Just because petitioner is permitted by statute to apply the term vocational-technical to its approved program does not mean that it has met the requirements for approval for a vocational school. Additionally, the regulation distinguishes between "schools, programs, or programs of study." N.J.A.C. 1A:19-2.1(c). If an approved program was equivalent to an approved school, there would be no need for the regulation to distinguish between the two ideas. If the agency desired to equate CTE programs and vocational schools, it could have

simply stated so. In sum, the petitioner may apply the term career and technical or vocational-technical to its approved CTE program; however, this does not mean that the approved CTE program is a vocational school.

CONCLUSION

For these reasons, I **CONCLUDE** that DVRHS is not exempt from paying for the tuition and transportation of its resident students who wish to attend HCVSD's BSA because DVRHS does not operate or maintain a vocational school. I further **CONCLUDE** that a CTE program approval is not equivalent to approval of a vocational school. And finally, I **CONCLUDE** that housing the approved vo-tech program at another school does not violate the statute or relieve the petitioner from paying tuition for such students.

ORDER

I hereby **ORDER** that the respondent's Motion for Summary Decision is hereby **GRANTED** and the petitioner's Cross-Motion for Summary Decision is **DENIED**, 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Sarah G. Crowley

April 24, 2020
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency:

Date Mailed to Parties:

SGC/cb

124-20 **New Jersey Commissioner of Education**

Final Decision

Board of Education of the Delaware Valley Regional High School District, Hunterdon County,

Petitioner,

v.

Board of Education of the Hunterdon County Vocational School District, Hunterdon County and Board of Education of the North Hunterdon-Voorhees Regional High School District, Hunterdon County,

Respondents.

Synopsis

Petitioner, Delaware Valley Regional High School District, sought an order relieving it of the obligation to pay for the tuition and transportation costs for its students to attend the respondent, Hunterdon County Vocational School District's (HCVSD) Biomedical Sciences Academy (Academy). Petitioner contended that its high school provides an equivalent biomedical sciences program which has been approved as a Career and Technical Education (CTE) program, and which has the same Classification of Instruction Code (CIP) as HCVSD's Academy, however is not an approved vocational school and has not applied for such status.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case and the matter is ripe for summary decision; the two issues to be determined, 1) whether the approval for a CTE program is equivalent to being an approved vocational school, and if this relieves the petitioner from the obligation to pay for students to go to the respondent vocational school, and 2) whether the location of the vocational school at a regional high school disqualifies it from receiving students and tuition from the petitioning district; *N.J.S.A.* 18A:54-20.1(a) requires school districts to pay tuition for student who are accepted into a county vocational school, and the statute makes no distinction regarding the location of the program; the location of the HCVSD's Academy on the campus of North Hunterdon-Voorhees Regional High School is irrelevant because it is a separate, approved vocational school with its own school code; *N.J.S.A.* 18A:38-15, which provides districts with discretion to pay the tuition for their students to attend another district that offers a course of study not offered by the home district, does not apply here because *N.J.S.A.* 18A:54-20.1(a) already creates the mandatory obligation to pay; further, petitioner is not exempt from *N.J.S.A.* 18A:54-20.1(a) because its approved CTE program in biological sciences is not the equivalent of a vocational school.

Upon review the Commissioner concurred with the ALJ that petitioner is required to pay tuition costs for its students to attend HCVSD's Academy pursuant to *N.J.S.A.* 18A:54-20.1(a). Finding petitioner's exceptions to be without merit, the Commissioner adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

124-20

OAL Dkt. No. EDU 13276-19
Agency Dkt. No. 191-8/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Delaware Valley Regional High School District, Hunterdon County,

Petitioner,

v.

Board of Education of the Hunterdon County Vocational School District, Hunterdon County and Board of Education of the North Hunterdon-Voorhees Regional High School District, Hunterdon County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Delaware Valley Regional High School District Board of Education (petitioner), and the reply thereto filed by the respondent, Hunterdon County Vocational School District Board of Education (HCVSD).[1]

Petitioner seeks an order declaring that it is not required to pay tuition or transportation costs for its students to attend HCVSD's Biomedical Sciences Academy

[1] Respondent North Hunterdon-Voorhees Regional High School District Board of Education also filed exceptions to point out that the Initial Decision failed to make conclusions with respect to its motion to dismiss but contends that in granting HCVSD's motion for summary decision, the ALJ intended to dismiss the petition as to both respondents. The Commissioner agrees.

(Academy). By way of background, HCVSD operates six vocational schools in Hunterdon County, including the Academy, which is located in a leased classroom on the campus of respondent North Hunterdon-Voorhees Regional High School District Board of Education (North Hunterdon-Voorhees). Students who attend the Academy take classes that are provided either directly by HCVSD, or pursuant to a contract between HCVSD and North Hunterdon-Voorhees. Petitioner operates a Career and Technical Education (CTE) program in biomedical sciences that has the same classification of instructional program (CIP) code as HCVSD's biomedical sciences CTE program, but has not been approved as a vocational school.

The Administrative Law Judge (ALJ) found that petitioner is required to pay tuition and transportation costs for its students to attend HCVSD's Academy, even though the Academy is housed at another regional high school. *N.J.S.A.* 18A:54-20.1(a) requires districts to pay tuition for their students who are accepted into a county vocational school, and the statute makes no distinction regarding the location of the program. Despite petitioner's arguments, the ALJ found that the location of the Academy on the campus of North Hunterdon-Voorhees is irrelevant because it is a separate vocational school with its own school code and is approved by the Department. The ALJ also found that *N.J.S.A.* 18A:38-15 – which provides districts with the discretion to pay the tuition for their students to attend another district that offers a course of study not offered at the home district – does not apply to this matter because *N.J.S.A.* 18A:54-20.1(a) already creates the mandatory obligation to pay. Moreover, petitioner is not exempt from *N.J.S.A.* 18A:54-20.1(a) because its approved CTE program in biomedical sciences - while considered a vocational-technical program - is not the equivalent of a vocational school.

In its exceptions, petitioner argues that the ALJ erred by concluding that *N.J.S.A.* 18A:54-20.1 requires petitioner to pay tuition for its students to attend the Academy. Petitioner

maintains that the plain language of the statute only requires tuition payment when a student attends a CTE program that is housed on the campus of "any of the schools of the county vocational school district," which does not include programs that are located at another high school. (Petitioner's Exceptions at 4). Instead of *N.J.S.A.* 18A:54-20.1, petitioner argues that *N.J.S.A.* 18A:38-15 - which gives districts the discretion to pay tuition when students attend programs at another school - should apply. Petitioner further argues that the Academy can hardly be considered a "school," as it is just a four-course CTE program, and all other aspects of education are provided by North Hunterdon-Voorhees.

Petitioner also contends that the ALJ erred in finding that it does not operate a vocational school. Petitioner maintains that since it has an approved CTE program, it meets the definition of "vocational school" for the purposes of *N.J.S.A.* 18A:54-20.1(a). Further, the Department's regulations "strongly indicate" that approval of a CTE program is also approval to operate a vocational school. For example, *N.J.A.C.* 6A:19-2.1(c) authorizes boards of education to apply the terms "career and technical" or "vocational-technical" to their schools or programs once they have been approved. (Petitioner's Exceptions at 12-13). Petitioner also relies on the unpublished Appellate Division decision in *Board of Education of the Bergen Vocational and Technical School District v. Board of Education of the Ramapo-Indian Hills Regional School District*, No. A-3572-04, 2006 *N.J. Super. Unpub. LEXIS* 355 (App. Div. Mar. 6, 2006), to support its argument that obtaining a CIP code is the functional equivalent of an approved vocational school. Accordingly, petitioner maintains that because it operates a vocational school, it should be exempt from the obligation to pay tuition under *N.J.S.A.* 18A:54-20.1(a).

Finally, petitioner argues that HCVSD does not have the authority to operate a vocational school in another district's high school. Petitioner claims that *N.J.S.A.* 18A:54-20,

which sets forth the powers of a county vocational school board, does not permit a county vocational school to admit students beyond the capacity of its campus and send those students to a vocational program at an existing high school. Although *N.J.S.A.* 18A:54-20 permits vocational schools to lease school buildings, petitioner maintains that the statute does not contemplate leasing a classroom for a CTE program and contracting with an existing high school for the remainder of the classes. Accordingly, petitioner urges the Commissioner to reject the Initial Decision and declare that petitioner is not required to pay tuition for students attending the Academy.

In reply, HCVSD contends that the Initial Decision should be affirmed in its entirety. HCVSD disagrees with petitioner's argument that the location of the Academy at North Hunterdon-Voorhees or the provision of non-CTE classes by that high school means that the Academy is not a vocational school. HCVSD emphasizes that the Academy is a separate and distinct school with its own school code that is run by HCVSD. HCVSD maintains that it was expressly permitted to open the Academy in a local school as it was created pursuant to a grant by the Commissioner, and - at that time - the Legislature encouraged vocational schools to establish programs in existing facilities. *N.J.S.A.* 18A:6-132 *et seq.* HCVSD further argues that the ALJ correctly concluded that the petitioner does not operate a vocational school. A CIP code for a CTE program is not the same as operating a vocational school, which requires separate approval by the Department. Accordingly, petitioner is obligated to pay for its students to attend the Academy, pursuant to *N.J.S.A.* 18A:54-20.1(a).

Upon review, the Commissioner agrees with the ALJ that petitioner is required to pay tuition costs for its students to attend the HCVSD's Academy. *N.J.S.A.* 18:54-20.1(a) provides:

> The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes.

As the Academy is one of the schools of the county vocational school district, the petitioner is obligated to send any of its students who are accepted into the program and pay for their tuition. Petitioner does not fall into the exception outlined in *N.J.S.A.* 18A:54-20.1(a) because it does not operate a vocational school since it has never applied or been approved to do so. Operating a CTE program is not the same as operating a vocational school. Additionally, the location of the vocational school program in a regional high school does not violate the statute. Accordingly, there is no basis for petitioner to be discharged of its obligation to pay the tuition costs for its students to attend the Academy.

The Commissioner does not find petitioner's exceptions to be persuasive as they substantially reiterate arguments that were already addressed by the ALJ. The plain language of *N.J.S.A.* 18A:54-20.1, specifically the use of "any of the schools of the county vocational school district," does not support petitioner's interpretation that the tuition requirement only applies to vocational schools that are located on their own campus and not those that are housed on the campus of another high school. Instead, the plain language applies to any vocational school and does not differentiate between programs based on their location. Further, *N.J.S.A.* 18A:38-15, does not supersede petitioner's obligation to pay tuition for its students to attend vocational

schools under *N.J.S.A.* 18A:54-20.1. Contrary to petitioner's arguments, the Department's regulations do not establish that the approval of a CTE program is the same as an approval to operate a vocational school.[2] Finally, the Commissioner disagrees with petitioner that HCVSD did not have the authority to create the Academy.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: June 8, 2020
Date of Mailing: June 11, 2020

[2] The case petitioner relies on, *Bergen Vocational and Technical School District, supra,* is unpublished and not precedential, but nevertheless fails to establish that maintaining a CIP code for a CTE program equates to operating a vocational school.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 13276-19
AGENCY REF. NO. 191-8/19

DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION,
Petitioner,
v.
HUNTERDON COUNTY VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION AND NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL, BOARD OF EDUCATION,
Respondents.

Stephen R. Fogarty, Esq., for petitioner, Delaware Valley Regional High School District, Board of Education (Fogarty & Ohara, attorneys)

Richard A. Vex, Esq., for respondent, Hunterdon County Vocational School District Board of Education (Vex Law, attorneys)

Teresa L. Moore, Esq., for respondent, North Hunterdon-Voorhees Regional High School, Board of Education (Riker, Danzig, Scherer, Hyland, and Perretti, attorneys)

Record Closed: January 17, 2020 Decision: April 24, 2020

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

Respondent, Hunterdon County Vocational School District ("HCVSD"), operates six schools in Hunterdon County, New Jersey. Respondent operates Career and Technical Education Programs ("CTE programs") at each of its six schools. Two of HCVSD's CTE schools are located at its campuses, Central Campus and Bartles Campus. Respondent operates three HCVSD Academies at other locations in Hunterdon County. These Academies are: The "Biomedical Sciences Academy" ("BSA"), the academy at issue, located at the North Hunterdon High School in a leased and remodeled classroom; The Environmental Sustainability & Engineering Academy located at Hunterdon County Educational Services Commission; and The Computer Science and Engineering Academy located at a leased space at both Delaware Valley Regional High School and Voorhees High School.

Each of respondent's Academies include non-CTE academic and other required courses provided pursuant to contract with a local high school or regional high school other than HCVSD. The BSA offers a four-year, full-time curriculum, and all CTE classes and all academic and other classes are provided either directly by HCVSD or pursuant to contract with the local comprehensive school district. In May 2019, the New Jersey Department of Education ("DOE") approved petitioner Delaware Valley Regional High School ("DVRHS") to operate a CTE program in biomedical sciences. DVRHS's newly approved biomedical sciences CTE program was assigned the CIP code of 260102. The BSA's CTE program CIP Code is identical to DVRHS's biomedical sciences CTE program CIP Code. However, DVRHS is not an approved vocational school, and has not applied for such status with the State Department of Education.

The petitioner filed an action seeking to be relieved of the obligation to pay for students at DVRHS's BSA program on the grounds that they provide an equivalent biomedical program which has received CTE approval. In addition, the petitioner argues that because the BSA program is housed at a different regional school, and not a vo-tech school, they are not obligated to pay tuition for their students under the statute.

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case. The respondent filed a motion for summary decision on October 15, 2019. Petitioner filed opposition to the motion and a cross-motion for summary decision on November 18, 2019. The respondent North Hunterdon-Voorhees Regional High School filed a motion to dismiss this matter, as they have no relationship, contractual or otherwise with the petitioner, and merely house the program at issue in one of their regional high schools. Oral Argument was heard on January 13, 2020, and the record closed on that date.

FINDING OF FACT

1. Respondent, HCVSD, operates six vocational schools in Hunterdon County, New Jersey.

2. HCVSD operates Career and Technical Education Programs at each of its six schools.

3. Two of HCVSD's CTE schools are located at its campuses, Central Campus and Bartles Campus.

4. HCVSD operates three Academies at other locations in Hunterdon County.

5. The Biomedical Sciences Academy is located at the North Hunterdon-Voorhees Regional High School in a leased classroom.

6. The Environmental Sustainability & Engineering Academy is located at Hunterdon County Educational Services Commission.

7. The Computer Science and Engineering Academy is located at leased space at both Delaware Valley Regional High School and North Hunterdon-Voorhees Regional High School.

8. Each of respondent's Academies include non-CTE academic and other required courses provided pursuant to contract with a local high school or regional high school other than HCVSD.

9. The BSA offers a four-year, full-time curriculum, and all CTE classes and all academic and other classes are provided either directly by HCVSD or pursuant to contract with the local comprehensive school district.

10. In May 2019, the New Jersey Department of Education ("DOE") approved petitioner Delaware Valley Regional High School ("DVRHS") to operate a CTE program in biomedical sciences.

11. DVRHS's newly approved biomedical sciences CTE program was assigned the CIP code of 260102.

12. The BSA's CTE program CIP Code is identical to DVRHS's biomedical sciences CTE program CIP Code.

13. DVRHS is not an approved vocational school and has not applied for such status with the State Department of Education.

LEGAL ARUGMENT AND CONCLUSION

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.

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). In this matter, there are no genuine issues of material fact. The respondent has a vocational program in Biomedical Sciences that it houses at a regional high school in its district. The petitioner has students attending this program and pays their tuition pursuant to N.J.S.A. 18A:4-20.1(a). The petitioner recently received CTE approval for a program in Biomedical Science. However, the petitioner does not operate a vocational school and has not applied or received approval to run a vocational school.

There are two issues before me on this motion. The first is whether the approval for a CTE program by the petitioner school district is analogous to approval for a vocational school, thus relieving them of the obligation to pay for students to go to the respondent vocational school. The other issue is whether the location of the vocational program at a regional high school disqualifies them from receiving students and tuition from the petitioner.

1. **Issue: Does the housing of a vocational program by HCVSD preclude them from collecting tuition for students attending the program?**

The petitioner has argued that the fact that HCVSD houses its Biomedical Academy in a regional high school renders null DVRHS's obligation to pay tuition for its students attending the academy. Petitioner argues that the plain language of the statute does not compel regional high schools to pay the tuition for students who attend a vo-tech program that is held at another regional high school, and that N.J.S.A. 18A:54-

20.1(a) only mandates tuition payments to situations where the student attends the vo-tech school's campus. However, the language of the statute makes no such distinction, nor can such an interpretation be implied by the language, case law or statutory intent. N.J.S.A. 18A:54-20.1(a) states:

> The board of education of each . . . regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the . . . regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district.

The program at issue is run by the respondent vocational school, which has received approval by the state to run the program. There is nothing in the statute which would mandate where the program is to be held.

Petitioner has argued that the fact that the respondent's Biomedical Academy is hosted at another regional high school negates petitioner's obligation to pay the tuition of its resident students attending the Biomedical Academy. The plain language of the statute contradicts this understanding. N.J.S.A. 18A:54-20.1(a) states:

> The board of education of each . . . regional school district in any county in which there is a county vocational school district shall send to **any of the schools** of the county vocational school district each pupil who resides in the . . . regional school district and who has applied for admission to and has been accepted for attendance at **any of the schools** of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district . . . The provisions of this section shall not apply to the board of education of a . . . regional school district **maintaining a vocational school** or schools **pursuant to article 2 of chapter 54 of Title 18A** of the New Jersey Statutes.
>
> [N.J.S.A. 18A:54-20.1(a) (emphasis added).]

The statute states that the board of education of each regional school district shall send resident pupils to **any of the schools of the county vocational school district** for

each resident pupil who has applied to and been accepted for attendance at **any of the schools of the county vocational school district**. N.J.S.A. 18A:54-20.1(a) (emphasis added). There are three important features of the language of this provision. First, it is important to note that the regional school district must send their students to any of the schools of the county vo-tech school district, as noted by the mandatory language "shall." This shows that regional school districts have no discretion to prevent their resident students from attending any of the schools of the county vocational school district. The regional school district must send their resident students to those schools. Next, the provision makes clear that the regional school district must send those students to "any" of the schools of the county vocational school district. There is no specification that the pupils must be restricted to attending only classes hosted at some main campus. There is no mention of a campus, main school, headquarters, or any narrowing language that would support petitioner's argument. Instead, the broad language "any" was used, implying that of the many schools within a county vocational school district, the regional schools must send their pupil to whichever of those schools to which their resident pupils were accepted for attendance. Finally, the provision includes the word "schools," plural, implying that it was contemplated that county vocational school districts may have multiple schools. Again, the word "schools" is not clarified or modified except by "of the county vocational school district."

The petitioner also argues that allowing county vo-tech schools to collect tuition for students taught in non-campus locations, such as a local regional high school, is contrary to legislative intent. Specifically, petitioner argued that reading the statute to allow tuition payments to county vo-tech schools for students attending vo-tech classes at other regional high schools would encourage a county vo-tech school "to scavenge for empty classroom space in nearby high schools to increase its tuition revenue." Petitioner pointed to N.J.S.A. 18A:38-15 for support to show that the Legislature intended local school districts to have to pay the tuition of students attending vo-tech courses hosted at another regional high school. N.J.S.A. 18A:38-15 provides that a local school board has discretion to pay the tuition of a resident student wishing to take a course of study at another high school if the home district does not offer the course of study. N.J.S.A. 18A:38-15. Petitioner argued this provision's discretion should be carried over to a

student attending another regional high school for the vo-tech courses hosted there if the home district does not offer the course of study. Also, petitioner goes as far as to say that DVRHS would not need to pay tuition under the N.J.S.A. 18A:38-15 because it offers instruction in the same vo-tech course of study as the other regional high school. In sum, petitioner argued that the home district should have discretion to pay tuition for a resident student who takes vo-tech courses taught by a county vo-tech school at a different regional school district, and even applying that standard, petitioner would not have to pay the tuition because petitioner offers the same course at the home district. However, the statute in question is not discretionary and the analogy to the N.J.S.A. 18A:38-15, is not appropriate.

Petitioner's final argument is that HCVSD has no statutory authority to accept students beyond the capacity of its schools and send those students and an instructor to a high school operated by another school district. Petitioner relies upon N.J.S.A. 18A:54-20, which outlines the powers of vo-tech schools, for the lack of authority to set up the relationship present in this case. HCVSD responds that the Biomedical Science Academy is a properly approved vo-tech school and the fact that it is hosted on the North Hunterdon-Vorhees Regional High School campus is irrelevant. First, respondent HCVSD argued that its Biomedical Sciences Academy located at the North Hunterdon-Voorhees Regional High School ("disputed vo-tech school") is a separate and distinct vocational school operated by HCVSD. Moreover, the disputed vo-tech school was specifically approved by the DOE, has a separate school code, the classes are hosted by HCVSD, attending students receive their diploma from HCVSD, and those students are counted on roll with the HCVSD by the DOE. Accordingly, the disputed vo-tech school is duly authorized under the relevant statutes and regulations, and the location of the program at a local school does not vitiate the obligation to pay tuition.

2. Is the approval of a CTE program in Biosciences by the petitioner the equivalent of maintaining a vocation school pursuant to N.J.S.A. 18A:54-5?

DVRHS argues that it qualifies for the exemption under N.J.S.A. 18A:54-20.1(a), since DVRHS operates its own program that is the same as the one operated by HCVSD. However, such an exemption is permitted only where there is an approved vocational school in the district. The DOE's approval of a career and technical education program ("CTE program") is not the equivalent to the DOE's approval of a school district operating a vocational school. The exemption from tuition payments is limited to regional school districts which maintain a vocational school pursuant to N.J.S.A. 18A:54-5 and -6 found in N.J.S.A. 18A:54-20.1(a). Having a CTE approved program is not the equivalent of operating a vocational school. Moreover, discretionary obligation under N.J.S.A. 18A:38-15 is not mirrored in the vocational statute, and the language in the vocational status is clear.

Petitioner argues that approval for a CTE program is equivalent to approval to operate a vocational school under N.J.S.A. 18A:54-5 and -6, relying upon N.J.A.C. 6A:19-2.1(c) for support of this equivalence. N.J.A.C. 6A:19-2.1(c) provides:

> A district board of education shall not apply the term "career and technical" or "vocational-technical" to any of its schools, programs, or programs of study unless those schools, programs, or programs of study are approved by the Department and meet the general requirements included in the approved State Plan for Career and Technical Education.
>
> [N.J.A.C. 6A:19-2.1(c)]

Petitioner interprets this regulation to mean that a district board of education, if permitted to refer to its school as vocational-technical once it obtains program approval, should then be considered a vo-tech school pursuant to N.J.S.A. 18A:54-20.1(a). However, before a vocational school can be established, "the location and rules for management of the school, the course or courses of study to be pursued therein, and all changes in such courses shall be approved by the commissioner, subject to the advice and consent of the

state board. N.J.S.A. 18A:54-6. No such approval was obtained by the petitioner Board of Education and they are not recognized or approved as a vocational school.

The petitioner's CTE program is not a vocational school for the purposes of N.J.S.A. 18A:54-20.1(a) and the two programs are not "the same" per that statute. The statute requires that a local school district is only exempt from making tuition payments for its students attending a county vo-tech school if the local district is operating its own vo-tech school established pursuant to N.J.S.A. 18A:54-5 and -6. N.J.S.A. 18A:54-6 requires that the location and rules for the management of vo-tech school, the course or courses of study, and all changes in such courses shall be approved by the Commissioner of Education, subject to the advice and consent of the state board, before the local district can establish a vo-tech school. N.J.S.A. 18A:54-6; petitioner never sought or attained approval from the Commissioner of Education to operate a vo-tech school. Moreover, the establishment of a CTE program within a regional high school does not equate to the establishment of a vocational school. See Bd. of Educ. of Bergen County Vocational and Tech. Sch. Distr. v. Bd. of Educ. of Ramapo-Indian Hills Regional High Sch., EDU 7891-03, Final Decision (October 13, 2004). And, although there seems to be some movement by the NJDOE away from designated vo-tech schools to in-district CTE programs, there has been no change in the law regarding the establishment of same.

The language of the statue provides that a regional high school that may apply the term "career and technical" or "vocational technical" to any of its schools, programs, or programs of study only if the school, program, or program of study is approved by the Department and meet the general requirements included in the approved State Plan for Career and Technical Education. N.J.A.C. 6A:19-2.1(c). Petitioner does not have an approved "school." Petitioner only offers an approved "program." Just because petitioner is permitted by statute to apply the term vocational-technical to its approved program does not mean that it has met the requirements for approval for a vocational school. Additionally, the regulation distinguishes between "schools, programs, or programs of study." N.J.A.C. 1A:19-2.1(c). If an approved program was equivalent to an approved school, there would be no need for the regulation to distinguish between the two ideas. If the agency desired to equate CTE programs and vocational schools, it could have

simply stated so. In sum, the petitioner may apply the term career and technical or vocational-technical to its approved CTE program; however, this does not mean that the approved CTE program is a vocational school.

CONCLUSION

For these reasons, I **CONCLUDE** that DVRHS is not exempt from paying for the tuition and transportation of its resident students who wish to attend HCVSD's BSA because DVRHS does not operate or maintain a vocational school. I further **CONCLUDE** that a CTE program approval is not equivalent to approval of a vocational school. And finally, I **CONCLUDE** that housing the approved vo-tech program at another school does not violate the statute or relieve the petitioner from paying tuition for such students.

ORDER

I hereby **ORDER** that the respondent's Motion for Summary Decision is hereby **GRANTED** and the petitioner's Cross-Motion for Summary Decision is **DENIED**, 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Sarah G. Crowley

April 24, 2020
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SGC/cb

125-20

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor children,
T.G. and C.G.,

Petitioner,

v.

Board of Education of the Township of Edison, Middlesex County, and Board of Education of the Borough of Milltown, Middlesex County,

Respondents.

Synopsis

Pro se petitioner challenged the determination of the respondent Board of Education of the Borough of Milltown that his children – who became homeless after they were evicted in May 2018 from their Milltown home – were no longer eligible for a free public education in Milltown because they had moved in with extended family in Edison and must therefore attend school in the Edison School District. Petitioner also challenged Edison's determination that such action was in the best interest of the children. Both respondents filed motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and summary decision is appropriate to resolve the issues of 1) whether the undisputed facts support the conclusion that T.G. and C.G. are not homeless, but reside in a fixed, regular and adequate home in Edison, and 2) who is obligated to pay the tuition and transportation costs for the children for the 2019-2020 school year; petitioner did not meet his burden to prove that T.G. and C.G. are entitled to be educated in Milltown; although the family was homeless when they were first evicted from their home in Milltown, by the 2019-2020 school year their residence in Edison had become sufficiently fixed, regular, and adequate to deem them domiciled in Edison and no longer homeless; pursuant to *N.J.S.A.* 18A:38-1(d), the children became the financial responsibility of Edison once they had resided there for one year; Edison, however, failed to notify petitioner that the district had determined the children were no longer homeless and continued to treat the family as if they were homeless. The ALJ ordered Edison to reimburse Milltown for the cost of the children's tuition and transportation in the total amount of $80,515.60, and further ordered that, in the best interests of T.G. and C.G., they will remain in their Milltown schools for the remainder of the 2019-2020 school year.

Upon review, the Commissioner concurred with the ALJ that the family was not homeless and were residents of Edison during the 2019-2020 school year. In so determining, the Commissioner found, *inter alia*, that while Edison is the district where the children were domiciled during the current school year and is therefore the district responsible for their education, Edison is not responsible for paying any excess cost of sending the children to another district. Accordingly, Edison must pay Milltown the cost of educating the children in that district but is also entitled to seek reimbursement from petitioner for any costs in excess of what Edison would have incurred to educate the children in their own schools. The Initial Decision was adopted as the final decision with this modification.

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

125-20

OAL Dkt. No. EDU 11768-19
Agency Dkt. No. 215-8/19

New Jersey Commissioner of Education

Final Decision

J.G., on behalf of minor children, T.G. and C.G.,

Petitioner,

v.

Board of Education of the Township of Edison, Middlesex County, and Board of Education of the Borough of Milltown, Middlesex County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by respondent Edison Board of Education (Edison) pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto filed by respondent Milltown Board of Education (Milltown).

The issues in this matter are whether petitioner's children are eligible to attend school in Milltown, and which party is responsible for the cost of their education. Petitioner and his family resided in Milltown for approximately seven years before being evicted in May 2018, at which time they moved in with petitioner's mother in Edison. The children continued to attend school in Milltown.[1] In June 2019, Milltown sent petitioner a disenrollment notice

[1] In addition to T.G. and C.G., petitioner has a third child. At the time of the eviction, the third child was too young to attend school. She now attends preschool in Edison based on an IEP developed by Edison. Her eligibility to attend school in Edison and Edison's financial responsibility for her education are not at issue in this case.

because petitioner could not provide proof of the children's residence in Milltown. In July 2019, Edison's Homeless Liaison sent petitioner a letter, stating that Edison – in mutual agreement with Milltown – had determined that Edison was responsible for the children's education and that it would be in their best interests to attend school in Edison. Petitioner appealed, and the children continued to attend school in Milltown for the 2019-2020 school year, during the pendency of this appeal. Milltown sought reimbursement from Edison for the costs of tuition and transportation for the 2019-2020 school year.[2]

The Administrative Law Judge (ALJ) found that petitioner did not meet his burden of proof to show that the children should be educated in Milltown. The ALJ found that the children were homeless when the family was initially evicted from their home in Milltown, but their residence in Edison had become sufficiently fixed, regular, and adequate by the 2019-2020 school year, such that they were no longer homeless and were instead residents of Edison. Moreover, the ALJ concluded that the children became the financial responsibility of Edison once they had resided there for one year, pursuant to *N.J.S.A.* 18A:38-1(d). The ALJ further found that Edison failed to notify petitioner that the district had determined that the children were no longer homeless; in fact, Edison continued to treat the children as if they were homeless by engaging in a "best interests" analysis regarding the children's enrollment and by providing information to petitioner about appeal rights in homelessness matters. Therefore, the ALJ ordered Edison to reimburse Milltown for the costs of the children's tuition and transportation. The ALJ also ordered that, in the best interests of the children, they remain in their Milltown schools for the rest of the 2019-20 school year.

[2] Milltown has not made any claim for reimbursement for costs incurred during the 2017-2018 and 2018-2019 school years.

In its exceptions, Edison argues that the ALJ improperly found that it continued to treat the children as if they were homeless, pointing to the petition of appeal, in which petitioner references at least four occasions on which he was told by Edison employees that he was considered a resident of Edison. Edison contends that because the ALJ found that the children were not homeless at the beginning of the 2019-20 school year, Edison is not responsible for the cost of the children's attendance in another district. According to Edison, its only obligation was to provide a free and public education to the children once they became residents in the district, and it fulfilled that obligation by offering to enroll them in Edison schools.

In reply, Milltown argues that Edison is the district financially responsible for the students, and thus Edison should be required to reimburse Milltown for the cost of tuition and transportation. Milltown contends that petitioner should not be responsible for the costs because Edison did not provide any notice to petitioner that he could bear that responsibility.

Upon review, the Commissioner concurs with the ALJ's conclusions that the children were not homeless and were residents of Edison during the 2019-2020 school year. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2 (emphasis added).

The Commissioner has previously addressed the fact-specific nature of a homelessness inquiry. In *M. O'K. v. Bd. of Educ. of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14 (August 12, 2014), *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016), following the foreclosure of their home in Cresskill, the O'K family occupied the bottom floor of their relatives' house in Little Ferry, which consisted of one small bedroom and a common area, without a bathroom or kitchen. The parents and two of the children shared the bedroom, while their third child slept in the common area. At the time of the litigation, neither parent was employed, and the family's sole income consisted of Social Security Disability benefits. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. The Commissioner found, and the Appellate Division affirmed, that the O'K family became homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, they continued to remain homeless due to their shared living conditions and the parents' economic hardship.

In contrast, in *State-Operated School District of the City of Camden, Camden County v. Ann C. Volk, Executive County Superintendent, New Jersey Department of Education, and E.H., on behalf of minor child, K.M.* (Commissioner Decision No. 172-17R, June 20, 2017), the family relocated from Voorhees to Camden due to economic hardship that prevented them from continuing their lease. In the Camden residence, the family was able to use the entire residence and was not relegated to a portion of the home that would otherwise be considered inadequate. E.H., the children's mother, argued that the residence was inadequate because the siblings had to share a room, which the Commissioner found was not uncommon. Furthermore, given E.H.'s ongoing employment at an annual salary of $65,000, the Commissioner was not

persuaded that she was unable to find suitable housing in Voorhees, particularly in light of her testimony that she had stopped looking for apartments. The Commissioner found that the family was not residing in the Camden residence of out necessity and that it qualified as a "fixed, regular, and adequate" nighttime residence, such that the family was not homeless. *Ibid.*

Homelessness, particularly in cases like the present matter, is best viewed in a continuum. *Ibid.* For instance, a family may move into a relative's home out of necessity and hardship, but over time, that home may become a regular residence. Petitioner may consider the Edison residence temporary, and his intention may be to eventually move back to Milltown in the future. However, while intention is a factor to be considered in determining homelessness, the totality of the facts and circumstances in this case, as thoroughly detailed in the Initial Decision, demonstrate that the family is no longer homeless.

Petitioner and his wife are both employed, and have been since before they moved to Edison, with an income of $71,000 per year. In their current residence with petitioner's mother, they do not pay rent or contribute to housing costs other than food, and the only monthly bill petitioner testified about was for a storage facility. Accordingly, their situation is not typical of the financial hardships usually associated with homelessness. They enjoy the use of the entire home, including three of the four bedrooms,[3] kitchen, bathrooms, all common areas, and utilities. Petitioner argues that the family wishes to move back to Milltown but has been unable to find affordable housing. However, the ALJ found that there was no documentation of petitioner's search and, in fact, petitioner admitted that he had not submitted a rental application in at least six months. Moreover, petitioner and his wife changed the addresses on their drivers' licenses to the Edison residence and took advantage of the benefits of that address when they enrolled their youngest child in preschool in Edison in accordance with an Individualized Education

[3] The family's previous residence in Milltown also had three bedrooms.

Program developed by Edison's special education department. Based on these facts, the Commissioner is not persuaded that the family was homeless for the 2019-2020 school year.

As petitioner's children were neither homeless nor residents of Milltown, they were not entitled to a free public education in Milltown's schools for the 2019-2020 school year. However, as the children did attend Milltown schools, the Commissioner must determine who bears the financial responsibility for their attendance. Milltown is clearly not the responsible party, as its obligation to provide the children with a free public education ceased when the family became domiciled in Edison in May 2019, in accordance with *N.J.S.A.* 18A:38-1(d) and *N.J.A.C.* 6A:17-2.3. Between Edison and petitioner, each argues that the other is the responsible party. Edison agrees that it became responsible for the children's education for the 2019-2020 school year. However, Edison contends that, having offered the children enrollment in its schools, its obligation to provide them with a free public education was fulfilled. But Edison does not address the fact that, if the children had been enrolled in Edison's schools – as the district itself determined to be in their best interests and repeatedly encouraged petitioner to do – Edison would have incurred a cost for their education. On the other hand, the purpose of the McKinney-Vento Act and the related state law is to ensure that a homeless child is not denied a free public education; it is not meant to enable a child to receive an education in a school district of preference by circumventing residency requirements. *Camden, supra.* In *Camden*, once the Commissioner determined that children were not homeless, but rather resided in Camden, Camden was held responsible for paying tuition to Voorhees, where the children attended school. However, Camden was permitted to recover from the parent the difference between the per pupil cost of education and transportation in Camden and the costs paid to Voorhees for the children. *Ibid.* This case presents a similar scenario. Edison is the district where the children were

domiciled for the 2019-20 school year and is therefore the district responsible for their education. However, Edison is not responsible for paying any excess cost of sending the children to another district. Therefore, while Edison must reimburse Milltown for the cost of educating the children in Milltown, it is also entitled to seek reimbursement from petitioner for any costs that exceed the cost Edison would have incurred to educate the children in its own schools.[4]

Finally, the Commissioner concurs with the ALJ that it is in the children's best interests to remain in Milltown's schools for the rest of the 2019-20 school year.

Accordingly, the Initial Decision of the OAL is adopted as modified herein. Edison is directed to reimburse Milltown in the amount of $80,515.60 for tuition and transportation costs incurred during the period in which T.G. and C.G. were ineligible to attend school in Milltown. Edison may seek reimbursement from petitioner as outlined herein.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 6/15/20
Date of Mailing: 6/17/20

[4] This amount shall be calculated as the total of: 1) the cost of the children's transportation to Milltown (deducting any cost of transportation Edison may have incurred had the children attended school in Edison); and 2) the difference between the cost of the children's tuition in Milltown for the 2019-2020 school year and Edison's per pupil cost for the 2019-2020 school year. Should Edison's cost of tuition be higher than Milltown's, the difference shall be credited towards the cost of transportation from Edison to Milltown).

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11768-19
AGENCY DKT. NO. 215-8/19

J.G. ON BEHALF OF
MINOR CHILDREN, T.G. AND C.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF EDISON, MIDDLESEX COUNTY, AND
BOARD OF EDUCATION OF THE BOROUGH
OF MILLTOWN, MIDDLESEX COUNTY,
Respondents.

J.G., on behalf of minor children, **T.G.** and **C.G.,** petitioner, pro se

Ramon E. Rivera, Esq., for respondent Board of Education of the Township of Edison (Scarinci & Hollenbeck, LLC, attorneys)

Isabel Machado, Esq., for respondent Board of Education of the Borough of Milltown (Machado Law Group, attorneys)

Record Closed: February 13, 2020 Decided: March 17, 2020

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner J.G., on behalf of minor children, T.G. and C.G., challenges: (1) the decision of respondent, Board of Education of the Borough of Milltown, Middlesex County (Milltown), that his children, who became homeless while living in the Borough of Milltown school district (Milltown District), are no longer domiciled in Milltown District and, therefore, must be transferred to the Township of Edison school district (Edison District), where they are now living; and (2) the decision of respondent, Board of Education of the Township of Edison, Middlesex County (Edison), that the best interests of T.G. and C.G. are served by attending the Edison District schools. Respondent Milltown filed a cross-petition by way of answer seeking a finding that respondent Edison is responsible to provide a free and appropriate public education (FAPE) to minor children T.G. and C.G. and/or must reimburse Milltown for all tuition and transportation costs.

Respondent/cross-petitioner Milltown now seeks summary decision (1) dismissing petitioner J.G.'s claim that his children are entitled to re-enroll in the Milltown District schools for the 2019-2020 school year in accordance with the McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431 to 11435 (McKinney-Vento Act), and the New Jersey regulations governing the education of homeless children, N.J.A.C. 6A:17-2.1 to 2.8; and (2) granting the claim of Milltown against respondent Edison for the costs of education and transportation for T.G. and C.G. for the 2019-2020 school year.

PROCEDURAL HISTORY

On August 21, 2019, petitioner filed with the Office of Controversies and Disputes of the New Jersey Department of Education (Department) a pro se petition of appeal and a request to re-enroll his minor children T.G. and C.G. in the Milltown District schools on an emergent basis. On August 26, 2019, the emergent matter was transmitted to the Office of Administrative Law (OAL) and scheduled for oral argument, which was held on August 30, 2019. During oral argument, petitioner introduced an email dated August 28, 2019, from

Kyle M. Anderson (Anderson), Interim Executive County Superintendent for Middlesex County, stating that he had advised Milltown to re-enroll T.G. and C.G in the Milltown District schools. Given that Anderson had already provided J.G. the relief he was seeking on an emergent basis, J.G. withdrew his emergent petition.

On October 17, 2019, a telephone prehearing conference was held to schedule further proceedings, including the hearing on February 5, 2020. A prehearing order was issued on October 24, 2019. Both respondents failed to appear for a telephone prehearing conference scheduled for December 3, 2019; a preemptory prehearing conference was held on December 16, 2019, during which the parties were directed to submit dispositive motions, if any, on or before January 6, 2020.

On January 6, 2020, respondent/cross-petitioner Milltown filed a motion for summary decision. By letter dated January 6, 2020, I notified the parties of the schedule for response briefs and that the hearing scheduled for February 5, 2020, was adjourned and rescheduled to allow time to address this motion. With Milltown's consent, I agreed to the joint request of petitioner and respondent Edison for a one-week extension for response briefs. Petitioner and respondent Edison submitted response briefs on February 3, 2020; respondent/cross-petitioner Milltown replied on February 13, 2020, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Most of the salient facts in this case are not in dispute. Between May 2011, and May 4, 2018, J.G. and his wife, A.G., and their three children (the G. family) lived in rental housing within the Milltown District. J.G. and/or A.G. have never owned a residence in Milltown. At the beginning of the 2017-2018 school year, two of the children were in school in Milltown, T.G. in seventh grade and C.G. in second grade. The third child, also J.G. (J.G., Jr.), had yet to begin school.

Since September 2015, J.G. has been continuously employed as a teacher at a school in East Brunswick, New Jersey.[1] He currently is also employed as head softball coach by Edison, and as a summer camp counselor at a school in Morristown, New Jersey. Since September 2013, A.G. has been continuously employed as a teacher at a school in New Brunswick, New Jersey.

On May 4, 2018, the G. family was evicted from the three-bedroom house they were renting in Milltown. (The family had previously been evicted from another rental unit in Milltown.) They moved in with J.G.'s mother (J.G., Sr.) in Edison and have resided there since. J.G., Sr. owns a four bedroom, one and one-half bathroom house. The G. family occupies three of the four bedrooms and has unrestricted access to the entire house, including the bathrooms, kitchen, and common areas.[2] J.G., Sr,. and J.G. purchased a bed for C.G. to use in what had been J.G., Sr.'s office. J.G. does not pay rent to J.G., Sr. nor does he contribute to any of the household expenses other than food. The only monthly bill he described is for a storage facility.

Based on J.G.'s response to interrogatories, Milltown contends that J.G. has not made efforts to secure alternative housing, having not submitted an application for rental housing for at least six months. Br. of Resp't Milltown in Support of Motion for Summary Decision (January 3, 2020), at 11, citing Ex. 2. J.G. responds that he has been unable to find a residence in Milltown with at least three bedrooms in his price range and he is inhibited in his search by his financial record. Response Br. of Pet'r, at 3-4. He also stated that the family has now "turned our attention to Spotswood," where they are searching for rentals "door to door." Id. at 3, 4.

Both J.G. and A.G. changed their New Jersey drivers' licenses to show their address in Edison. Between July 1 and August 9, 2019, minor child C.G. attended the Edison Township Recreation Department summer program. On July 24, 2019, J.G. and A.G.

---

[1] In his response to interrogatories, J.G. refused to provide any information regarding the income earned by J.G. and/or A.G. Br. of Resp't Milltown in Support of Motion for Summary Decision (January 3, 2020), Ex. 2. In his response brief, however, J.G. stated that the G. family income for 2019 was approximately $71,000. Ltr. Br. of Pet'r in Opposition to Motion for Summary Decision (February 3, 2020), at 2. J.G. did not, however, provide documentary proof of the family's income or expenses.

[2] In his brief, J.G. describes conditions in his mother's home that are not "adequate," such as that C.G.'s bedroom is also used as an office and he and A.G. must continuously pick up after their youngest child. Response Br. of Pet'r, at 3, 4.

enrolled their youngest child in preschool in Edison. Br. of Resp't Milltown, Ex. 4. J.G., Jr. has an Individualized Education Program (IEP) that was developed for her by the Edison District special education department. See, Response Br. of Pet'r, at 6. The G. family sought the special education services of Edison and raised no challenge to the IEP which places J.G., Jr. in the Edison District schools.[3]

T.G. and C.G. attended school in the Milltown District during the 2018-2019 school year. In February 2019, in preparation for enrollment in Spotswood High School, Spotswood Borough Public School District (SHS),[4] Middlesex County, for the 2019-2020 school year, T.G. met with her guidance counselor to select classes. The G. family intended that in the 2019-2020 school year, T.G. would attend SHS and C.G. would attend Joyce Kilmer Elementary School (JK Elementary) in Milltown.

On March 7, 2019, Milltown District asked petitioner for proof of residency. Given that the G. family was living with J.G., Sr. in Edison, J.G. could not provide proof of residency in Milltown. On June 24, 2019, Milltown District sent a Disenrollment Notice to J.G. and A.G. stating that because they had not provided proof of residency in Milltown District, T.G. and C.G. were no longer enrolled in the Milltown District schools, but could be re-enrolled with proof of residency. A description of the documents required to prove residency in Milltown District was included in this notice. Br. of Resp't Milltown, Ex. 5.

By letter dated July 31, 2019, Richard Benedict (Benedict), Edison Manager of Enrollment and Data Systems and Homeless Liaison, notified J.G. and A.G. that Edison in "mutual agreement with Milltown, [had] determined that [T.G. and C.G. were] the educational responsibility of Edison" and it would be in the best interests of the G. children to attend the Edison schools. Ibid. The factors considered by the two districts included that neither T.G. nor C.G. had previously attended the school in which their parents requested they be enrolled; transportation from Edison to both SHS and JK Elementary would require the G. children to be

---

[3] J.G. appears to argue that J.G., Jr.'s enrollment in Edison should be disregarded as she did not "have a school of origin" at the time of the eviction and Milltown does not have a program such as that which J.G., Jr. is attending in Edison. Id. at 6.

[4] SHS is the receiving school for high school students from Milltown. The Milltown District serves only grades K-8.

on buses close to one hour each day; the G. family had resided in Edison for over one year and stability would be found in enrolling the children in the same district in which they are living; and the parents had already enrolled their youngest child in the Edison District, meaning that they were requesting that each of their children be enrolled in a different school district, each with different schedules, calendars, and policies.

In his due process petition, J.G. stated that he began the process of appealing Benedict's decision with telephone calls to Interim Executive County Superintendent Anderson. Pro Se Petition of Appeal (August 21, 2019), ¶ 23. J.G. spoke with Anderson by telephone on August 20, 2019, and Anderson stated that he agreed with Edison's decision but that Milltown should not have disenrolled T.G. and C.G. Id., ¶ 28. As described in the procedural history, above, by emails dated August 28 and 30, 2019, Anderson directed Milltown to permit J.G. to register his children in Milltown District schools, stating that failure to do so would be a violation of the McKinney-Vento Act. Br. of Pet'r, Exs. A and B.

T.G. and C.G. attended the Milltown District schools during the 2017-2018 school year and the 2018-2019 school year. Milltown makes no demand for tuition and/or transportation costs for the 2017-2018 school year or for the 2018-2019 school year.

Minor child T.G. has attended SHS at cost to Milltown since the beginning of the 2019-2020 school year. The per pupil cost for her tuition is $14,940.00/school year or $83.00/day. The cost of transportation for T.G. is $145.60/day. Minor child C.G. has attended JK Elementary at cost to Milltown since the beginning of the 2019-2020 school year. The per pupil cost for his tuition is $11,662.00/school year or $64.79/day. The cost of transportation for C.G. is $153.92/day.

The preceding is not in dispute; accordingly, I **FIND** the preceding as **FACTS.**

POSITIONS OF THE PARTIES

In its motion for summary decision, respondent/cross-petitioner Milltown first takes the position that the G. family is not homeless under federal and state law and is domiciled in Edison, where the family has resided for over one year. Second, even if the G. family was deemed homeless during the 2019-2020 school year, the best interests of the children are served by having them attend school in Edison, not Milltown (and Spotswood). Finally, regardless of the family's status, it is Edison, not Milltown, which is financially responsible for the education of the G. children pursuant to N.J.S.A. 18A:38-1(d). Accordingly, Edison must reimburse Milltown for tuition and transportation costs for T.G. and C.G. as of and following May 4, 2019.

Respondent Edison joins respondent/cross-petitioner Milltown in arguing that petitioner's children are not homeless and were not homeless for the entirety of the 2019-2020 school year. Edison, however, takes the position that it is petitioner who must reimburse Milltown for all tuition and transportation costs incurred by Milltown with respect to T.G. and C.G. for the 2019-2020 school year. Edison disclaims any responsibility for the tuition and transportation costs incurred by Milltown with respect to T.G. and C.G. as of and after May 4, 2019.

Petitioner does not dispute the above-described facts, but does draw different conclusions with respect to his family's situation, both with respect to their current housing and their financial position.[5] He then appears to make the following argument in support of his opposition to Milltown's motion for summary decision. First, his family has not moved since Milltown initially confirmed that they were homeless, in May 2018. Therefore, the G. family is still protected by the McKinney Vento Act, which provides for children who have become homeless to remain in the school district in which they were enrolled at the time of homelessness. However, J.G. now agrees that as of May 2019, his family became domiciled in Edison and financial responsibility for the education of his children shifted to Edison. In fact,

[5] For example, J.G. admits that he and his wife are employed, but he adds that they are at-will employees on annual contracts and that their financial means is inadequate to find alternate housing. While Milltown describes J.G.'s failure to look for housing for at least the past six months, J.G. states that he has "made every effort" to search the rental market but admits that he cannot document these efforts. Finally, while Milltown describes the family's current housing as "fixed and adequate," J.G. describes it as uncomfortable, inadequate, and subject to the pending decision of J.G.'s mother to move.

J.G. contends that for this reason, Edison "engaged Milltown to 'agree' that it was in the best interests of [T.G. and C.G.] to be enrolled in Edison." Response Br. of Pet'r, at 5. Because the family is still "homeless," petitioner contends that it remains in the best interests of his children for Edison to finance their continued enrollment in the Milltown schools.

LEGAL ANALYSIS AND CONCLUSIONS

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540.]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-3.7.]

What began in August 2019 as a dispute over the eligibility of T.G. and C.G. to attend the Milltown schools is now also a dispute over whether Edison is obligated to keep the children in the Milltown schools. Either way, the burden of proof rests with petitioner to show that his children should be educated in Milltown, where the family lived in May 2018, as opposed to in

Edison, where the family has been deemed domiciled since May 2019. As stated above, petitioner concedes that as of May 2019, his family has been deemed domiciled in Edison and, therefore, Edison is financially responsible for his children's education. Response Br. of Pet'r, at 7. Milltown contends that in making this argument, petitioner has essentially admitted that "he and his family have established residence . . . in Edison [and] there is no need for further analysis in this matter[.]" Reply Br. of Resp't Milltown (February 10, 2020), at 3. The agreement of the parties that as of May 4, 2019, the G. family was deemed domiciled in Edison does not resolve the issue of whether the family resides permanently in Edison. However, I **CONCLUDE** that summary decision is appropriate to resolve the following issues:

1. Whether the undisputed facts support the conclusion that T.G. and C.G. are not homeless but reside in a "fixed, regular and adequate" home in Edison.

2. Whether Milltown, Edison, or J.G. is obligated to pay the tuition and transportation costs for T.G. and C.G. for the 2019-2020 school year.

New Jersey regulations provide that children are homeless when they stay in the home of relatives or friends temporarily because the family lacks a regular or permanent residence of its own. N.J.A.C. 6A:17-2.3(a)(3). Similarly, the McKinney-Vento Act describes homeless children as those "who lack a fixed, regular, and adequate nighttime residence . . ." including, "children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason[.]" 42 U.S.C. 11434a(2)(A), (B)(i). "Thus, an evaluation of 'homelessness' cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." M.O'K. and S.O'K. o/b/o K.O'K., A.O'K., and C.O'K. v. Bd. of Educ. of Borough of Cresskill, Bergen Cty. and Bd. of Educ. of Little Ferry, Bergen Cty., OAL Docket No. EDU 14830-13, Comm'r (Final Decision, Aug 12, 2014).

Here, it is clear that in May 2018, when the G. family was evicted from their Milltown home and moved into the Edison home of J.G., Sr. out of necessity, the children were homeless as defined by the regulations. See, N.J.A.C. 6A:17-2.2(a)(3). Accordingly, the

district of residence of the children was Milltown, the district in which their parents resided prior to becoming homeless. N.J.S.A. 18A:7B-12(c). This designation did not change until the G. family was "deemed domiciled in another jurisdiction, pursuant to N.J.S.A. 18A:38-1.d." N.J.A.C. 6A:17-2.3(c). The G. family was deemed domiciled in Edison when their "all-year-round dwelling place [was] within the [Edison District] for one year or longer." N.J.S.A. 18A:38-1(d). There is no dispute that the G. family has lived continuously with petitioner's mother in Edison since May 2018, for close to two years.

Further, while the Commissioner has endorsed the conclusion that McKinney-Vento Act makes it clear that there is no maximum duration of homelessness, M.O'K. and S. O'K., Final Decision, at 5 citing L.R. v. Steelton-Highspire Sch. Dist. 54 IDELR 155 (M.D.Pa. 2010), petitioner errs in concluding that the McKinney-Vento Act permits his family to remain in their original school district indefinitely, as long as they do not move from his mother's home. M.O'K. and S. O'K., Initial Decision, at *13-14 citing L.C. v. Bd. of Educ. of the Twp. of Branchburg, 96 N.J.A.R 2d (EDU) 1002, 1006 ("[T]he living arrangement of a family that becomes homeless and then stays with relatives may become 'sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness' after a period of time."). While J.G. (and J.G., Sr.) may have originally intended that the family's move to Edison would be temporary while they got a handle on their finances and were able to move back to Milltown, J.G., Sr.'s home is now, almost two years later, a "sufficiently fixed, regular and adequate" residence. The G. family occupies three bedrooms, which is the same number of bedrooms they had in their previous rental, and have access to the entire house with all the essentials, including heat, electricity, bathrooms and kitchen facilities. Being obligated to clean up after your children cannot be termed a hardship. Though J.G. states that his mother is anxious to sell the house and move out, she appears to have been accommodating to her son and his family, helping with the purchase of a bed for C.G. and removing soil-stained carpet from her office when C.G. moved in.

J.G. and A.G. are both employed and have been since before they moved to Edison; they have no current housing expenses and therefore, presumably would have been able to begin to address the financial situation that led to their eviction.[6] Although J.G. claims they have been

[6] J.G. did not provide documentary or other reliable evidence of the basis for the eviction.

unable to find affordable housing, there is no reliable evidence that they are looking to move, and good evidence (J.G.'s brief) that they have abandoned the search for housing in Milltown. The desire to move is not enough to "diminish that their current living arrangement is regular and fixed so as to be deemed permanent." M.O'K. and S. O'K., Initial Decision, at *19.[7] Significantly, the family took advantage of the benefits of their Edison residence for their youngest child while simultaneously denying such residency for the purpose of maintaining their other children's eligibility to attend school outside the Edison District.[8] I **CONCLUDE** that T.G. and C.G. are not homeless, but live in Edison.

Even if the G. family was still homeless, New Jersey "school law imposes a limit upon how long a former district of domicile is financially responsible for the education of homeless children." A.M. and M.S. on behalf of minor children A.S. and L.S. v. Bd. of Educ. of the Town of Dover, OAL Docket No. EDU 9780-10, Comm'r (Final Decision, June 14, 2011). The regulations specifically provide that a free public education must be made available to persons between the ages of five and twenty who are "domiciled within the school district," which includes "any person who has had or shall have his all-year-round dwelling place within the district for one year or longer[.]" N.J.S.A. 18A:38-1(d). Edison became financially responsible for the education of T.G. and C.G. (and J.G., Jr.) as of May 4, 2019. I **CONCLUDE** that the free and appropriate public education of T.G. and C.G. became the financial responsibility of Edison in May 2019, after they had resided in Edison for one year.

Petitioner contends that the McKinney-Vento Act requires Edison, the district of residence, to continue to pay tuition and transportation costs to send T.G. and C.G. to SHS and JK Elementary in the current school year because it is in the children's best interests, and such determination of "best interest" relies primarily on the wishes of the parents and the children. Response Br. of Pet'r, at 4-5. If T.G. and C.G. were still homeless, this "reassignment of financial responsibility for the children's education" to Edison would not have also required T.G. and C.G. to leave the Milltown schools. A.M. and M.S., at 3. The McKinney-Vento Act and the relevant New Jersey regulations provide that a local school

[7] It is worth noting that if the G. family moves to Spotswood, both C.G. and J.G., Jr. will have to change schools.

[8] The family also took advantage of their residency in Edison when sending C.G. to the Edison summer camp.

district shall determine a homeless child's district of enrollment in light of the child's best interest. 42 U.S.C. § 11432(g)(3)(E); N.J.A.C. 6A:17-2.5.

Edison contends that T.G. and C.G. are not homeless and, therefore, J.G. is responsible "to reimburse the [Milltown District] for all tuition and transportation costs incurred by Milltown for the education of C.G. and T.G. for the 2019-2020 school year." Ltr. Br. of Resp't Edison in Partial Support of Motion for Summary Decision (February 3, 2020), at 2. This position, however, is not consistent with the letter Benedict, the Edison Homeless Liaison, sent to J.G. and A.G. on July 31, 2019. In this letter, Benedict notes that the family has resided in Edison for one year and, therefore, Edison is responsible for the children's education. But, he fails to state that Edison has determined that the children are no longer homeless. Benedict instead provides a "best interests" analysis which by its terms assumes that the children are still homeless. See, Br. of Resp't Milltown, Ex. 5. Further, Benedict describes the parents' right to appeal the decision that the children must be enrolled in Edison and includes a copy of the Edison Policy which states that if a parent disputes the enrollment decision, the child(ren) shall be immediately enrolled in the district of the parent's choice pending final resolution of the dispute. Ibid. Nowhere in this letter are the parents put on notice that either district has taken the position that the children are no longer homeless, nor given notice that should Edison's decision be upheld, the parents will be responsible to pay the tuition and transportation costs. (In fact, the policy document provided to J.C. by Benedict refers to a regulation that apportions financial responsibility for homeless children between the State and local district.)

Though T.G. and C.G. were not homeless at the beginning of the 2019-2020 school year, their district of residence, Edison, continued to treat them as if they were homeless. Therefore, I **CONCLUDE** that Edison must reimburse Milltown for the costs of tuition and transportation incurred for T.G. and C.G. during the 2019-2020 school year.

It appears that the emails dated August 28 and 30, 2019, from Superintendent Anderson may have caused petitioner some confusion. J.G. describes Anderson's emails as directions to Milltown to permit J.G. to register his children in the Milltown District schools, as to do otherwise would be a violation of the McKinney-Vento Act. See, Pro se Pet. of Appeal, ¶ 28. Although

Anderson quoted N.J.A.C. 6A:17-2.3, in his first email, the action he took was authorized by the following regulation:

> The chief school administrator of the school district of residence or designee shall determine the child's school district enrollment immediately after consultation with the parent. The school district of residence shall adhere to the following procedures:
>
> 1. Enrollment decisions shall be made immediately upon notification of the need for enrollment. When the decision is made, the child shall be enrolled immediately. If a dispute arises regarding enrollment of a homeless child, the homeless child shall be immediately enrolled in the school district in which enrollment is sought by the parent or guardian, pending resolution of the dispute pursuant to N.J.A.C. 6A:17-2.7.
>
> [N.J.A.C. 6A:17-2.5 (emphasis added).]

When Anderson spoke with J.G. on August 20, 2019, Anderson made clear that he agreed with Edison that the children had been residing in Edison for more than one year and were the educational responsibility of Edison, and that the best interests of the children would be served by enrolling in the Edison schools. See, Pro se Pet. of Appeal, ¶ 28; Br. of Resp't Milltown, Ex. 5. Further, Anderson stated that as long as J.G.'s appeal of that decision was pending, the children were to stay in the Milltown schools. Ibid. The "violation of McKinney-Vento" that Anderson referred to when speaking with J.G. was not the failure to keep the children in the Milltown schools indefinitely, but the failure to keep them in the Milltown schools during the pendency of J.G.'s appeal. T.G. and C.G. were therefore permitted to remain in the Milltown schools.

As of the date of this decision, J.G.'s appeal will no longer be pending, but the appropriate placement for T.G. and C.G. for the remainder of the current school year is not as clear. The Commissioner has stated that the regulations "disfavor disruptions in the continuity of a child's educational program." A.M. and M.S., at 4. At the beginning of the 2019-2020 school year, T.G. and C.G. both enrolled in new schools, SHS (the receiving school for Milltown students) and JK Elementary, respectively. In September 2019, the educational and social transition to the Edison schools would not have been much different for either child than to their

new schools in the Milltown District, a fact brought to J.G.'s attention during the short-lived emergent proceedings in this matter. Making that transition now however, with just four months left in the school year, would be the type of disruption against which the Commissioner warned. Accordingly, I **CONCLUDE** that T.G. and C.G. shall remain at SHS and JK Elementary, respectively, through the conclusion of the 2019-2020 school year and, as of the end of the 2019-2020 school year, T.G. and C.G. will no longer be entitled to enroll in the Milltown schools (or for T.G., in SHS) without the payment by J.G. of tuition and transportation costs.[9]

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the motion of respondent/ cross-petitioner Board of Education of the Borough of Milltown for summary decision in its favor is **GRANTED** and the pro se appeal of petitioner J.G. is **DISMISSED.**

It is hereby **ORDERED** that the motion of respondent/cross-petitioner Board of Education of the Borough of Milltown for summary decision on its cross-petition for the costs of tuition and transportation for minor children T.G. and C.G. for the 2019-2020 school year is **GRANTED** against respondent Board of Education of the Township of Edison. Respondent Board of Education of the Township of Edison is hereby **ORDERED** to reimburse respondent/cross-petitioner Board of Education of the Borough of Milltown a total of $80,515.60, for the costs of tuition and transportation for minor children T.G. and C.G. for the 2019-2020 school year.

Finally, it is hereby **ORDERED** that minor children T.G. and C.G. shall remain in attendance at Spotswood High School, Spotswood, New Jersey, and Joyce Kilmer Elementary School, Milltown, New Jersey, respectively, through the conclusion of the 2019-2020 school year, not including any extended school year program during the summer of 2020. At the conclusion of the 2019-2020 school year, petitioner J.G. shall be responsible to pay all future tuition and transportation costs for T.G. and/or C.G. should they attend schools outside the Edison District.

---

[9] To be clear, any action by the G. family to relocate to a district other than Edison by the beginning of the 2020-2021 school year will have no impact on this decision and should the family so move, all three minor children will be eligible for a FAPE only in the district in which their new home is located.

This Initial Decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 17, 2020
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: March 17, 2020

Date Mailed to Parties: March 17, 2020

TMC/nd

APPENDIX

LIST OF EXHIBITS

For Petitioner:

P-1 Letter brief supporting petitioner's application and opposing the motion for summary decision

For Respondent Board of Education, Township of Edison:

RE-1 Letter brief supporting Edison's position and opposing the application

For Respondent Board of Education, Borough of Milltown

RM-1 Letter brief supporting Milltown's positions and opposing the application

126-20

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES
TENURE HEARING

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

In the Matter of the Arbitration Between:

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

CLAIMANT

AND

PRISCILLA UMEIZU

RESPONDENT

OPINION

AND

AWARD

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

DOCKET DOE 214-8/18 19

ARBITRATOR: GERARD G. RESTAINO, ASSIGNED BY THE NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH C.18A:6-17.1

APPEARANCES:

FOR THE CLAIMANT
CHRISTINA ABREU, ESQ. — COUNSEL FOR NEWARK SCHOOL DISTRICT

FOR THE RESPONDENT
JAMES ZAZZALI, JR. ESQ. — COUNSEL FOR RESPONDENT
PRISCILLA UMEIZU — RESPONDENT

PROCEDURAL BACKGROUND

This proceeding takes place pursuant to P.L. 2012, Chapter 26 of the laws of the State of New Jersey. The Respondent, Priscilla Umeizu, hereinafter referred to as Ms. Umeizu/Respondent, was a tenured teaching staff member in the State-Operated School District of the City of Newark, hereinafter referred to as the District. The Respondent was an elementary school teacher assigned to the Dr. E. Alma Flagg School.

Ms. Umeizu was rated ineffective for the 2017-2018 school year. Ms. Umeizu was rated partially effective for the 2018-2019 school year. The Respondent has failed to effectively perform the duties of a teacher. Accordingly, on July 29, 2019, the District Superintendent, Roger Leon, filed tenure charges with thirty-one counts of inefficiency against the Respondent. A Statement of Evidence accompanied those tenure charges. The inefficiency charges were received by DOE, Controversies and Disputes on August 26, 2019.

On September 5, 2019, the Respondent filed answers to the tenure charges with the Commissioner of Education who reviewed them in accordance with N.J.S.A. 18A:6-17.3c. Upon review, the Commissioner was unable to determine that the evaluation process had been followed. Pursuant to N.J.S.A. 18A:6-16 the charges were referred to arbitration, and on September 13, 2019, the undersigned was appointed arbitrator.

On September 26, 2019, a conference call with Christina Abreu, counsel for the Claimant, James Zazzali, Jr., counsel for Respondent, and the arbitrator was held to discuss scheduling, witnesses and documents needed to present their respective cases-in-chief. On December 5, 2019, a hearing was held, and it was agreed that

further discussions were needed by the principals to secure a resolution, if possible, of the charges of inefficiency.

A series of emails between both counsel and the arbitrator helped move this matter towards settlement. However, CIVID-19 prevented any face-to-face meetings but the parties did exchange proposals and counter proposals. On June 5, 2020, the parties executed a Settlement Agreement, which is incorporated by reference into my award.

I have reviewed the terms of the Settlement Agreement and find that it is in accordance with N.J.A.C. 6A:3-5.6,: In re Cardonick, State Board Decision of April 6, 1983 (1990 School Law Decisions (SLD) 842,846.) The Settlement Agreement is consistent with the established standards set forth in the above cited SLD.

Dated: June 10, 2020

Gerard G. Restaino, Arbitrator

COMMONWEALTH OF PENNSYLVANIA - NOTARY SEAL
Deborah Ann Henneforth, Notary Public
Wayne County
My Commission Expires 09/29/2022
Commission Number 1286064

State of Pennsylvania)
County of Wayne) ss:

On this 10th day of June, 2020, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing Arbitration Award and he duly acknowledged to me that he executed the same.

Deborah Ann Henneforth
Deborah Ann Henneforth

Weber Gallagher

1 Crossroads Drive Suite 102A
Bedminster, NJ 07921

T«FIRM_PHONE»
F«FIRM_FAX»

June 8, 2020

VIA EMAIL

Direct Dial: (973) 854-1075
Email: cabreu@wglaw.com

Gerard Restaino, Mediator
2149 Lakeview
Lake Ariel, PA 18436

RE: The Newark Public Schools v. Priscilla Umeizu
Our File Number: 0105975

Dear Mr. Restaino:

Enclosed please find executed Settlement Agreement between the parties, in the above-entitled matter.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

/s/ Christina M. Abreu

Christina M. Abreu

CMA:ai
Enclosure

cc: James R. Zazzali, Jr., Esq. w/ encl. (via email)

NEWARK BOARD OF EDUCATION
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Newark Board of Education

In re PRISCILLA UMEIZU and the BOARD OF EDUCATION OF THE CITY OF NEWARK	SETTLEMENT AGREEMENT DKT. NO. 214-8/18

This Settlement Agreement ("Agreement") is made by and between the Newark Board of Education (the "Board"), with an address at 765 Broad Street, Newark, New Jersey 07102, predecessor State-Operated School District of Newark and its successors, assigns, officers, employees, agents and representatives ("Board"), and Priscilla Umeizu ("Umeizu"), residing at 112 Glenwood Court, Union, New Jersey (collectively, the "Parties").

WHEREAS, Umeizu is a tenured teaching staff member employed by the Board;

WHEREAS, on or about August 26, 2019, the Board certified a tenure charge of inefficiency against Umeizu;

WHEREAS, upon certification of such charge, Umeizu was suspended without pay from her employment with the Board for a period of 120 days;

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration;

WHEREAS, the settlement set forth herein is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Umeizu hereby agrees to retire from her tenured position effective June 1, 2020. Attached is a copy of Umeizu's signed Letter of Retirement. (Exhibit A). Umeizu's separation from employment will be deemed a voluntary retirement in good standing. Other than as required by law, upon inquiry from any third parties, the Board will only confirm Umeizu's employment, position, title, salary and dates of employment.

2. Umeizu hereby waives and releases any and all claims and defenses that exist or may exist as of the date she signs this Agreement, and agrees not to pursue or assert any such claims or defenses in this or any future proceeding, except in opposition to any future action the Board may take against Umeizu. Umeizu represents that she has not filed any claims, complaints, charges, or suits that she may have previously filed against the Board, and that in the event Umeizu has filed any such action, this Agreement will serve as Umeizu's formal written notice of withdrawal thereof. This Agreement is intended to be the final resolution of all outstanding matters between the Board and Umeizu as of the date of this agreement, with the exception of workers compensation claims.

3. In exchange, Umeizu will be permitted to voluntarily utilize and draw down the accrued days that she has accumulated in her unused bank of days in order to receive salary commencing January 2, 2020 until her date of retirement on June 1, 2020. As of January 1, 2020, Umeizu had a total of 214 days of sick leave accumulated. If Umeizu exhausts all of the accrued unused days in her bank prior to her date of retirement, Umeizu will be placed on "administrative leave without pay" until her date of retirement. Other than the salary and benefits that Umeizu receives until the date of her retirement as well as the value of any remaining accrued unused sick days that she may cash out after retirement pursuant to the terms of the applicable Collective Bargaining Agreement, Umeizu will not receive any further monies from the Board in exchange for this Agreement.

4. The Board also agrees not to pursue any disciplinary action, including termination of Umeizu's employment, so long as this Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Agreement

is voided, the Board retains the right to pursue disciplinary action against Umeizu, including termination from the District.

5. Umeizu agrees that she will not apply for reemployment with the Board at any time. Specifically, Umeizu will be considered to have permanently resigned and retired from her tenured position as a result of this Agreement. If Umeizu does apply for reemployment with the Board and is approved for employment in any capacity, the terms of this Agreement shall control and be grounds for immediate termination of Umeizu's employment.

6. This Agreement shall not constitute a precedent in any matters involving other employees.

7. Except as noted above, Umeizu waives all claims of any nature against the Board with regard to her employment with and/or her separation from the District, including fees, or other monetary relief, with the exception of workers' compensation claims.

8. By entering into this Agreement, and in exchange for good consideration as set forth in Paragraph 3 and 4 above, the sufficiency of which is hereby acknowledged by the parties, Umeizu releases and discharges the Board, the Board Superintendent, its Board of Education and its Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that she has or may have against the Board regarding her employment with the District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Umeizu's employment with the Board and separation from the Board except for workers compensation claims. It specifically includes, without limitation, all claims which Umeizu may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with

Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims and for health insurance continuation coverage under and pursuant to COBRA. Umeizu agrees to save, hold harmless and indemnify the Released Parties for any legal costs and attorneys' fees associated with the enforcement of the terms of this Agreement should enforcement become necessary.

9. Notwithstanding Paragraph 8 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or

lawsuit against the Board based upon any of the above-released claims in Paragraph 9, Umeizu agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Umeizu of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Umeizu acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given twenty one days within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Umeizu understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period.

11. As of the effective date of her retirement, all of Umeizu's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end, except for any benefits to which she may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget reconciliation Act of 1986 ("COBRA") or N.J.S.A. 18A:66-39, 40 and 41 and/ or through her effective retirement date.

12. The parties respectively acknowledge that counsel has advised them regarding this Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

13. This Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

14. If any provision or portion of a provision of this Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

15. This Agreement is subject to final approval by the Board and will only become effective upon the approval of the Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue the matter further.

Dated: 5/8/20

Priscilla Umeizu
PRISCILLA UMEIZU

Dated: 6/5/20

Josephine Garcia
JOSEPHINE GARCIA
Board Chairperson
Newark Board of Education

CERTIFICATION

I, PRISCILLA UMEIZU, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that I have been advised of the Commission of Education's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiner for possible suspension or revocation of certificate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 5/8/20

Priscilla Umeizu
PRISCILLA UMEIZU

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
School Ethics Commission
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

By: Laurie Fichera
Deputy Attorney General
(609) 376-3120

IN THE MATTER OF DOMINIC MILLER, LONG BRANCH BOARD OF EDUCATION, BERGEN COUNTY	:	OFFICE OF ADMINISTRATIVE LAW
	:	OAL DOCKET NO. EEC 05201-2018 N
	:	AGENCY DOCKET NO. 074-17
	:	**CONSENT ORDER**

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC") and Respondent, Dominic Miller ("Respondent"), have mutually agreed to settle the above-captioned matter, with GURBIR S. GREWAL, Attorney General of New Jersey, by Laurie Fichera, Deputy Attorney General, appearing on behalf of the SEC, and Albert H. Wunsch, III, Esq., appearing on behalf of Respondent; and

WHEREAS, this matter arose from the SEC's decision of March 27, 2018, finding probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24(b); and N.J.S.A. 18A:12-24.1(d) and N.J.S.A. 18A:12-24.1(e); and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation or be considered an admission of any conduct beyond that specifically described herein, or in the attached affidavit of Respondent.

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

1. Respondent acknowledges that the conduct described in the attached affidavit, incorporated herein by reference, constitutes a violation of N.J.S.A. 18A:12-24(b), N.J.S.A. 18A:12-24.1(d), and N.J.S.A. 18A:12-21.1(e).

2. The parties agree that the SEC will recommend that the Commissioner impose the penalty of a reprimand.

3. The Commissioner agrees that he will adopt the SEC's recommendation and impose the penalty of a reprimand for the conduct described in the attached affidavit.

4. By accepting the penalty of a reprimand, Respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the reprimand.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's March 27, 2018 decision finding probable cause.

127-20 SEC

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
School Ethics Commission
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

By: Aimee Blenner
Deputy Attorney General
(609) 376-3100

IN THE MATTER OF JONATHAN CARAFA, DOMINIC MILLER, AND MICHAEL NARDINO, LODI BOARD OF EDUCATION, BERGEN COUNTY	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EEC 15516-2017 N AGENCY DOCKET NO.: C45-17 **CONSENT ORDER**

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC") and Respondents, Jonathan Carafa, Michael Nardino, and Dominic Miller ("Respondents"), have mutually agreed to settle the above-captioned matter, with GURBIR S. GREWAL, Attorney General of New Jersey, by Aimee Blenner, Deputy Attorney General, appearing on behalf of the SEC, and Teresa Moore, Esq. and Natalya Johnson, Esq., appearing on behalf of Respondents; and

WHEREAS, this matter arose from the SEC's decision of September 27, 2017(C45-17), finding probable cause to credit the allegations that Respondents violated N.J.S.A. 18A:12-24(b), N.J.S.A. 18:12-24(c), and N.J.S.A. 18A:12-24.1(f); and

WHEREAS, the SEC strongly admonishes the conduct as outlined in the Probable Cause Notice dated September 27, 2017. The SEC deems that Respondents' failure to meet ethical standards in this instance led to a serious outcome, and the SEC maintains grave concerns regarding the nature of this ethical breach by board members;

WHEREAS the settlement of this matter shall not constitute precedent in other pending or future litigation or be considered an admission of any conduct beyond that described herein, or in the attached certifications of Respondents.

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

1. Respondents acknowledge that the conduct described in the Probable Cause Notice dated September 27, 2017, incorporated herein by reference, has been deemed by the SEC to constitute a violation of N.J.S.A. 18A:12-24(b), N.J.S.A. 18:12-24(c), and N.J.S.A. 18A:12-24.1(f) as alleged in C45-17.

2. The SEC will recommend that the Commissioner impose the penalty of a reprimand.

3. The SEC's agreement to settle this matter is predicated, in part, on the fact that Respondents no longer serve on the Lodi Board of Education and, but for this fact, the SEC would not have necessarily agreed to the settlement as proposed.

4. The Commissioner agrees that he will adopt the SEC's recommendation and impose the penalty of a reprimand for the conduct described in the Probable Cause Notice dated September 27, 2017.

5. By accepting the penalty of a reprimand, Respondents agree to waive any and all hearings to which they are entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondents further agree that they will not oppose the reprimand.

6. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's September 27, 2017, decision finding probable cause.

Teresa L. Moore, Esq.
Attorney for Respondents

Dated: June 11, 2018

Aimee Blenner

Aimee Blenner, D.A.G.
Attorney for Petitioner

Dated: June 11, 2018

Respondents, Jonathan Carafa, Michael Nardino, and Dominic Miller are hereby reprimanded for the conduct as described in the Probable Cause Notice dated September 27, 2017.

Dr. Lamont Repollet
Commissioner of Education
As to Penalty Only

Dated: June 24, 2018

129-20SEC

SEC Dkt. No. T16-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T16-19.pdf)
Agency Dkt. No. 105-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Anthony Cassano,
Board of Education of the City of
Leonia, Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent filed exceptions to the recommended penalty, providing a list of various circumstances that he alleges prevented him from completing the training in a timely manner.

Upon review, the Commissioner does not find respondent's exceptions persuasive and concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, 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: 6/24/2020
Date of Mailing: 6/25/2020

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

130-20SEC

SEC Dkt. No. T21-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T21-19.pdf)
Agency Dkt. No. 106-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Jennifer Metzger,
Board of Education of the Township of
Franklin, Gloucester County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, 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: 6/24/2020
Date of Mailing: 6/25/2020

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

131-20SEC

SEC Dkt. No. T22-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T22-19.pdf)
Agency Dkt. No. 107-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Kristen Figueroa,
Board of Education of the Township of
Lawrence, Cumberland County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, 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: 6/24/2020
Date of Mailing: 6/25/2020

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

132-20SEC

SEC Dkt. No. T29-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T29-19.pdf)
Agency Dkt. No. 109-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Katherine Hamilton,
Board of Education of the Borough of
Roosevelt, Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, 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: June 24, 2020
Date of Mailing: June 25, 2020

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

133-20SEC

SEC Dkt. No. T31-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T31-19.pdf)
Agency Dkt. No. 110-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Amie Ficacci,
Board of Education of the Township of
Hardyston, Sussex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, 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: 6/24/2020
Date of Mailing: 6/25/2020

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

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

SCHOOL DISTRICT OF THE BOROUGH OF DUMONT, BERGEN COUNTY,

Petitioner,

-and-

JOHN PODESTA,

Respondent.

AGENCY DOCKET NO.: 38/2/20

OPINION AND AWARD

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

James L. Plosia, Jr.
Plosia Cohen Law Firm
385 Route 24, Suite 3G
Chester, NJ 07930

For the Respondent:

Evan L. Goldman
Goldman Davis Krumholz & Dillon, P.C.
3 University Plaza, Suite 410
Hackensack, NJ -76-1

This matter comes before me on tenure charges brought under N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, et seq., by Petitioner Borough of Dumont School District, Board of Education, Bergen County (the "District) against Respondent John Podesta. The tenure charges at issue here were certified to the Bureau of Controversies and Disputes by the District on or about February 13, 2020. I was appointed the arbitrator to adjudicate this matter on March 2, 2020.

I conducted a hearing via video conferencing over nine days: May 18, 19, 20, 21, 26, 27, 28, June 1 and 2, 2020. Both sides were represented by counsel and were afforded the opportunity to call witnesses, present evidence, and cross-examine witnesses offered by the opposing party. All witnesses were sworn.

The District presented the testimony of five District employees: Luiz Lopez, District Affirmative Action Officer and a school principal, James Wichmann, Dumont High School Principal, Maria Poidomani, Director of Curriculum, Superintendent Emanuele Triggiano, and Vice Principal Jacqueline Bello. The District offered 35 documents as exhibits: 2 were withdrawn and 33 were entered in evidence. Respondent presented the testimony of three witnesses: Dr. Karen Bennett, Principal of Honiss School; Ruth Keenan, Selzer School Secretary; and Kathleen Podesta, Respondent's wife. Respondent also testified in his own behalf. Respondent offered 7 exhibits: some were withdrawn as duplicative; 3 were entered in evidence. Although no official record of the proceeding was made, I made audio recordings of the proceedings through the video platform, which I made available to the parties. I kept the record open for one week following the last day of hearing for the submission of (a) audio recordings of four conversations between Respondent and Jacqueline Bello; (b) Respondent's summative evaluations for the five years he has been a principal; and (c) for such additional text messages between Respondent and Ms. Bello as the parties jointly identify. The parties submitted post-hearing briefs simultaneously on June 12, 2020 and responsive briefs on June 19, 2020. No objection has been made to the fairness of this proceeding.

TENURE CHARGES

COUNT I

1. Mr. Podesta's inappropriate actions toward Ms. Bello, including physical contact, purchasing of gifts for Ms. Bello, and professions of love for Ms. Bello, constitute conduct unbecoming a tenured principal.

2. Mr. Podesta's inappropriate conduct constitutes conduct unbecoming a tenured employee and mandates the termination of his employment as a tenured employee in the Dumont School District.

COUNT II

1. Mr. Podesta's supervision of and interactions with Ms. Bello have frequently been inappropriate and inconsistent with the duties of a tenured Principal in the Dumont School District.

2. Mr. Podesta has acted in an irrational, mean-spirited, and inappropriate fashion in his conversations about Mr. Wichmann with Ms. Bello.

3. Mr. Podesta's irrational and counter-productive insistence that Ms. Bello have as little contact as possible with Mr. Wichmann was inappropriate, contrary to the best interests of the Dumont School District and constitutes conduct unbecoming a tenured employee in the Dumont School District.

4. Mr. Podesta's retaliation against Ms. Bello for his subjective and incorrect assumption that Ms. Bello was acting in an "insubordinate and disloyal" manner toward him constitutes conduct unbecoming a tenured employee in the Dumont School District. This retaliation included, without limitation, Mr. Podesta's threats to fire Ms. Bello.

5. Mr. Podesta, in his irrational, self-absorbed, and unfair treatment of Ms. Bello, has engaged in conduct unbecoming a tenured employee in the Dumont School District.

6. Mr. Podesta's conduct, as described above, mandates the termination of his employment as a tenured employee in the Dumont School District.

ISSUE PRESENTED

Whether the Board has demonstrated by a preponderance of the credible evidence that the Respondent has engaged in conduct unbecoming a tenured employee. If so, what shall be the penalty?

FACTUAL BACKGROUND

The District. The District is located in Bergen County, New Jersey. It operates four elementary schools: Lincoln and Grant, that serve grades K-5 and feed into the remaining two K-8 schools, Selzer and Honiss. There is one high school for the District, Dumont High School (Dumont High). The District is overseen by a Superintendent, Emanuele Triggiano, who reports to the nine-member, elected Board of Education (Board). Each of the District's schools is led by a Principal, assisted by a Vice Principal (VP), or, in the case of the High School, one or more Assistant Principals (AP).

In additional to the Superintendent, the District employs other District-wide supervisors, including Dr. Maria Poidomani, Director of Curriculum. In addition, each VP is assigned District-wide supervisory responsibilities over the four subject matter areas – Math, Science, Social Science, and English – as well as over programmatic areas, including Art and Music. The Superintendent meets with District leaders, including Principals, every two weeks in what are known as Administrative Council (A.C.) meetings. Typically, VPs do not attend unless they are substituting for their Principals.

The Origin of the Present Charges. These tenure charges arise out of conduct that Respondent, a tenured elementary school principal in the Dumont School District, directed toward his vice principal, Jacqueline Bello. The charges are

based upon the findings of the District's Affirmative Action officer, Luis Lopez, who conducted an investigation after Respondent went to him on or about September 25, 2019 to complain about Ms. Bello. Respondent's initial complaints were two-fold: that Ms. Bello had made an inappropriate comment about Respondent's Italian heritage, and that she had an inappropriate relationship with the Principal of Dumont High School, James Wichmann. During the course of his investigation, Mr. Lopez heard additional complaints: from Ms. Bello about Respondent and from Respondent about Ms. Bello. To investigate all these complaints, Mr. Lopez spoke to nine District employees, as well as Respondent's wife. A number of these individuals testified before me in this proceeding. Mr. Lopez's findings were contained in a 73-page report he submitted to the District. Mr. Lopez testified in this proceeding and his report was entered into evidence as D. 2.[1]

Respondent. Respondent has been employed by the District for approximately 40 years. He attended Jersey City State College, where he received an undergraduate degree in music education and a master's degree in urban education, administration and supervision. His full-time employment as a music teacher began in 1981 at Grant School in the District. In 1996 he transferred to Lincoln School, where he taught music four days per week while he continued one day at Grant. Emanuele Triggiano, the current District Superintendent, was the principal of Lincoln School in 1996 when Respondent started working there. Up until the filing

[1] In this Background section, I only address those facts that I deem relevant to the disposition of these charges. I make no reference to arguments the parties have made regarding other matters, such as Respondent's divorce years ago or statements by personnel who did not testify in this proceeding.

of the present charges, Mr. Triggiano and Respondent have been close, both as colleagues and outside of work; they and their wives have socialized together.

Respondent first took on District-wide music responsibilities in 1993 when he became the orchestra coordinator for the four elementary schools. In 2010 Respondent became Vice Principal of Selzer School. At that time, the Selzer VP's only District-wide responsibility was supervision of the summer enrichment program. However, that year the administration decided to create a position of Supervisor of Fine Arts. Respondent was given that title in addition to his title of Selzer VP and became responsible for oversight of music and art programs throughout the District. In 2015, Respondent became Principal of Selzer School.

The parties stipulated that during the 40 years Respondent has been employed by the District, there has never been any type of complaint against him, and he has never been reprimanded or disciplined in any way. He has always received positive evaluations. I reviewed the summative evaluations for the four years he was Principal at Selzer; are all positive.

Respondent's Involvement with Music. In addition to working as a School Principal, Respondent is also a performing musician. He plays the string bass, among other instruments, and has a band that performs in and around New Jersey. He has often invited work colleagues from the District to attend his performances. Some colleagues have attended, including Ruth Keenan, the Selzer secretary; Ms. Bello was invited but did not attend.

Respondent testified at length about his passion for teaching music and promoting music within the District. He spoke with pride about his efforts to build a

stringed instrument and orchestra program. When he started as a music teacher at Grant School, the program had a small number of students, 24 or 25; when he transferred to Lincoln School, 15 years later, the program was up to 120 students, and almost every student was involved in either playing an instrument or singing in the chorus. By the time he became the VP at Selzer, there were over 100 string players in the district-wide orchestra.

Respondent testified that he also played an active role in supporting the marching band program. This included participating in the band summer camps each August, both in paid and unpaid capacities. He also chaperoned band trips, including one memorable trip in approximately 2013 when the band was invited to perform at West Point. Respondent arranged for two of his band-mates, who were on active duty in the army and played in the army band, to meet and greet the Dumont High students when they visited West Point.

While Respondent served as Music Supervisor for the District from approximately 2011 until 2015, his duties included participation in hiring music teachers and supporting and promoting music programs. When he became Principal at Selzer, he stepped back from his supervisory role over the District-wide music program. However, he continued to participate on some hiring committees for music teaching positions: Dr. Karen Bennett, Principal of Honiss School, usually asked him to sit on hiring committees for music positions at her school because she valued his experience and expertise; Superintendent Triggiano invited him to review resumes and sit in on interviews for other music positions, sometimes after Respondent asked to be involved. Both Respondent and Mr. Triggiano testified that

they had many conversations about the music program: Mr. Triggiano recalled that Respondent was "never happy" about how the music program was being run. Over the years, Respondent had differences with Mr. Wichmann, now the Principal of Dumont High, but formerly a football coach. Respondent identified three areas of difference: (1) when Mr. Wichmann was a coach, he gave preference to the football team over the marching band in terms of access to practice time on the field; (2) Mr. Wichmann proposed that live music be eliminated at elementary school graduations in order to make more room for guests in the gym, where the commencement ceremonies were held; and (3) Mr. Wichmann allegedly told Respondent that a stringed program was "never going to happen" at Dumont High.

Jacqueline Bello. At the time of the incidents that gave rise to these tenure charges, Ms. Bello was the VP of Selzer School and the Director of Music and Art for the District. Ms. Bello grew up in Nutley, New Jersey and attended school with Mr. Triggiano's son Chris. She was educated at Fordham University and received a master's degree in counseling at Montclair State. She taught for 7 years, primarily middle school math, in Newark and Nutley public schools.

At some point Ms. Bello married and moved with her husband to Long Island. There she worked for SAT/ACT in test preparation and did some college advising. She has three children. Subsequently, Ms. Bello got divorced and moved back to New Jersey with her sons. She had obtained a Guidance Counselor Certificate, and in 2012 the District hired her as a Guidance Counselor at Dumont High; her principal at Dumont High was Mr. Wichmann. During the hiring process, she went through three rounds of interviews, the final interview being with Superintendent

Triggiano and Dr. Poidomani. Ms. Bello had not kept in touch with Mr. Triggiano's son, and the subject of her going to school with him did not come up during the interviews, nor is there any evidence that it played a part in her hiring.

Ms. Bello earned a standard principal's certificate through an alternative route and completed a formal mentorship program run by the New Jersey Supervisors and Principals Association (NJPSA). She was assigned a mentor from outside the District, Dr. Dennis McDonald. In 2016 an Assistant Principal position became vacant at the Dumont High School and Ms. Bello applied, although she had not yet completed all of the steps to be certified. She was given a courtesy interview but was not offered the position.

A VP position at Selzer School also became vacant that year, and Ms. Bello applied for that. She was not selected for that position either. However, the individual who was selected in 2016 gave notice at the end of that year that he did not want to continue in the position, and so in the summer of 2017 there was another search. Ms. Bello again applied, and this time she was the successful candidate.

Ms. Bello began as the VP at Selzer on August 1, 2017. Her official duties included supervising summer enrichment as well as art and music programs for the District, at both the elementary and high school level. For the two years she held the position of VP at Selzer, Respondent, as her Principal, was her supervisor. He was responsible for her annual summative evaluations, and each year he gave her positive evaluations. Up until the end of the academic year in 2019, he had nothing but praise for Ms. Bello. Dr. Poidomani testified that Respondent called Ms. Bello "the best thing that had happened to Selzer," and frequently commented on the

excellent working relationship he had with her, using the phrase "army of two" to refer to their partnership. Mr. Triggiano testified that for those two years, Respondent was "always very positive" about Ms. Bello. Respondent and Ms. Bello both testified to their positive working relationship through those two academic years, using the "army of two" and similar phrases to describe their collaboration.

The Summer of 2019

Beginning in June 2019 and throughout the summer, as will be described below, the working relationship between Respondent and Ms. Bello deteriorated, and the events that form the basis of the present tenure charges took place.

Ms. Bello's application for a principal position in another District. In mid-May, 2019, Ms. Bello learned through a friend, that someone she knew had become the Superintendent of the West Essex School District, was conducting a search for the position of Principal at the West Essex Middle School, and had asked the friend to make sure that Ms. Bello was aware of the opening. West Essex is close to Ms. Bello's home and would involve a considerably shorter commute. Ms. Bello decided to apply. She called both Mr. Triggiano and Respondent before Memorial Day to let them know. Respondent told Ms. Bello that he would be disappointed if she left, but he wished her well. He understood that this would be a promotion and would be closer to home for her. Ms. Bello testified that Respondent asked her many personal questions, and she was "worried" at the end of the conversation. But she knew that they had worked well together, and she thought the questions, while intrusive, were not inappropriate. Ms. Bello found out in June that she did not get the job.

Respondent spoke to Dr. Poidomani about Ms. Bello's application for the West Essex Principalship. According to Dr. Poidomani, Respondent said he wanted to talk "off the record" and expressed dismay about her having applied. Respondent asked why the District would give tenure to someone who is thinking about leaving. Dr. Poidomani told him, this is what we do – we train vice principals to become principals; she pointed out that Ms. Bello wasn't seeking another job, but this opportunity presented itself, so she applied. At the end of the conversation, Respondent told Dr. Poidomani, "you're right. That's why I always talk to you." Dr. Poidomani thought the whole incident was over.

Mr. Triggiano testified that Respondent also broached the subject of Ms. Bello's application for the principalship with him At first, Respondent was upset and couldn't understand why Ms. Bello would want to move. Mr. Triggiano told Respondent that everyone has to do what's best for them. Mr. Triggiano got the impression that Respondent may not have wanted Ms. Bello back after she applied. Like Dr. Poidomani, Mr. Triggiano believed that Respondent realized from their conversation that what Ms. Bello had done made sense for her; Mr. Triggiano felt that "it was over," and Respondent had moved on.

Respondent acknowledged that he had conversations with both Dr. Poidomani and Mr. Triggiano about Ms. Bello applying for the West Essex job. Respondent testified that he told both of them he wished Ms. Bello good luck and was going to help her prepare for the interview. Respondent acknowledged that initially he was not happy about the prospect of having to replace Ms. Bello – she had been his third VP in three years: he told Dr. Poidomani, "Maria, you can't catch a

break with these VPs." However, he figured he would just have to train another VP. When Ms. Bello told him that she did not get the job, he told her he was happy she wouldn't be leaving. Respondent testified that Ms. Bello told him she was not sorry that she didn't get the job, because she had "mixed feelings from the beginning." He says she told him, "I love working for you, I love Dumont. We make a great team. If you'll have me, I would like to continue to be your VP." He replied, "Absolutely;" that he wanted her to continue as his VP.

High School Music Vacancy 2019. At the very end of the 2018-2019 school year, on June 20 or thereabouts, the marching band teacher at Dumont High informed her principal, Mr. Wichmann, that she was going to be resigning her position. Mr. Wichmann testified that her resignation "caught us by surprise" and posed problems: the marching band season opened the first week in August at band camp; to get a new teacher in place for that required getting a candidate to the Board at its July 19 meeting, only a few weeks away. Ms. Bello testified that the music teacher's resignation was "stinging because of the timing." Mr. Wichmann and Ryanne Hutchinson, AP at Dumont High, informed Mr. Triggiano of the vacancy, put together a job posting, and got the job posted externally and internally to all Dumont faculty and staff. Mr. Wichmann also quickly put a hiring committee together, consisting of himself, Ms. Hutchinson, Ms. Bello, and Kyle Bennett, the Dumont High choir teacher. As resumes came in, Ms. Hutchinson began to schedule interviews. With very short notice to everyone on the committee, she scheduled the first interviews for July 9, the Tuesday after the July 4th weekend.

Ms. Bello testified, and Respondent confirmed in his direct testimony, that she told Respondent about the music teacher's resignation "right away" on the "same day" that she learned about it. Respondent also agreed that he knew when the job was posted. Ms. Bello recalled that Respondent asked her why the teacher was leaving, and stated that he liked her personally, but not professionally – she had wanted to make several changes that he thought were not in the best interests of the program, including changing the cadence for the marching band. Respondent told Ms. Bello this was an opportunity to get a new person into the position who would move the District toward the objectives he had for the District's music program.

Ms. Bello, Mr. Wichmann, Dr. Poidomani and Mr. Triggiano all testified that the process for filling any vacancy in the District is led by the principal of the school where the vacancy occurs. As Mr. Triggiano testified, the Principal has "total responsibility for his school." Respondent, however, testified that the hiring process was led by the District-wide supervisor of the content area: in the case of music vacancies, the process should be led by the music supervisor, who, in 2019, was Ms. Bello. He testified that when he was the music supervisor, from 2010 to 2015, he was in charge of hiring committees. However, he admitted on cross examination that when he was Selzer Principal he, rather than the subject matter supervisors, put together certain hiring committees that did not even include those supervisors. And he recalled hiring committees at other schools that did not include the supervisors.

On Tuesday, July 9, 2019, Respondent attended an A.C. meeting. Mr. Wichmann, Mr. Triggiano, and Dr. Poidomani also attended this meeting. Mr. Triggiano asked how the search for a new music teacher at Dumont High was

progressing, and Mr. Wichmann reported that the search committee was already reviewing candidates and beginning interviews. Respondent was extremely upset when he heard about the interviews: he wanted to be on the committee. He testified that Mr. Triggiano that morning had handed him a number of resumes of candidates for the music position, and Respondent spoke to Mr. Wichmann to tell him he wanted to be on the committee. Mr. Wichmann replied that the committee had already started and was going to move fast. Several interviews were scheduled for the next day, July 10. Respondent asked to see resumes that Mr. Wichmann had with him; Mr. Wichmann complied. Respondent stated that he would make himself available, "I want to help you."

After Respondent returned to Selzer, he had two lengthy conversations with Ms. Bello that, according to him, "got a little heated." Respondent held Ms. Bello responsible for the fact that he had not been included on the committee and that he had learned about the interviews at the A.C. meeting. To him, this was particularly upsetting because it was a repeat of what he felt had happened in 2017.

In late July, 2017 shortly before Ms. Bello started as Selzer VP and Supervisor of Music and Art, the band teacher resigned, effective August 8. The job was posted, and Mr. Wichmann formed a hiring committee. Respondent testified that he thought Ms. Bello, although brand-new as VP and Music Director, would have known about the search and been in charge. On August 11, 2017, at an A.C. meeting, Respondent learned that the search was going forward, and interviews were being scheduled without his participation. He called Mr. Wichmann and Mr. Triggiano to express a desire to be a member of the committee. He was in fact added to the

committee and participated in all or all but one of the interviews. Respondent considered Ms. Bello's failure to advise him about the formation of the hiring committee in 2017 to be a "breach of loyalty" and of the "chain of command" due a principal from his vice principal.

In 2019, when this issue arose, Respondent felt, as he confided to his fellow principal, Dr. Bennett, that he was being "blind-sided" once again. Ms. Bello explained that she was not leading the search process, Mr. Wichmann was, and she had only learned about the first interview that took place during the A.C. meeting, early that morning or the day before, while Respondent was on vacation.

Respondent called Mr. Triggiano that afternoon to complain about having been left off the committee. He was also upset because he would miss the interviews scheduled for July 10, since he had previously scheduled that as a vacation day. Mr. Triggiano assured Respondent that he could participate and that if he missed the first round of interviews, Mr. Triggiano would include him on the final round, with himself and Dr. Poidomani. Mr. Triggiano also promised to call Mr. Wichmann about the matter.

Mr. Wichmann called Respondent "within 3 minutes" of Respondent ending his conversation with Mr. Triggiano. Mr. Wichmann said, he understood that Respondent wanted to be on the committee, and he was welcome to participate, but the interviews scheduled for July 10 could not be changed.

The afternoon of July 9, 2019, Respondent called Ms. Bello on her cell phone, while she was driving home from work. According to Ms. Bello the conversation was "heated." She testified that Respondent "pretended" he had not known that the

music interview was scheduled for that morning. Ms. Bello was shocked and confused by the call, finding it upsetting, because she knew she had spoken to him about the music interviews that morning when he returned from vacation. In his testimony Respondent agreed that he did have a conversation with Ms. Bello the morning of July 9 in which they discussed the music position; that Mr. Wichmann wanted to move quickly; and that there were going to be interviews. However, he claimed Ms. Bello did not tell him that there would be interviews that very morning.

That evening, at 7:01 p.m., Respondent sent an email to Mr. Wichmann, Mr. Triggiano, Ms. Bello and Ms. Hutchinson. He wrote that after "further consideration and after speaking with [Mr. Triggiano], I would like to AGAIN offer my assistance with the search to find a new music teacher for the high school." He explained that he had a vacation day scheduled for July 10 and could not participate in the interviews, urged Mr. Wichmann not to rush the process or "sacrifice quality for the sake of expedition," and asked that the interviews be rescheduled. (D. 25)

Mr. Wichmann understood that Respondent was upset; he and Ms. Bello both interpreted Respondent's email as "angry" because of his use of capital letters, which is often interpreted in emails as shouting. Mr. Wichmann called Mr. Triggiano to discuss the matter. He explained that it was difficult to schedule interviews in the summer, and one of the scheduled candidates was someone who had been highly recommended. Mr. Wichmann asked Mr. Triggiano if he was required to include Respondent on the committee, to which Mr. Triggiano replied, he was not: "if you want to, you can."

As he had planned, Respondent took July 10 as a vacation day. Respondent was so upset by the events of the prior day that he spoke to Dr. Poidomani on July 10 from the marina where he was spending the day with his cousin on his boat. The parties disagree on who initiated the conversation, but both Dr. Poidomani and Respondent agreed this was a very lengthy conversation – 45 minutes to an hour long. Dr. Poidomani testified that Respondent was highly emotional: she felt she was "talking someone off the ledge." He told her he felt that Ms. Bello had "betrayed him" and used that word "over and over again." Dr. Poidomani told him Ms. Bello had not done anything wrong, that Mr. Wichmann was running the committee, but he said, "You don't understand, it was a personal thing between us." He also "bad mouthed" Mr. Wichmann, calling him negative names. Respondent testified that Dr. Poidomani agreed with him during this call that Ms. Bello had messed ("f'd") up in that she should have called him. Dr. Poidomani denies this. Both sides agree that the conversation ended with Dr. Poidomani urging him to let go of the issue and move on.

July 11 conversation between Respondent and Ms. Bello. When Respondent returned to work on July 11, he learned that the interviews had indeed gone ahead as scheduled on July 10 without him. That afternoon, Respondent called Ms. Bello into his office, saying that he wanted to talk to her about the music interviews. According to Ms. Bello, the conversation lasted over an hour, starting around 1:30 or 2:00 p.m. and ending after the staff had left. Ms. Bello knew that Respondent was angry with her and knew from Dr. Poidomani and Mr. Triggiano that Respondent had conveyed to them how upset he was. Ms. Bello wrote a memo

to herself that evening to memorialize the main points of the conversation. (D. 30) Some of the points she noted were:

- When she was called into Respondent's office, he had what he called her "file" open on his desk, told her he was writing her up and would be placing a letter in her file;
- He had highlighted areas of her evaluation where he had emphasized that she needed to "continue to communicate;" this was a directive that she had "ignored;" she had been "insubordinate;"
- He did not like her 'loyalty and relationship" with Mr. Wichmann and feared that it would "drive a wedge" in the relationship between the two of them; he instructed her going forward to tell him about all communications she had with Mr. Wichmann, especially regarding the music department;
- Respondent said that he was "most disappointed" because the two of them had a "close relationship;" he realized that "I love you" and asked if she loved him too; he said that their relationship over the past 2 years was "special" and that he "had a piece of me that [my ex-husband] never had" and that "I had a piece of him that [Respondent's wife] would never have."
- Respondent told her that he was going to recommend that she not get tenure and that she should look for a new job;
- After she apologized for inadequate communication with him, Respondent said he was "pleased that I was agreeable and contrite and therefore would not recommend my firing, but that I would need to earn his trust back and

work to rebuild the relationship. He said he was the boss ... and I should never forget it."

- After she left his office, while she was packing up to leave for the day, Respondent came into her office and "hugged me tightly for several seconds "placing his head on the side of my face;" "his demeanor had changed, and he was smiling at me."

In addition to writing the email to herself, Ms. Bello wrote an email that night to an attorney friend whose firm handles workplace sexual harassment claims, asking for advice about "an upsetting incident" that occurred at work that day. That email, too, was entered into evidence. (D. 31)

Ms. Bello testified that she found the meeting particularly upsetting because of the threats to her tenure and her job, and she found Respondent's comments about love to be "humiliating" and "degrading." Toward the end of the meeting, Respondent started singing a Billy Joel song to her, "Shameless;" she was familiar with the song, a love song with lyrics that include "I'm thinking about you and you're thinking about me. I'm shameless, shameless for loving you."[2] Further, she found

---

2

"Shameless"

Well I'm shameless when it comes to loving you
I'd do anything you want me to
I'd do anything at all

And I'm standing here for all the world to see
There ain't that much left of me
That has very far to fall

You know I'm not a man who has ever been
Insecure about the world I've been living in
I don't break easy, I have my pride
But if you need to be satisfied

I'm shameless, baby I don't have a prayer
Anytime I see you standing there
I go down upon my knees

And I'm changing, I swore I'd never compromise
I have never let anything have this much control over me
Cause I worked too hard to call me life my own
Yes I made myself a world and it worked so perfectly
But it's your world now, I can't refuse
I never had so much to lose
I'm shameless...shameless

You know it should be easy for a man who's strong
To say he's sorry or admit when he's wrong
I've never lost anything I ever missed
But I've never been in love like this...
It's out of my hands
I'm shameless, I don't have the power now
But I don't want it anyhow
So I've got to let it go

I'm shameless, shameless as a man can be
You can make a total fool of me
I just wanted you to know

I am shameless

the hug was more of an embrace than a casual hug, in that it lasted a long time and was unusually tight. Ms. Bello knew that Respondent was a "hugger," whereas she is not.

Respondent confirms that he had a long conversation with Ms. Bello on July 11, but specifically denied:

- that he told her he loved her;
- that he said he had a piece of her that her ex-husband had never had or that she had a piece of him his wife would never have;
- that he said he was the boss and she should never forget it;
- that she should inform him of all communications she would have with Mr. Wichmann going forward.

Respondent agreed that:

- he had his "Principal's file" on his desk that he uses to document staff issues; that he told her she had disregarded a "recommendation" rather than "directive" about communications; and that he would have to "memorialize" this, put "something in writing" because "it's pretty serious;"
- he talked about her "loyalty" and "insubordination;"

But you convinced me otherwise
I'll do anything you please

You see in all my life I've never found
What I couldn't resist, what I couldn't turn down
I could walk away from anyone I ever knew
But I can't walk away from you

Shameless...
Shameless...

Lyrics from Internet

- he engaged in a "salutary hug" – "we hugged each other" – similar to other hugs they had shared in the past;
- he sang part of "Shameless" to her; he did so because she had been apologizing and he didn't want her to "grovel," "you have to be shameless – like the Billy Joel song."

Respondent testified that he had been very upset with Ms. Bello because the same thing had happened in 2017; however, he never intended to put anything in her personnel file – he only wanted to memorialize their conversation. He felt the meeting ended on a positive note, because she apologized, he accepted her apology, and they were going to move on.

July 12 conversation. The morning of July 12, Respondent called Ms. Bello into his office, asked her to close the door and continued the conversation from the day before. He apologized for bringing up the "Shameless" song, saying, "Don't get the wrong idea; I didn't mean anything inappropriate about that song."

Ms. Bello told him that she didn't think he was being fair to her, that she did not understand how she had done anything wrong or was insubordinate, she felt he was "building a case" against her, and she did not want him to put anything in her file. Ms. Bello testified that Respondent continued to say that he had given her a directive and that she should have communicated with him over the July 4th weekend about the music interviews. Ms. Bello sent herself another email to memorialize the conversation. (D. 32)

Respondent confirmed much of the substance of the July 12 conversation, except he testified that Ms. Bello initiated the conversation. He agreed that she was

upset that he would put anything in writing and try to get rid of her. Respondent testified he told her it was not his intention to get rid of her, and, anyway, only the Superintendent "can make that call." He urged her to put the matter out of her mind.

However, to him, July 12 "marked the beginning of this whole thing." The day before, on July 11, Ms. Bello had been apologetic, but on July 12, she was "a different person" – she had become "emboldened;" she told him she did not think she had done anything wrong. On or about July 16, Respondent drafted a memorandum to Ms. Bello about the meetings on July 11 and 12. (D. 33) He recapped what he thought Ms. Bello had done wrong, both in 2017 and 2019, in failing to keep him informed about music hiring committees and other matters. He did not, however, give this memo to her right away.

Latter part of July and early August. For the remainder of July, Respondent and Ms. Bello carried on the District's business with relatively little conflict. Respondent sat in on the remaining music interviews and the final interviews with Mr. Triggiano and Dr. Poidomani and agreed with the committee's recommendation of a finalist for the position. Respondent took Ms. Bello out for lunch on her birthday, July 15; they met about school business and discussed the new hire in the music department.

Respondent prepared another memorandum to Ms. Bello on July 24, memorializing a conversation they had the day before about the music department. (D. 34) In that memo, Respondent stated that he would be "involved in the operations of the music department," and that Ms. Bello valued his experience and

expertise and welcomed his mentorship and partnership. According to Ms. Bello, Respondent gave her both memos, D. 33 and D. 34 on July 26. At that time, she asked Respondent why he was writing her up if they were trying to move past the music department issues. He told her these would go into his Principal's file, and he would just keep them "for his records."

Also, on July 26, Respondent heard Ms. Bello laughing on the phone with someone, while he was making copies on the office copier outside her door. He testified that when Ms. Bello finished her conversation, she told him she had been talking to Mr. Wichmann, and they had been laughing about a staff or faculty member who was driving them crazy.

Ms. Bello took vacation in late July and Respondent did as well, returning August 10 or 11, so they did not see one another for about two weeks, although Respondent texted Ms. Bello about school matters from Florida, where he was vacationing.

August 12 Conversation. On Respondent's first day back at Selzer School after his vacation in Florida, he had a conversation with Ms. Bello that lasted well over an hour. Ms. Bello testified that Respondent initiated the conversation; she recorded it on her cell phone, without Respondent's knowledge. The District provided me with an audio recording of the conversation and also had a certified court reporter transcribe it. The transcription runs to 69 pages. Respondent testified that the transcription is accurate, except for the few places where it was inaudible. The parties urged me to listen to the audio recording and I did so.

Early in the conversation, Respondent brought up the laughing conversation between Ms. Bello and Mr. Wichmann back on July 26. Ms. Bello told Respondent that she had now received an invitation to an annual summer barbecue that Mr. Wichmann was holding at house, where he would be celebrating his 50th birthday. Respondent then went on to talk, at length, about how much he dislikes Mr. Wichmann and why. Among other things, he said:

- "I don't want to hear [his] name" (T. at 15);
- "He was the one that caused this monumental – ruined our relationship;" "he caus[ed] this trouble between you and I" (T at 16, 17);
- I don't understand "why you're not even the slight bit angry with him or upset with him for causing this because he was the one who shut you down;" "I don't see how your relationship could be unchanged because of this when ours was turned into turmoil" (Tr. 21);
- "It's a slap in the face that this son of a bitch caused all of this trouble, turned our world upside down here and you still want to be the sister he never – wished he never had. That's not okay with me" (T. at 28);
- "If you don't realize what kind of trouble this guy caused and what kind of trouble he is and what kind of scum he is, then there's nothing I'm going to say" (T. at 28);
- "[Y]ou don't think he damaged our relationship, which to me is astounding" (T. at 29);

- "[H]e shouldn't feel like everything is all right between you, like that, you know, that there's like nothing happened. Let's not forget what happened" (T. at 30);
- "I'll tell you what changed, the fact that I became aware that you – your relationship with him was still like, you know, yuck it up with [J], like the way, you know. That shouldn't be. To me [JW] is the anti-Christ for the music program ... for the district in general. He's an asshole. I never liked him. He's an arrogant son of a bitch. *** You seem to think this guy walks on water and I can't stand the sight of him. ***... this asshole blew the top off of my school with this thing" (Tr. 33-4);
- "I don't want to hear you laughing and shit with [JW]. [W] is a piece of shit who doesn't care this much about you and that's how I feel. It's an insult. It's a slap in the face after everything that happened and after all the bullshit that was caused, everybody involved, that, that, that, that he should think that he has that kind of a frigging proximity after what he caused here. He almost caused you your job because I was this close to getting on the phone and telling [ET], look I can't work with Jackie" (Tr. 34-5);
- "I can't stand [JW], never could for a plethora of reasons. Arrogant son of a bitch. You ask anyone in this building. They think he's an arrogant son of a bitch, and he is an arrogant son of a bitch. I had to eat that and then this exploded and now I can't – I can't, and I won't. This is non-negotiable for me. I don't want to hear his name unless you're talking about what a piece of crap

he is.... And this is not over between [J] and me. That I can tell you for sure... *** ... that piece of shit...He is not welcome here" (Tr. at 40);

- "I'm on a mission now to expose this asshole for what he is, an asshole, and I will and I won't have to do anything. *** I won't have to fire a shot. He'll do it to himself. He put the noose around his neck with that frigging we're not going to have live music" (Tr. at 42);
- "I made the mistake of allowing you so much into my head because you're in my head more than anybody because of the way we do things *** I mean I think of you in good ways, but when that flip, that switch flips with that asshole, that was it" (Tr. at 51);
- "It's just infuriating that this happened, he's the cause of it, and I don't know how you can say he's not, but --- and to have that shit in your face. That I'm not good with. That I'm not [inaudible]" (Tr. at 57);
- "I'm not going to allow anyone to disrespect me further than I've already been in regards to this" (Tr. at 52);
- "[S]omeone like this [JW] I want to get" (Tr. at 55);
- "[T]here's going to come a point, and it may come to blows that [JW] and I are going to have that conversation;" Ms. Bello asks, "Why would it come to blows...that's not something you would have to do as a grown man and a professional. Why would it have to come to blows" Respondent: "Because that's the way he is. He's a bully and that's one way to deal with those" (Tr. at 59) ;
- "[E]very time he screws up, I'm going to be there" (Tr. at 62);

Respondent used certain other notable words and phrases repeatedly throughout this conversation. For example,

- Words to the effect that "to me, it's very insulting" appear on pages 24, 25, 26, 27, 35, 52, 64;
- Respondent told Ms. Bello that she would not be able to "earn my trust back by carrying the same type of relationship with [JW] and that's the way it is for me. That's non-negotiable for me." (Tr. at 27; see also Tr. at 40, 52);
- Respondent used variations of the words "fuck" in relation to the situation with Mr. Wichmann many times (Tr. at 38, 39,43, 50); He also used the equivalent word, "frigging": "He put the noose around his neck with that frigging we're not going to have live music."(Tr. at 42); "He's got the IQ of a frigging golf ball" (Tr. at 43);

When Respondent spoke about how he was "going to get" Mr. Wichmann, he referred to his upbringing: "I wouldn't have survived living on the street the way I did *** boxing..." Ms. Bello explained that she did not "process things" in the "same exact Hoboken street fighter way that you do." (Tr. at 55) She went on to say, "You know, I think it's a little Italian, too. I think it's that Italian thing that I don't have. You, know, I think maybe it might be a little cultural. I don't know." To which Respondent answered, 'I don't know about that. I'm so far from the Italian culture ... it's not even funny." (Tr. at 56) Ms. Bello continued to talk about how she viewed things differently, saying "maybe it's a little too Pollyanna of me;" to which Respondent replied, you are "white toast." (Tr. at 58, and from audible recording)

Remainder of August 2019. On or about August 15, Ms. Bello went to the High School around 9:00 in the morning. That day, she and Mr. Wichmann were scheduled to visit a school in New Milford to look at their art studio: the District was refurbishing the art room at Dumont High, and the visit was planned to get ideas for that project. Mr. Wichmann testified that Ms. Bello showed up visibly upset. He asked why she was there – it was early, and they had planned that Mr. Wichmann would pick her up at Selzer. She explained that it was not a good day at Selzer, and Respondent was yelling at her about being away. Later that day, after the Milford visit, Mr. Wichmann and his AP, Ryanne Hutchinson, sat with Ms. Bello, who told them that Respondent was angry if she had anything to do with Dumont High; that Respondent had negative feelings about Mr. Wichmann; that he was getting inappropriate, giving her gifts that made her uncomfortable; and that he had given her a "creepy" hug that was long and hard. Mr. Wichmann left Ms. Bello alone to talk further with Ms. Hutchinson for an hour before returning. At some point, whether before or after he left the two women alone, Mr. Wichmann told Ms. Bello words to the effect that she was presenting like a battered woman. When she asked him what he meant, he said that she was stuck in a very inappropriate situation and didn't know how to get out of it. Mr. Wichmann also asked Ms. Bello if she felt sexually harassed; she nodded yes. He told her she was going to have to talk to Mr. Triggiano and offered that he or Ms. Hutchinson would go with her.

Ms. Bello surreptitiously recorded three additional conversations with Respondent before the end of August, on August 19, 21, and 26. I was provided with audio recordings of those conversations, and transcriptions of all three were entered

into evidence as D. 20, 21 and 22. The conversations on August 19 and 21 were almost entirely about school matters. The conversation on August 26, however, was contentious.

Respondent started out asking why he had not been copied on an email to Mr. Triggiano pertaining to a music proposal. When Ms. Bello replied that Respondent had been aware of the proposal, and that no one else was copied on it, Respondent replied "that makes no difference." (D. 22, Tr. at 3-4) Respondent then asked why he hadn't been informed about a meeting Ms. Bello was having with the lunch ladies. She replied that he was aware of this; it was held each year. Ms. Bello said, Respondent had told her she did not need to inform him about "minutia" and asked how she was supposed to know when it was minutia and when it wasn't. Respondent replied, "That's your opinion," "don't leave anything to chance." When Ms. Bello replied that she did communicate with Respondent, he pushed back and said, several times, "you're saying that I don't hear stuff... *** Well, what didn't I hear? *** you don't think it's important that I know about the lunch ladies?" (Id. at 6-8) Ms. Bello ended the conversation by saying, "I'm not doing this. I'm done," to which Respondent replied, "Yeah, you are done. *** You are done." (Id. at 8) Listening to the audio recording, I heard an edge to Respondent's questions and Ms. Bello's frustration.

At some point that day, Ms. Bello went to see Dr. Poidomani at the District offices. She told Dr. Poidomani that she was upset about how she was being treated by Respondent: that he was being verbally abusive and cursing, he had begun writing her up, was criticizing her for attending Mr. Wichmann's barbeque and for

not communicating with him adequately about putting personnel on the BOE agenda. Dr. Poidomani immediately took Ms. Bello into Mr. Triggiano's office to make him aware of her concerns.

Mr. Triggiano testified that prior to August 26th, he had been aware from some of his frequent conversations with Respondent – they spoke on the phone maybe 10 times per week -- that Respondent was not happy with Ms. Bello's performance, and that he was "displeased with her friendship" with Mr. Wichmann. Before Dr. Poidomani brought Ms. Bello in to see him, Mr. Triggiano had spoken to Ms. Bello "very infrequently." She told him that day that Respondent was giving her a hard time, starting to write her up, yelling at her and trying to intimidate her.

The next day, August 27, after the A.C. meeting, Mr. Triggiano brought Respondent and Ms. Bello together for a "mediation" session. He asked Dr. Poidomani to be present. Respondent asked if Dr. Bennett could sit in. Mr. Triggiano asked Dr. Bennett if she had any personal knowledge about the issues between Respondent and Ms. Bello. Dr. Bennett said no; she was there simply to support her colleague and because she had had issues with her own VP at one point. Mr. Triggiano allowed her to remain. The session was "pretty lengthy," about an hour. Mr. Triggiano allowed both Ms. Bello and Respondent to speak – they went "back and forth." Respondent said that Ms. Bello was insubordinate, not trustworthy; that she was too friendly with Mr. Wichmann, and she should keep her distance from him. Ms. Bello apologized more than once: for making a reference to Respondent's Italian heritage, and for not communicating more effectively with him, but Respondent said it wasn't a sincere apology. Mr. Triggiano tried to resolve

things: he wanted them to be able to work together professionally. The outcome of the meeting was that Ms. Bello said she was willing to resolve things and move on, while Respondent, somewhat reluctantly, said he would try. Mr. Triggiano made a few changes at the District level to reduce the tension between Respondent and Ms. Bello: first, he removed Ms. Bello from supervising the music department, giving that responsibility to Ms. Hutchinson; second, he assigned Dr. Poidomani to do a formal observation of every VP in the District.

Later that week, Ms. Bello went to Dumont High to meet with Mr. Wichmann, Mr. Triggiano and other high school staff about the opening of the newly renovated art room. Part way through that meeting, Respondent called, demanding that she come back to Selzer and help him with scheduling problems, although she was not usually involved in preparing the schedule. She complied, although she testified she found no problem with the schedule when they reviewed it.

Events in September 2019. The new school year began the next week, after Labor Day. Mr. Triggiano did not hear from Respondent or Ms. Bello for two weeks and was hopeful that "everything was resolved." However, on September 17, Respondent called and asked to see him. Respondent was very upset when he came into Mr. Triggiano's office. He said, he couldn't stand to be in the same room with Ms. Bello and that he can't work with her: "she's a liar, no matter what she says." He said, he had tried, but couldn't "get past this." Mr. Wichmann's name came up: Respondent said that Ms. Bello was "too close" and has to be on the phone all the time with him. Mr. Triggiano told Respondent something he had said before to both Respondent and Ms. Bello: if you have a complaint, if there's something

inappropriate that happened, you need to file a complaint with Luis Lopez, the District's Affirmative Action Officer and we'll investigate it thoroughly.

On September 25, 2019, Respondent went to Mr. Lopez to complain about Ms. Bello. He asked if he could just talk "off the record" about the situation, but, after consulting Mr. Triggiano, Mr. Lopez said, no. If Respondent had concerns, he had to make a complaint, which Mr. Lopez would investigate thoroughly. Respondent never gave Mr. Lopez a written complaint, although he was asked several times to place his concerns in writing. Mr. Lopez nevertheless initiated the investigation that led to these charges.

Ms. Bello's Other Concerns. As noted above, in the course of Mr. Lopez's investigation, Ms. Bello raised concerns about other behaviors of Respondent that she had not shared with Dr. Poidomani or Mr. Triggiano, but which she had, to some extent, shared with Mr. Wichmann and Ms. Hutchinson. Ms. Bello testified that she found these behaviors to be intrusive and inappropriate; she felt they were motivated by romantic or sexual inclinations. They are summarized briefly here.

Intrusions into Ms. Bello's personal life, particularly when she was out on medical leave. Ms. Bello testified that Respondent called and texted her excessively, particularly when she was out on medical leave and recovering from major surgery in the spring of 2019. She testified that he asked her to have her mother call him and let him know how the surgery went; Respondent testified that he had not made that request. Of particular concern to Ms. Bello were Respondent's persistent requests to take her out to dinner. Eventually, she agreed to go, but

cancelled that day, giving the excuse that she had to attend *Shiva* for a friend of the family. Respondent and his wife testified that the idea of taking her out to dinner originated with his wife, and that Respondent made that clear to Ms. Bello over the telephone.

Gifts and hugs. All of the Selzer employees who testified agreed that the school staff had a tradition of exchanging gifts for birthdays and holidays. There was also testimony from Respondent and the school secretary, Ruth Keenan, that Respondent and other staff were "huggers" and frequently exchanged hugs with their gifts. Ms. Bello testified that she is not a hugger, and she found Respondent's hugs to be "creepy," particularly the hug he gave her on August 12, after their long, contentious conversation. Ms. Keenan confirmed that Ms. Bello is not a "hugger," and she has only witnessed one time that Ms. Bello hugged Respondent – when his dog died.

There was evidence concerning four gifts in particular that Ms. Bello found inappropriate, because they appeared to be given "for no reason," were unduly personal, and were accompanied by hugs. Those were:

(1) a necklace with an inexpensive anchor charm: Respondent said he selected the anchor because Ms. Bello had mentioned that anchors were meaningful to her; he gave it to her in March 2019, right before her surgery;

(2) a bottle opener with an anchor on it: Respondent said he had extra bottle openers and put them on a table for faculty or staff to take; he handed one to Ms. Bello, because of the anchor symbol;

(3) scented soaps: Respondent had wrapped the soaps in red tissue paper and gave them to Ms. Bello on July 26; he told her that he liked the smell of the soap and she could use it at work; Respondent and his wife testified that they bought a bunch of scented soaps at Marshalls; Respondent testified he and Ms. Bello had discussed soaps that a colleague had at school, and so he thought to give some to her;

(4) T-shirts: Respondent and his wife bought a number of T-shirts while on their August vacation in Florida; Respondent thought to give one that was left over to Ms. Bello; the shirt had an anchor on it.

POSITIONS OF THE PARTIES

The District argues that it has met its burden to prove the tenure charges by a preponderance of the credible evidence. In particular, (1) Ms. Bello, Mr. Triggiano, Dr. Poidomani, Luis Lopez and Mr. Wichmann were all credible witnesses who testified in a manner that was consistent, supported by contemporaneous memoranda and the recordings Ms. Bello made of conversations with Respondent; (2) Respondent, on the other hand was not a credible witness; in fact, he lied both in the pleadings and in his testimony or was patently unbelievable on several key points, including: (a) not mentioning the song "Shameless" when he spoke to Mr. Lopez, and denying in his answer to the Tenure Charges that he brought the song up; whereas he admitted in this proceeding that he had sung the song to Ms. Bello on July 11 and apologized for doing so on July 12; (b) testifying in this proceeding that "Ms. Bello hugged me all the time," and stating in his answer to the Tenure Charges that Ms. Keenan "will testify that she witnessed Ms. Bello hugging Mr. Podesta and

initiating the hug on several occasions;" whereas Ms. Keenan testified that she could at most recall a single instance when Ms. Bello hugged Respondent; (c) claiming that Ms. Bello first evidenced "disloyalty" to him and failed to keep him informed about interviews for a music position in August of 2017 so that he had to learn of the matter at an A.C. meeting on August 11; whereas the evidence showed that the music vacancy was not announced until August 8 and only posted thereafter, so it was impossible that interviews were scheduled by that A.C. meeting; (d) claiming in this proceeding that "I don't hate Mr. Wichmann," bears him no ill will and could work with him as a colleague if he is allowed to return to his position as Principal at Selzer; whereas Respondent's hostility to Mr. Wichmann is captured in own words, as recorded by Ms. Bello on August 12, and by Mr. Lopez during his interviews, as well as Dr. Bennett's testimony that Respondent wanted to rant and complain about Mr. Wichmann during the August 27 mediation, but the Superintendent stopped him; (d) trying to "soft-pedal" his earlier statements that Ms. Bello had engaged in a pattern of lying, disloyalty and betrayal toward him; whereas those were exactly his words to Mr. Lopez; (e) claiming that Mr. Triggiano had a pre-existing relationship and a "soft spot" for Ms. Bello; whereas he did not attempt to contradict or impeach the testimony of both Mr. Triggiano and Ms. Bello that no such relationship existed; (f) claiming that Ms. Bello did not apologize during the August 27, 2019 mediation session, whereas Ms. Bello, Mr. Triggiano and Dr. Poidomani, all were clear that she did; (g) claiming that Ms. Bello had not informed him about the music interviews on July 9, 2019; whereas he admitted that she did talk to him that morning about the process, and she always told him where she was going when she left the school

building; (3) when balanced against the credible testimony of Ms. Bello and the other District witnesses, Respondent's hopelessly contradictory and even dishonest testimony falls far short and cannot overcome the preponderance of the District's evidence that proves his guilt as charged.

Given that the District has proven the tenure charges, the only appropriate penalty is discharge, in that (1) Respondent has demonstrated throughout the investigation of this matter and the hearing herein, that he has not learned a lesson and that the offending behavior will recur; (2) Respondent's attitude has been that of an aggrieved victim who lashes out against anyone who dares to oppose his subjectively perverse view of the world: he turned on his friend, colleague and mentor, Mr. Triggiano, and accused him of bias, inventing a family relationship with Ms. Bello; he turned on Ms. Bello, accusing her of having the temerity to apply for a principalship outside the District, suggesting that she should not receive tenure as a Vice Principal; he further accused her of being emboldened, and exhibiting a lack of loyalty; this is not someone who has or is able to learn from his past mistakes; (3) further Respondent has taken the position throughout this proceeding that his conduct toward Ms. Bello was never inappropriate; despite the evidence and his admission that he frequently acted in a manner that was entirely inappropriate for a senior supervisor toward his subordinate: he sang a love song to her, told her how much he thought about her; asked her out to dinner, gave her presents of a personal nature, such as scented soap, suggesting that she use it at work, hugged her, complained about her work relationship with another principal in the district, and turned on her when she did not agree to cut off all ties of friendship and collegiality

with that principal; and obsessively required her "blind obedience" to him on all matters related to the District's music program; (4) he has so "poisoned the well" with his profane and vile diatribe against his professional colleague that it is impossible to expect that he and Mr. Wichmann would be able to work productively together in the future; (5) Respondent is a person with an utterly misplaced martyr complex who has refused to accept responsibility for any of his actions. For all of these reasons, the Tenure Charges herein should be sustained, and the Arbitrator should uphold the District's decision to remove Respondent's tenure and discharge him from employment.

Respondent, on the other hand, argues that the District has not met its burden to prove the tenure charges, in that (1) while there is certainly evidence of friction between Respondent and his Vice Principal, that friction only last two months, during the summer of 2019 when school was not in session; that friction did not affect the normal operation of Selzer School and both Respondent and Ms. Bello continued to conduct themselves in a professional manner throughout; not a single District employee ever witnessed or heard any dispute between the two of them; (2) whatever conflict there was between the two administrators seems to have been resolved by the end of July, and, although it became an issue again on August 23, 2019, after Respondent returned from vacation; that occurred because Ms. Bello "instigated" and secretly recorded a conversation between the two of them; any further conflict in August was due to Ms. Bello's failure to copy Respondent on emails pertaining to the lunch ladies; (3) there was no proof that Respondent had a romantic and/or sexual interest in Ms. Bello; Ms. Bello's allegations were not

supported or borne out by the conversations she secretly recorded with Respondent; further, Ms. Bello never told Mr. Triggiano or Dr. Poidomani of any alleged professions of love, inappropriate sexual or romantic overtures, gifts or invitations; she only raised these allegations after Respondent filed a complaint against her; (4) the investigation conducted by the Affirmative Action officer for the District into Respondent's claims was fatally flawed because (a) Mr. Lopez did not initially interview two important witnesses, Dr. Bennett and Respondent's wife, only doing so after Respondent's counsel asked him to; (b) Mr. Lopez never gave Respondent an opportunity to reply specifically to things said by Ms. Bello, although he gave her that opportunity; (c) the District did not follow its own Healthy Workplace Environment policy which requires the Superintendent to meet with the offender(s) and victim(s) if "the investigation determines conduct prohibited by this policy has taken place" to review the investigation results and to implement remedial measures to ensure such conduct does not continue or recur; instead, at the conclusion of Mr. Lopez's investigation and report, the matter was brought directly to the Board, which adopted these charges; the mediation session conducted by the Superintendent prior to the investigation, does not satisfy the explicit terms of the District's policy; had this matter been properly presented to the parties and ultimatums given to each of them, this matter would have been resolved with a transfer or transfer and perhaps some type of training; (5) it is undisputed that Respondent did not formally attempt to get Ms. Bello terminated (which he lacks the authority to do) or to affect her tenure; (6) while Respondent concedes that he is passionate about the music program, having spent much of his 40 year career in the District building and

nurturing the program, his anger toward Mr. Wichmann was attributable not only to Mr. Wichmann's management of the 2019 music interviews, but also to differences of opinion in the importance of live music in the school; in any event, Respondent is not charged with conduct unbecoming regarding Mr. Wichmann, but only regarding Ms. Bello; further, any anger or hurt feelings that Respondent had regarding the 2019 music interviews had no ill effect on the operation of the school.

Discharge is not warranted in this case because (1) Respondent's conduct, even if he was unduly upset about the music interviews, does not constitute the type of conduct that either "adversely affects the morale or efficiency" of the District or "has a tendency to destroy public respect" for the District; the evidence is uncontroverted that neither the normal operations of Selzer school nor of the District were adversely impacted in any way; (2) Respondent has an unblemished record of 40 years of service in the District with no prior discipline of any type; this record must be taken into consideration when considering the appropriate penalty for misconduct, if there was any involved here; (3) removal of tenure is an extremely severe penalty, which can result not only in loss of employment, but loss of pension; Respondent's ability, record and length of service are all factors that must be considered to mitigate any penalty; (4) even if Respondent's conduct toward Ms. Bello and Mr. Wichmann could be considered "over the top," based upon case law in New Jersey and other decisions, this conduct clearly does not rise to the level of conduct unbecoming, let alone conduct unbecoming that should result in a removal of tenure; in many cases where the employee's conduct was arguably worse than that charged against Respondent, dismissal and removal of tenure were not upheld; (5)

Respondent maintained a dignified and professional demeanor throughout this proceeding, even when witnesses called him a liar; he did not assign any ill motive to other witnesses, even when he disagreed with them, nor did he exhibit anger or agitation. In sum, there are no facts from which it can be determined that there is "just cause" for removal of Respondent's tenure. In addition, his suspension without pay for 120 days was unjustified. Respondent should be immediately reinstated and receive back pay for all of the time that his salary has been withheld during the pendency of these proceedings.

DISCUSSION

Both parties were ably represented by counsel in this proceeding and had full opportunity to present evidence and make arguments in support of their respective positions. In the preparation of this Opinion and Award, I have given careful consideration to the testimonial and documentary evidence, the legal authorities cited, and the positions and arguments set forth by the parties. For the reasons set forth below, I find the District has proven both Charge I and Charge II, and that Respondent did engage in conduct unbecoming a tenured Principal. I further find that the conduct was egregious, and that removal from his position and loss of tenure is the appropriate penalty.

While each party has raised questions about the credibility of the other side, many of the most significant facts in this matter are undisputed. That Respondent used intemperate and ugly language about a fellow principal in the District to his Vice Principal, that he put pressure on her and chastised her for continuing to work with that Principal, as her job duties required, that he

expressed to her his intense personal feelings, using words and song that were wholly unprofessional – all these facts have been established by uncontroverted evidence. Respondent's language regarding Mr. Wichmann, a fellow administrator in the District, and which Respondent admits was accurately recorded on August 12 by Ms. Bello, in and of itself was conduct unbecoming and warrants his discharge. That language included:

- profanities: he's an "asshole," a "piece of shit," "a piece of crap," the "antichrist;"
- insults: "he has the IQ of a frigging golf ball," he's an arrogant son of a bitch; he is "scum;"
- and threats: "this is not over;" "I'm on a mission to expose this asshole;" "he put the noose around his neck;" "someone like this I want to get and it may come to blows;" "he's a bully and that's one way to deal with those;" "every time he screws up, I'm going to be there."

Perhaps even more serious were Respondent's demands that Ms. Bello not speak Mr. Wichmann's name, "unless you're talking about what a piece of crap he is," and his telling her he did not want her to have a good working relationship with Mr. Wichmann: "I don't want to hear you laughing and shit" with him. These were unprofessional demands that, along with other conversations on other dates, represented pressure from her supervisor to behave toward another administrator in the District in a manner that was contrary to her professional obligations and her personal inclinations toward

civility and comity. Wholly apart from whether these demands were motivated by romantic or sexual inclination, they were unprofessional, inappropriate and constitute conduct unbecoming a tenured principal.

Respondent adamantly denies that he ever told Ms. Bello that he loved her; points out that he never asked to have sex with her; and only touched her by giving her hugs in the office, in a manner that was friendly -- "salutary" in nature -- the same kinds of hugs he gives other Selzer employees. His denials are contradicted by Ms. Bello's testimony, which was very credible and was supported by her contemporaneous memoranda.

Respondent defended giving Ms. Bello gifts unconnected to her birthday or Christmas, by pointing out that his wife had helped him pick them out, and they were meant merely as gestures of friendship. Likewise, he defended his frequent calls to her and his invitation to dinner as examples of concern and friendship, all known to and promoted by his wife. Yet, the evidence is uncontroverted that he spoke at length to Ms. Bello about the "damage," "trouble," "turmoil," and "blowing up" of their relationship. He also told her he had "made the mistake of allowing you so much into my head, because you're in my head more than anybody." And he sang a love song to her, Billy Joel's song, "Shameless," in a context that even he realized was inappropriate, because he apologized the next day. Respondent's testimony that he only sang the song to Ms. Bello, because he didn't want her to "grovel," is not credible. As the District pointed out in its post-hearing brief, this explanation does not match his testimony about the conversation to Mr. Lopez, or in this hearing; indeed, after

talking about "groveling," he then denied he had used the term. Whether he intended the song as a profession of love or not, it is in fact a love song. Particularly in light of Respondent's other declarations, Ms. Bello as the recipient of the song, and I as a fact finder, are justified in considering it as such.

Respondent obsessed for over two weeks while he was on vacation and away from the District over the fact that on July 26 Ms. Bello had laughed with Mr. Wichmann over the phone and then explained to him what they had been laughing about. This incident so bothered him that he raised the subject with her the morning of his first day back from vacation, August 12, and took off on an hour-long rant about Mr. Wichmann, her disloyalty, and what he viewed as irreparable damage to their working relationship at Selzer. Whether motivated by romantic or sexual inclinations, this was harassing behavior, prohibited by law and by District policy.

In sum, I find that by his conduct, Respondent crossed the physical and social boundaries that must exist between a supervising principal and his subordinate.

Further, Respondent repeatedly threatened Ms. Bello's job and her tenure. His accusations of disloyalty and insubordination were all the more inappropriate, since they were aimed at her for doing nothing more than applying for a principalship and performing her job as Supervisor of Music and Art. He spoke against her to District leadership – Dr. Poidomani and Mr. Triggiano, in June and again in August – and directly and repeatedly threatened Ms. Bello over the months in question.

All of these behaviors are grossly inappropriate for a supervising Principal to inflict upon his subordinate Vice Principal. When District leadership learned that Ms. Bello was unhappy with how Respondent was treating her, Mr. Triggiano and Dr. Poidomani convened a mediation session, during which they urged Respondent and Ms. Bello to put differences behind them and work together for the good of their school and the District. Ms. Bello readily agreed, but Respondent was unable to let go of his emotions: he continued to chastise Ms. Bello for interacting with Mr. Wichmann, and the very day he returned from vacation, he once again harangued her, and he then asked Mr. Triggiano to remove her from his school.

Respondent appears to believe that his passion for music and pride in developing a strings program for the District excuse his behavior toward Ms. Bello and Mr. Wichmann. However, once he became principal of Selzer, he had no responsibility for steering the program, and his passion certainly did not entitle him to harass Ms. Bello for performing her professional duties.

Interestingly, it was Respondent's own inability to let go of his feelings toward Ms. Bello that brought matters to a head. He was the one who initiated a formal District investigation by going to Mr. Lopez in September to lodge a complaint against Ms. Bello. That complaint led Ms. Bello to inform the District about Respondent's conduct and to share the memoranda and recordings she had made of their interactions. Had he been able to control his anger and keep his opinions to himself, Ms. Bello would probably not have come forward; she had

kept the details of their interactions to herself, aside from confiding a part of the story to Mr. Wichmann and Ms. Hutchinson in August.

Respondent has argued that these tenure charges are not warranted because Respondent's conduct was limited to a two-month period of time, during which school was not in session. I note that it was Respondent who went to Mr. Lopez in September with complaints, when the new school year was underway. Furthermore, I reject Respondent's argument that the normal operations of Selzer were not affected, and no one observed any conflict between Respondent and Ms. Bello. The fact that Ms. Bello did not launch a formal complaint against his behavior does not mean that she was unaffected: she documented her response at the time, and she sought advice from an attorney whose firm specializes in sexual harassment. Certainly, based upon her own testimony and the testimony of Mr. Triggiano, Dr. Poidomani and Mr. Wichmann, all of whom witnessed her distress, she did, indeed suffer and was harmed by his conduct.

Not only District leadership, but also staff at Selzer knew something was wrong between Respondent and Ms. Bello. Respondent's own witness, Ruth Keenan, the school secretary, knew that there was some "strain" between Respondent and Ms. Bello, and knew that it was due to the music interviews in July, because Respondent told her so, mentioning Ms. Bello. Respondent also told Ms. Keenan he did not "care for" Mr. Wichmann; asked her about the frequency of Mr. Wichmann's calls to Ms. Bello; and expressed the opinion that Mr. Wichmann should have called him. Ms. Keenan knew that Respondent learned about those conversations because Ms. Bello told him about them. While

Ms. Keenan testified that she did not observe any difference in the behavior of either Respondent or Ms. Bello to indicate they were upset during the summer months, she certainly was aware of tensions between them.

Respondent implies that he and Ms. Bello were equally to blame for the "conflict," describing the situation as one of "friction" between two District employees. I cannot accept this interpretation of the facts that were presented to me. What is abundantly clear is that Respondent alone was responsible for the "friction" between himself and his vice principal: he was the one who brought the subject up repeatedly; he was the one who made demands on her to perform her job as Supervisor of Music and Art in a uncivil and unprofessional manner. And he was the one who spoke of his inability to "get her out of his head" – to stop thinking about their close relationship and how he believed it had been destroyed by Mr. Wichmann. Respondent argues in his post-hearing brief that Ms. Bello was the one who "raised the issue again during the recorded conversation of August 12, 2019," thus resurrecting issues between the two of them that had died down after early July. However, that interpretation is belied by Ms. Bello's testimony and by the transcript itself. Respondent was the one who invited her to come into his office to talk on that day, and very early in the conversation Respondent was the one who raised the issue of Ms. Bello's conversation with Mr. Wichmann on July 26, which he had continued to worry about on his vacation. (See D. 2, Tr. at 13)

Further, this was not a conflict between two peers: Respondent was Ms. Bello's supervisor, in a position of power over her, and he had a professional

obligation to behave in a non-threatening, supportive manner. In any event, the behavior of the two was not equivalent: his behavior toward his subordinate was way "over the top," personal and threatening, while her behavior was always polite, professional and restrained. Respondent argues that because he did not have the authority to actually prevent Ms. Bello from getting tenure or to fire her, his threats to "write her up" and to go to Mr. Triggiano to secure her removal from Selzer, were innocent. Again, I cannot agree. As her supervisor, talking to Dr. Poidomani and Mr. Triggiano about denying her tenure because she applied for a job out of the District, was inappropriate. And his threats to write her up, to put negative information in her file, and speaking to Mr. Triggiano about her employment and otherwise removing her from Selzer School were as substantive as they were improper. She did nothing to merit negative censure: the weight of credible evidence establishes that she did inform him of the music interviews on July 9, which, in any case, were not within his purview, but were properly under the direction of Mr. Wichmann as Dumont High Principal. His repeated threats nevertheless to penalize her were retaliatory and harassing and grew more inappropriate as the summer progressed into the fall.

Respondent also argues that the profane and hostile language he unleashed about Mr. Wichmann somehow doesn't count, because he has not been charged with conduct unbecoming toward Mr. Wichmann, only toward Ms. Bello. This is a specious argument. In Count II, the District has charged Respondent with acting in an "irrational, mean-spirited and inappropriate fashion in his conversation about Mr. Wichmann with Ms. Bello." (Par. 2) The District also

charged that Respondent 's "irrational and counter-productive insistence that Ms. Bello have as little contact as possible with Mr. Wichmann, was inappropriate, contrary to the best interests of the [District] and constitutes conduct unbecoming...." (Par. 3) Thus, Respondent's language about Mr. Wichmann is certainly part of these tenure charges and is part of the evidence that he engaged in conduct unbecoming a District administrator. The fact that he made Ms. Bello listen to his diatribes and pressured her to buy into his view of Mr. Wichmann only exacerbates the inappropriateness of his conduct.

Finally, I find no merit to Respondent's contention that the charges against him are fatally flawed because the District did not hold a second mediation session with him and Ms. Bello after Mr. Lopez completed his investigative report. Respondent cites to the Board's Healthy Workplace Environment Policy. (D. 12) In particular he cites the following language:

> If the investigation determines conduct prohibited by this policy has taken place, the Superintendent or designee will meet with the offender(s) and the victim(s) to review the investigation results and to implement remedial measures to ensure such conduct does not continue or reoccur. Appropriate disciplinary action may be taken depending on the severity of the conduct.

First it must be noted that Respondent, himself, did not adhere to this policy. The policy states that an employee who believes inappropriate conduct has been directed at him, "*shall* submit a written report to the Superintendent of Schools." (Id., emphasis added.) Respondent was the person who initiated the investigation by Mr. Lopez, yet, despite repeated requests, he never submitted his complaints in writing. Further, while the policy states that the Superintendent

or his designee will meet with the offender and victim, it does not state that it will meet with them *together*. More importantly, the policy makes it clear that where the misconduct uncovered in an investigation is "severe," disciplinary action may be taken. That is what the Board decided was appropriate after reviewing Mr. Lopez's report. The policy does not require a meeting with offender and victim before discipline is initiated. And, as the District has pointed out, Mr. Triggiano did bring Respondent and Ms. Bello together to try to resolve Respondent's complaints about her. When that proved futile, the Board was within its authority to proceed with disciplinary action after it received Mr. Lopez's report.

Respondent has cited several cases for the proposition that Respondent's behavior was less serious than the behavior of other tenured personnel where dismissal was not upheld. I find those cases to be so factually distinct from the present case as to be of no analytical value. First, all but two cases involved tenure charges against teaching personnel; one case involved a computer operator/secretary. As discussed below, principals play a very different role than teachers in a school district. Second, in four of the cases, the misconduct alleged was against students: leaving students unattended in a classroom (*Irvington v. Roca-Rodi (2014)*); swearing, being offensive and/or demeaning *(Paterson v. Vincenti (2014));* kissing a student on the cheek, taking a student to a play without informing the school (*Pittsgrove v. Boyle (2014));* yelling at students, making them line up by race (*Jersey City v. Harris (2015)).* The remaining cases included consuming alcohol on the job, which resulted in a last chance agreement (*Greater Egg Harbor v. Zepralka (2015));* a union rep becoming

abusive toward an administrator while raising a grievance (*Paterson v. McEntee (2017)*); and a technology instructor disconnecting the loudspeaker connected to the school alarm, thus endangering students (*South Hackensack v. Masullo (2017)*). In each case, a substantial penalty was imposed upon the tenured employee, although discharge was not upheld.

The one case cited by Respondent that is most similar factually to the present case is *Monroe Township v. Becker* (2020). There a tenured Vice Principal was brought up on charges because on one occasion he told a person, "If you call me 'amigo' again, I'll fucking kill you." The respondent underwent a psychiatric evaluation, which found he did not have a problem with anger management. Because this was a single isolated incident, his ten years of good evaluations mitigated against termination; instead he was ordered to serve a thirty-day unpaid suspension.

Respondent's position and conduct are in no way comparable to the cited cases. A school principal is in a position of great responsibility. He is not only the academic leader of the school community; he is also responsible for implementing all District policies and modeling behavior that is expected of employees and students. As a supervisor, he is particularly responsible for treating all students, faculty, and staff with respect, dignity and fairness. When, as here, the principal abuses his position to demean and harass others in the District and in his own school, over a period of months, and despite the District's intervention, that is misbehavior that undermines the essential requirements of his position. Further, unlike the Vice Principal who was threatening and

intemperate on one occasion, here we have more egregious and repetitive conduct that went on for a period of at least two months and evidenced disrespect toward District officials and harassment of a subordinate.

Respondent argues that he should be returned to his position with no penalty at all, except, perhaps, some training. However, Respondent has expressed no recognition that his conduct was inappropriate and no regret or remorse. Thus, he cannot be expected to change. It is indeed unfortunate that after 40 years of unblemished service to the District, Respondent will end his career this way. But his conduct was totally unacceptable. His pursuit of emotional vendettas against Mr. Wichmann and Ms. Bello and his inappropriate expressions of love and pressure on Ms. Bello for a close personal relationship, all constitute conduct unbecoming a Principal and disqualify him from administrative leadership in the District.

With regard to the particular tenure charges, I make the following findings:

COUNT I

1. "Mr. Podesta's inappropriate actions toward Ms. Bello, including physical contact, purchasing of gifts for Ms. Bello, and professions of love for Ms. Bello, constitute conduct unbecoming a tenured principal." This charge is sustained.

2. "Mr. Podesta's inappropriate conduct constitutes conduct unbecoming a tenured employee and mandates the termination of his employment as a tenured employee in the Dumont School District." This charge is sustained.

COUNT II

1. "Mr. Podesta's supervision of and interactions with Ms. Bello have

frequently been inappropriate and inconsistent with the duties of a tenured Principal in the Dumont School District." This charge is sustained.

2. "Mr. Podesta has acted in an irrational, mean-spirited, and inappropriate fashion in his conversations about Mr. Wichmann with Ms. Bello." This charge is sustained."

3. Mr. Podesta's irrational and counter-productive insistence that Ms. Bello have as little contact as possible with Mr. Wichmann was inappropriate, contrary to the best interests of the Dumont School District and constitutes conduct unbecoming a tenured employee in the Dumont School District." This charge is sustained.

4. "Mr. Podesta's retaliation against Ms. Bello for his subjective and incorrect assumption that Ms. Bello was acting in an "insubordinate and disloyal" manner toward him constitutes conduct unbecoming a tenured employee in the Dumont School District. This retaliation included, without limitation, Mr. Podesta's threats to fire Ms. Bello." This charge is sustained.

5. "Mr. Podesta, in his irrational, self-absorbed, and unfair treatment of Ms. Bello, has engaged in conduct unbecoming a tenured employee in the Dumont School District." This charge is sustained.

6. "Mr. Podesta's conduct, as described above, mandates the termination of his employment as a tenured employee in the Dumont School District." This charge is sustained.

AWARD

The District has established Counts I and II. The proven allegations are serious and constitute grounds for termination of tenure. Accordingly, Respondent's dismissal for conduct unbecoming is upheld.

Ruth Moscovitch

Ruth Moscovitch, Arbitrator

Date: June 23 2020

ACKNOWLEDGMENT

STATE OF New Hampshire)
) ss.:
COUNTY OF Carroll)

On June 23rd 2020 RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

Alison J. Gage

Notary Public
My Commission expires

ALISON J. GAGE
Notary Public - New Hampshire
My Commission Expires July 27, 2023

135-20

SEC Dkt. No. T12-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T12-19.pdf)
Agency Dkt. No. 114-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Richard Norris,
Board of Education of the City of Pleasantville,
Atlantic County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is removed, as of the date of this decision, from his position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/2020
Date of Mailing: 7/1/2020

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

136-20

SEC Dkt. No. T18-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T18-19.pdf)
Agency Dkt. No. 115-5/20

New Jersey Commissioner of Education
Final Decision

In the Matter of Peter Micera,
Board of Education of the Northern Valley Regional High School District, Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's May 19, 2020 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is suspended, as of the date of this decision, from his position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/2020
Date of Mailing: 7/1/2020

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

137-20

SEC Dkt. No. T25-19 (https://www.state.nj.us/education/legal/ethics/training/2020/125-19.pdf)
Agency Dkt. No. 116-5/20

New Jersey Commissioner of Education

Final Decision

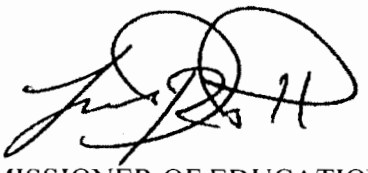
In the Matter of Thomas Bardinas,
Board of Education of the Borough of
Bradley Beach, Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is removed, as of the date of this decision, from his position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/2020
Date of Mailing: 7/1/2020

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

138-20

SEC Dkt. No. T27-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T27-19.pdf)
Agency Dkt. No. 117-5/20

New Jersey Commissioner of Education
Final Decision

In the Matter of Margaret Baldwin,
Board of Education of the Village of
Loch Arbour, Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is removed, as of the date of this decision, from her position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/2020
Date of Mailing: 7/1/2020

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

139-20

SEC Dkt. No. T28-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T28-19.pdf)
Agency Dkt. No. 118-5/20

New Jersey Commissioner of Education
Final Decision

In the Matter of Maureen Sherlock,
Board of Education of the Village of
Loch Arbour, Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is removed, as of the date of this decision, from her position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/2020
Date of Mailing: 7/1/2020

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

140-20

SEC Dkt. No. T30-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T30-19.pdf)
Agency Dkt. No. 119-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Victoria Galasso,
Board of Education of the Township of
Elsinboro, Salem County.

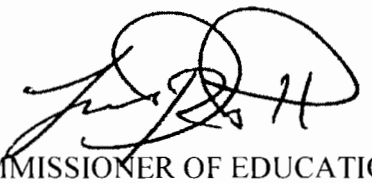
The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's May 19, 2020 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is suspended for 30 days, as of the date of this decision, from her position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/2020
Date of Mailing: 7/1/2020

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

141-20

SEC Dkt. No. T33-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T33-19.pdf)
Agency Dkt. No. 120-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Adam Robinson,
Board of Education of the Borough of
Washington, Warren County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the SEC recommends that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is removed, as of the date of this decision, from his position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/2020
Date of Mailing: 7/1/2020

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

143-20

SEC Dkt. No. T24-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T24-19.pdf)
Agency Dkt. No. 108-5/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Kenneth Saunders,
Board of Education of the City of
Asbury Park, Monmouth County.

The Commissioner[1] has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

[1] This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

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

IT IS SO ORDERED.[2]



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 7/1/2020

Date of Mailing: 7/2/2020

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

144-20

New Jersey Commissioner of Education

Final Decision

J.A., on behalf of minor child, K.M.,

Petitioner,

v.

Board of Education of the Township of Middletown, Monmouth County,

Respondent.

Synopsis

Pro se petitioner challenged the determination of the respondent, the Board of Education of the Township of Middletown, that petitioner is not domiciled in Middletown Township and that K.M. is therefore not eligible to receive a free public education in the district. The Board asserted that petitioner has admitted she now lives in Keansburg but wanted to have K.M. continue his education in Middletown Township schools; the Board argued that the appeal is without merit and that petitioner's request for relief has no basis in law. The Board filed a motion to dismiss the petition.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public school is free to children domiciled within the school district, and the domicile of a child follows that of the parent; in this case, it is undisputed that petitioner no longer lives in Middletown; petitioner is cognizant of the fact that K.M. is not eligible to continue his education in the District; petitioner failed to respond to the Board's motion to dismiss, failed to appear on a scheduled conference call, and did not offer the OAL "an explanation for the nonappearance within one day" of the petitioner's non-appearance within the meaning of *N.J.A.C.* 1:1-14.4(a). The ALJ concluded that a plain reading of *N.J.A.C.* 1:1-14.4(a) required the matter to be returned to the transmitting agency for appropriate disposition. According, the ALJ granted the Board's motion to dismiss and ordered that the case be returned to the Department for appropriate disposition pursuant to *N.J.A.C.* 1:1-3.3(b) and (c).

Upon review, the Commissioner concurred with the ALJ's finding that petitioner admitted she was not a domiciliary of Middletown for the 2019-2020 school year, and further concurred that K.M. was not entitled to a free public education in the district's schools during that time. Accordingly, pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner directed petitioner to reimburse the Board in the amount of the district's annual per pupil cost for the 2019-2020 school year. In so doing, the Commissioner noted that it was not necessary for the OAL to administratively return the file to the agency since the ALJ's conclusions on the merits of the case were sufficient to grant the Board's motion to dismiss.

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.

144-20

OAL Dkt. No. EDU 00482-20
Agency Dkt. No. 321-12/19

New Jersey Commissioner of Education

Decision

J.A., on behalf of minor child, K.M.,

Petitioner,

v.

Board of Education of the Township of Middletown, Monmouth County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner admitted that she was not a domiciliary of Middletown for the 2019-2020 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the school district during that time.[1]

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time-period during which the minor children were ineligible to attend school in Middletown. Therefore, the Board is entitled to tuition reimbursement equal to its annual per

[1] Despite reaching this conclusion, the ALJ did not render a decision on the Board's motion to dismiss. Instead the ALJ based his determination on petitioner's failure to participate in the hearing process, and administratively returned the file to the agency pursuant to *N.J.A.C.* 1:1-3.3. However, it was not necessary for the OAL to administratively return the file to the agency since the ALJ's conclusions as to the merits of the case are sufficient to grant the Board's motion to dismiss.

pupil cost for the 2019-2020 school year, during which time petitioner's minor child was ineligible to attend school in respondent's district.

Accordingly, the Board's motion to dismiss the petition of appeal is granted. Petitioner is directed to reimburse the Board in the amount of the district's annual per pupil cost for the 2019-2020 school year, the time-period in which K.M. was ineligible to attend school in Middletown.

IT IS SO ORDERED. [2]



COMMISSIONER OF EDUCATION

Date of Decision: 7/1/2020
Date of Mailing: 7/2/2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING MOTION TO DISMISS

OAL DKT. NO. EDU 00482-20
AGENCY DKT. NO. 321-12/19

J.A. on behalf of minor child, K.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

J.A. on behalf of minor child, K.M, pro se

Afshan Ajmiri Giner, Esquire, for respondent (Florio, Perrucci, Steinhardt and Cappelli, LLC, attorneys)

Record Closed: May 14, 2020 Decided: May 22, 2020

BEFORE **DEAN J. BUONO,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF CASE

Petitioner, J.A. on behalf of minor child, K.M., challenges respondent, Board of Education for the Township of Middletown's, (Board/District) finding that petitioner does

not live within the District and is not domiciled in the District. As such, petitioner is required to reimburse the District for tuition.

On January 10, 2019, the Department of Education, Office of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), where it was filed 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. In lieu of filing an answer to the petition, the Board filed a motion to dismiss. The undersigned conducted a telephone conference with the parties and instructed the petitioner to file a response to the motion to dismiss by March 20, 2020. I also instructed her that the response need not be formal, a simple letter would suffice. On May 14, 2020, the undersigned conducted another telephone conference in an effort to ascertain petitioner's position on the motion. Petitioner failed to appear for the telephone conference. However, petitioner indicated to my assistant that she is "essential personnel" and could not participate in the conference. My assistant offered petitioner, through e-mail, a time change for the conference call to 12 noon or another time in the morning of May 14, 2020, to accommodate petitioner, but no response was received from petitioner.

Interestingly, this case does not present divergent facts. Respondent argues that the Board properly investigated and determined domicile. Petitioner argues that they "moved out of the District" but would "like my son to continue his education in Middletown because of his IEP and recommendations of his therapist and child study team. Changing schools would be a detriment to his education and mental health." (Pro Se Residency Appeal.)

FACTUAL DISCUSSION

Most of the salient facts surrounding this matter are not in dispute and represent the history of this case by their respective parties. Having reviewed the brief in support of the motion to dismiss, **I FIND as FACTS:**

Petitioner is a former resident of Middletown, New Jersey. On July 25, 2019, petitioner entered into a lease agreement for a term of three years for a property located

in Keansburg, New Jersey. (Exhibit B.) Keansburg is a borough in New Jersey, wholly separate from the Middletown educational district. Keansburg has its own school district, and students living in Keansburg are not eligible to attend school in the Middletown District as they are not domiciled in Middletown, New Jersey. Petitioner was notified of K.M.'s ineligibility to attend school in the District in October 2019 and then again in November 2019, as petitioner admittedly moved to Keansburg, New Jersey. (Exhibit C.) Nevertheless, petitioner insisted that K.M. remain in the District's schools and receive special education and related services; notably, the same services are available to K.M. in Keansburg. (Exhibit D.)

On November 1, 2019, the District sent petitioner a Notice of Initial Determination of Ineligibility, stating that petitioner was not domiciled in the District as her permanent address was in Keansburg, New Jersey. (Exhibit E.) The District further advised petitioner of her right to appear before the Board for a residency hearing.

On November 20, 2019, petitioner appeared before the Board for a residency hearing, during which, petitioner was again apprised of the residency requirements. The Board also gave petitioner the opportunity to share her position and considered her circumstances; following which, the Board made a determination that K.M. was not eligible to remain in the District's schools. A Notice of Final Determination of Ineligibility was issued and sent to petitioner finding that K.M. was not domiciled in the District, and therefore, ineligible to attend the District's schools. (Exhibit F.)

On or about December 11, 2019, petitioner filed a residency appeal, wherein she admitted that she moved out of the District but would like to keep K.M. enrolled in the District. See Exhibit A.

LEGAL ARGUMENT AND CONCLUSION

"Specific pleading requirements are governed by the agency with subject matter jurisdiction over the case." N.J.A.C. 1:1-6.1(a). The rules require that a "petition shall include . . . a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws." N.J.A.C. 6A:3-1.4(a). When

deficient and inadequate petitions are presented to the Commissioner, at any time prior to transmittal of the pleadings to the OAL—in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer—the Commissioner may dismiss the petition on the grounds that the petitioner has not advanced any cause of action, even if the petitioner's factual allegations are accepted as true. See N.J.A.C. 6A:3-1.10.

In fulfilling their quasi-judicial responsibilities, state agencies look to judicial principles for guidance. Hackensack v. Winner, 82 N.J. 1, 28-30 (1980). "[C]ourt-fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." Id. at 29. The New Jersey Supreme Court further held,

> many principles and rules that govern judicial proceedings and determinations can be applied to an agency's quasi-judicial or adjudicative function. Judicial rules of procedure and practice are transferrable to administrative agencies when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications.
>
> [I/M/O Tenure Hearing of Onorevole, 103 N.J. 548, 554-55 (1986).]

Thus, the principles which govern a motion to dismiss for failure to state a claim under R. 4:6-2(e) apply equally to a motion to dismiss to advance a cause of action under N.J.A.C. 6A:3-1.10.

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted under R. 4:6-2(e), "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. State, Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (emphasis added). The court may not consider anything beyond whether the complaint states a cognizable cause of action. Id. For purposes of determining the motion, the court must "assume the facts as asserted by [petitioners] are true and give [them] the benefit of all inferences that may be drawn in [their] favor." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). If the complaint states no basis for relief and discovery would not supply one, dismissal is the appropriate remedy. Banco Popular N. Am. v. Gandi, 184

N.J. 161, 166 (2005). If the factual allegations are "palpably insufficient to support a claim upon which relief can be granted," the court must dismiss the complaint. Rieder. Moreover, it "runs against the grain of public policy to force a public entity to incur the cost of defending an action that ultimately and undoubtedly will be dismissed on the merits." Tryanowski v. Lodi Bd. of Educ., 274 N.J. Super. 265, 268-69 (Law Div. 1994) (emphasis added).

In New Jersey, a person between the ages of five and twenty years old is entitled to a free public education in the district in which they reside or is domiciled. See N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). Domicile is defined as "the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning." R.O.G., on behalf of minor children, G.G.G. and G.O.G. v. Bd. of Educ. of the Twp. of Union, Union County, OAL Dkt. No. EDU 05034-18, Comm. Dec. No. 236-18 (Aug. 9, 2018) (internal citations and quotation marks omitted). It is uncontroverted that a unemancipated child's domicile is that of their parents. See Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989); Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ., 283 N.J. Super. 505 (App. Div. 1995). Therefore, a child is deemed a resident of a school district if the child's parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." See S.F., on behalf of minor child, R.F. v. Bd. of Educ. of the City of Orange, Essex County, OAL Dkt. No. EDU 18797-17, Comm. Dec. No. 354-18 (Nov. 8, 2018) (internal citation omitted).

In an appeal of a residency determination by a local board of education, the burden of proof is on the petitioning parent or guardian, who must prove by a preponderance of the evidence that the child is eligible to attend school in the district. See N.J.S.A. 18A:38-1b(2) ("The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and . . . shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education. . . .") (emphasis added.) The Commissioner has found that in

considering the merits of a residency appeal, the evidence must be reviewed "to determine whether it supports the claims of the parent or guardian." See R.E. and S.M., on behalf of minor child, N.E. v. Bd. of Educ. of the Twp. of Union, Union County, OAL Dkt. No. EDU 04252-18, Comm. Dec. No. 238-18 (Aug 8, 2018). The Commissioner further explained that "[o]nce a board has reasonably determined that the parents/guardians do not reside in the district, the burden to establish domicile in an appeal of that decision is on the parents/guardian[,]" and therefore, "the query and subsequent findings should be centered on whether petitioners have supported their claims by a preponderance of the evidence." Id. (emphasis added.)

Therefore, in order to prevail in this matter, petitioner must prove by a preponderance of the evidence that she is domiciled in the District and K.M. is eligible to attend school in the District. Petitioner is unable to establish that she is domiciled in the District. In fact, by her own admission, they no longer reside in the District. If one examines the three-year lease agreement from July 25, 2019, for a property located in Keansburg, New Jersey, it further corroborates that petitioner has been residing in a home in Keansburg, since the commencement of the 2019-2020 school year. Petitioner cannot prove by a preponderance of the evidence that she is domiciled in the District and that K.M. is eligible to attend the District's schools.

It bears noting that the educational programming and services offered in a school district, is not a consideration when determining a student's eligibility to attend school in said district. Furthermore, whether an ineligible student should be allowed to remain in a school district is not based upon the educational program/services available in that district. To find otherwise, would be contrary to law and would pose an undue burden on school districts to educate students who are not entitled to a free public education in those districts. The applicable statutes and regulations setting forth the requirements for school eligibility, and the exceptions thereof, do not take into account the specific programs and/or services in a school district as a factor in determining student residency. The query is clear and simple: whether you are domiciled or reside in the school district. Petitioner's sole basis for seeking K.M.'s continued enrollment in the District—the educational program/services offered by the District—despite clearly having moved out of the District, is not appropriate for consideration in this matter.

Notwithstanding the irrelevance of the educational programming and services in the ultimate consideration of this matter, the Board notes that the Keansburg school district can offer the same program and services to K.M. See Exhibit D.

It is undisputed that petitioner does not live in Middletown, New Jersey. Petitioner is also cognizant of the fact that K.M. is not eligible to continue his education in the District. Despite such, and even after having admitted that petitioner no longer resides in Middletown and that K.M. is not entitled to attend the District's schools. Respondent argues that the residency appeal is without merit and petitioner's request for relief has no basis in law. Allowing petitioner to pursue this matter any further duly burdens the Board and goes against the grain of public policy. However, we are not able to pursue that or any opposing facts because petitioner failed to participate in the process.

Moreover, the respondent's Notice of Motion in Lieu of an Answer was filed seeking dismissal of the petitioner's petition pursuant to N.J.A.C. 1:1-14.4. Under N.J.A.C. 1:1-14.4:

> (a) If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).
>
> (b) If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.
>
> (c) If the judge receives an explanation:
>
> 1. If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing; or

> 2. If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may reschedule the matter and, at his or her discretion, order any of the following:
>
> i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;
>
> ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or
>
> iii. Such other case-related action as the judge deems appropriate.
>
> (d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

Based upon the facts as detailed, **I CONCLUDE** that the petitioner was provided with appropriate notice of the motion to dismiss and how to reply as well as a scheduled proceeding, namely a telephone conference call which was to be held on May 14, 2020, at 3:00 p.m. The petitioner was provided written notice of the motion to dismiss and the scheduled telephone conference. Also, petitioner concedes in her communications with the OAL that she was aware of the scheduled call and reported that she is essential personnel and her boss would not let her participate in the scheduled conference. Despite receiving appropriate notice, of the motion and telephone call, neither the petitioner responded to the motion to dismiss nor appeared on the scheduled conference call. The petitioner has further been unresponsive to subsequent efforts by OAL staff to communicate with her regarding a follow-up telephone conference and her pending hearing date on August 19, 2020.

Although the OAL received a communication from the petitioner regarding her failure to appear on the scheduled conference call, the OAL did not receive "an

explanation for the nonappearance within one day" of the petitioner's non-appearance within the meaning of N.J.A.C. 1:1-14.4(a). Having not received an explanation from the petitioner to explain her non-appearance on the conference call, N.J.A.C. 1:1-14.4 directs that this tribunal "shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c)." As the respondent has not requested a decision on the merits of the matter be issued ex parte, no further proceedings pursuant to N.J.A.C. 1:1-14.4(d) are necessary. This tribunal, therefore, is left only with the mandate that the matter "shall" be returned to the transmitting agency for appropriate disposition. N.J.A.C. 1:1-14.4(a).

The use of the term "shall" in N.J.A.C. 1:1-14.4(a) is generally construed as mandatory as opposed to the statutory use of the term "may" which is permissive or directory. Franklin Estates, Inc. v. Edison, 142 N.J. Super. 179, 184 (App. Div. 1976). I **CONCLUDE** that the petitioner has been dilatory in prosecuting her appeal, effectively abandoning the prosecution of her petition, has been unresponsive to communications from the OAL regarding her pending matter, and failed to present good cause in a timely manner as to why her failure to appear for a scheduled conference should be excused pursuant to the provisions of N.J.A.C. 1:1-14.4(c). She has also failed to reply to a motion to dismiss. A plain reading of N.J.A.C. 1:1-14.4(a), therefore, requires that the matter now be returned to the transmitting agency for appropriate disposition. See also N.J.A.C. 1:1-3.3(b).

ORDER

Based on the foregoing, the respondent's motion to dismiss the petition is **GRANTED** and I **ORDER** that the clerk return the case to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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

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

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

May 22, 2020
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 5-22-2020

Date Mailed to Parties: 5-22-2020

mph

EXHIBITS:

For petitioner:

None

For respondent:

Motion to Dismiss with attached exhibits

145-20

New Jersey Commissioner of Education

Final Decision

A.J., on behalf of minor child, J.J.,

Petitioner,

v.

Board of Education of the Town of Boonton, Morris County,

Respondent.

Synopsis

Petitioner appealed the respondent Board's determination that J.J. committed an act of harassment, intimidation and bullying (HIB) in violation of New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, when he said the "n" word to some classmates and was overheard by another student, who complained to one of the school guidance counselors; an HIB investigation subsequently ensued and concluded that an act of HIB had occurred; J.J. denied using the "n" word on the morning in question but noted a distinction between two forms of the word, one ending in "er" and the other with "a"; J.J. admitted that he sometimes used the "a" form of the word among close friends, as a term of familiarity or endearment. A hearing in the matter was held at the Office of Administrative Law (OAL) on January 13, 2020.

The ALJ found, *inter alia*, that: the Act defines HIB as any gesture, written, verbal or physical act, or electronic communication that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, and must also substantially disrupt or interfere with the orderly operation of the school; while the Act does not limit "distinguishing characteristic" to those specified in the statute, it has consistently required such a perceived motivation; here, the Board acknowledged that the comment in question, regardless of who said it, was not directed at the complainant, and the complainant did not initially know the identity of the person who she claimed uttered the "n" word, until she identified him through photographs. The ALJ concluded that the Board failed to establish that J.J. said the "n" word on the morning in question; accordingly, any resulting HIB violation and/or code of conduct violation in this matter must be overturned.

Upon review, the Commissioner reversed the Initial Decision of the OAL and affirmed the Board's determination of HIB. In so doing, the Commissioner found, *inter alia*, that: the record contains sufficient credible evidence to support the Board's decision that J.J. said the "n" word; while the evidence may leave room for two opinions regarding whether J.J. made the statement, it is insufficient to overturn the Board's decision, which was not arbitrary, capricious or unreasonable; and the Commissioner is not permitted to substitute his judgment for that of the Board.

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.

145-20

OAL Dkt. No. EDU 10470-19
Agency Dkt. No. 158-7/19

New Jersey Commissioner of Education

Decision

A.J., on behalf of minor child, J.J.,

Petitioner,

v.

Board of Education of the Town of Boonton, Morris County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed.

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by J.J. The Board found that J.J. had committed an act of HIB when he said the "n" word to some classmates and it was overheard by another student (complainant). The Administrative Law Judge found that J.J. did not say the word on the morning in question and overturned the Board's finding that J.J. had committed an act of HIB.

In its exceptions, the Board argues that the ALJ applied the incorrect legal standard when he concluded that the Board failed to establish that an act of HIB took place. The Board cites to case law establishing that its decision should not be overturned unless it is arbitrary or capricious. The Board also recounts its evidence demonstrating that the act did occur, such that it meets even the ALJ's improperly applied preponderance of the evidence standard. The Board further contends that the ALJ was factually incorrect when he found that J.J. denied making the statement during his initial interview with the district's HIB investigator, pointing to the investigation report which listed J.J.'s attempts to explain his

behavior. Moreover, the Board argues that J.J. was not a credible witness when he denied making the statement during the OAL hearing, as that testimony conflicted with prior statements.

In reply, petitioner argues that J.J. did not say the "n" word and never admitted to saying it. Petitioner notes that the Investigation Report indicates that the statement was made without malicious intent. Petitioner takes issue with the investigator's techniques while interviewing J.J. and subsequent procedures of the district in addressing the complaint.

Upon review, the Commissioner disagrees with the ALJ's conclusion that J.J. did not say the "n" word. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974). Based on the evidence in the record, the Commissioner finds that petitioner did not meet his burden of demonstrating that the Board's decision was arbitrary, capricious, or unreasonable. The record contains sufficient credible evidence to support the Board's decision that J.J. said the "n" word, including the complainant's statements and the staff's review of corroborating video evidence. While petitioner presented evidence showing that J.J. did not make the statement, including his denials and the denials of his friends who were interviewed, at best this evidence balances the evidence that he did make the statement.[1] While the evidence may leave room for two opinions regarding whether J.J. made the statement, it is insufficient to overturn the Board's decision, because it does not demonstrate

[1] The ALJ did not make specific credibility findings regarding the witnesses' testimony, which makes the precise weight of each party's evidence difficult to determine. For purposes of this decision, the Commissioner assumes that the ALJ found petitioner's witnesses credible, but nonetheless reaches the same legal conclusion regarding the standard of review.

that the decision was arbitrary, capricious, or unreasonable. To overturn the Board's decision would require the Commissioner to substitute his judgment for the Board's, which is impermissible.

The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements.[2] First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

Regarding the first element, in defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that

[2] The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. The parties do not contest that this requirement has been met.

perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra.* Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis. Here, it was not arbitrary, capricious, or unreasonable for the Board to conclude that the complainant reasonably perceived J.J.'s use of a racial slur as being motivated by the distinguishing characteristic of race.[3]

Regarding the second element, the complainant told school staff that she did not want to come to school because the "school is racist.". (Initial Decision at 5) The school's anti-bullying specialist testified that the complainant's statement demonstrated a substantial disruption of the student's rights, and the district's superintendent agreed, testifying that the district does not want the children to come to a school "where they feel that they will be discriminated against on any level." (Initial Decision at 8) The Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that the use of a racial slur interferes with the rights of other students to attend school in a bias-free setting, and that J.J.'s comment substantially disrupted the complainant's rights.

Regarding the third element, an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . .". *N.J.S.A.* 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that his actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know. *Wehbeh, supra.* As such, a board of education can find that an individual committed an act of HIB even if the individual did not

[3] Petitioner has argued both that he did not say anything on the morning in question, and that if he did say anything, there is a distinction between two variations of the "n" word, one ending in "a" and one ending in "er." The Board has argued that the word is offensive in either form, and two of its witnesses testified that they have informed students that the district considers both forms to be inappropriate. J.J. himself indicated on cross-examination that some African-American students would object to either form of the word. The Commissioner agrees that either form of the word can be the basis for a finding of HIB.

intend to cause harm. Here, the Board found that J.J.'s use of the "n" word was insulting or demeaning, satisfying *N.J.S.A.* 18A:37-14 of the Act. The Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that J.J.'s use of a racial slur was insulting or demeaning.

Accordingly, the Initial Decision is reversed, and the Board's determination that J.J. committed an act of HIB is affirmed.

IT IS SO ORDERED. [4]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: 7/10/2020
Date of Mailing: 7/15/2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10470-19
AGENCY DKT. NO. 158-7/19

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

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,

Respondent.

A.J. o/b/o **J.J.**, petitioner pro se

James L. Plosia, Jr., Esq., for respondent (Plosia Cohen, attorneys)

Record Closed: March 19, 2020 Decided: April 9, 2020

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner, A.J., disputes respondent Boonton Board of Education's harassment, intimidation, or bullying (HIB) investigation regarding his minor son, J.J., and the Board's subsequent finding that an HIB violation occurred. Petitioner also disputes

any corresponding code-of-conduct violation. The child, J.J., is accused of uttering the "n" word to a group of two or three friends during a conversation. A third-party minor child ("target") who is African-American overheard the utterance, became incensed, and complained to the administration. The target did not see which one of the youths in the group uttered the "n" word, but she was subsequently able to identify J.J. as the bad actor after a school district employee provided her with a copy of the yearbook, which contained pictures of the target's schoolmates for her to select from.

ISSUE

Do the facts here constitute an HIB violation under the Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13?

PROCEDURAL HISTORY

Petitioner filed the instant petition with the New Jersey Commissioner of Education, where it was received on July 2, 2019, by the Office of Controversies and Disputes.

The matter was transmitted as a contested case to the Office of Administrative Law (OAL), where it was received on July 31, 2019.

The matter was set down for a hearing on January 13, 2020. Final submissions were received on March 19, 2020, at which point the record was closed.

SUMMARY OF TESTIMONY

J.J.

J.J. is the minor child of petitioner A.J. On the morning of February 6, 2019, J.J. was dropped off at school by A.J. a few minutes before the bell rang. J.J. approached a small group of students he knew (two or three youths), greeted them, and waited with

them for the bell to ring. J.J. testified that these youths were already in the middle of a conversation and that he had little verbal interaction with them that morning aside from the initial greeting.

Two days later, on Friday, February 8, 2019, J.J. was summoned into the school's main office, where he was met by Principal Nosal and Ms. Maier, the school anti-bullying specialist. J.J. testified that, at the time, he did not know what he had been called there for. Upon questioning, he denied having said the "n" word on the morning of February 6, 2019.

J.J. further testified that he has been an active Boy Scout for nine years, a member of the town drum core for five years, and has played in local soccer and baseball leagues for nine years. He has also performed over 260 lifetime hours of community service through his various activities.

On cross-examination, J.J. testified that there is a difference between the "n" word spoken and written as "nigger" and that spoken and written as "niggah." He further testified that he never uses the "nigger" form, because he knows it to be disrespectful. He does, sometimes, use the "niggah" form among close friends, but only as a term of familiarity or endearment. He further testified that he used neither term on the morning in question.

Mrs. J.

Mrs. J. is J.J.'s mother. Mrs. J. testified that J.J. has had an individualized education program since preschool for attention deficit disorder, attention deficit hyperactivity disorder, and sensory issues.

Mrs. J. testified that J.J. had been disciplined by the school once before for saying the "f" word. She testified that J.J. received a one-day out-of-school suspension and a fourteen-day in-school suspension. She testified that for each of the fourteen

days of in-school suspension, J.J. would start the day reporting to the principal's office along with his mother, Mrs. J., and would be asked by the principal at the time, Dr. Caruso, if J.J. was ready to return to school. Each day J.J. would respond that he was ready, and each day Dr. Caruso would direct him to complete another day of in-school suspension until the total fifteen days was served. Mrs. J. then testified that based on her past experiences with the school, she believes her son is routinely targeted by the administration.

Mrs. J. testified that on Friday, February 8, 2019, she was contacted by Principal Nosal, and was informed that there had been an HIB complaint against her son, that it had been substantiated, and that J.J. would be receiving a suspension. She was given no further information. When she inquired about the basis for the HIB violation and corresponding code-of-conduct violation, she was informed by the principal that he could not provide her with any such information due to privacy concerns, and that for further detail she would have to ask her son, J.J. Mrs. J. requested that Principal Nosal stay the suspension until she and her husband could arrive at the school to review and discuss the incident with the administration, but Nosal declined the request and affirmed the immediate suspension of the child. No issue involving any racial slur was conveyed to Mrs. J. at the time.

Christine Maier

Christine Maier (Maier) testified on behalf of the school board. She is a guidance counselor at J.J.'s school and also the anti-bullying specialist (ABS). She has been employed for thirteen years as a guidance counselor and for more than two years as an ABS. She testified that there is no specific training to be an ABS.

Maier testified that the incident at issue was first reported by the complaining student (the target) to Mrs. Brady (Brady), who is another guidance counselor at the school, on February 6, 2019. Maier testified that she became aware of the incident the next morning, February 7, 2019, after Brady had reported the target's

complaint to Principal Nosal. Maier did not initially interview the target, but based on her review of the incident report, she understood that the target, who is an African-American student, reported to Brady that she overheard someone say the "n" word earlier in the day, while the target was standing just outside the school, waiting for the bell to ring. Maier testified that the target did not know who the individual was that made the comment. Based on the report, Maier testified that Brady then showed a yearbook to the target and asked her to look at the pictures of the students in order to identify the individual who said the "n" word. The target identified J.J. as the individual who uttered the "n" word.

Maier then read into the record the following statement from the target as recorded by Brady from the incident report: "This school is racist; I don't want to come here." The report went on to say that the target overheard another student say the "n" word to some other students and the target was upset.

Maier then testified to the factors she uses to determine if an HIB complaint exists, and applied them to the facts at hand: 1) identifying characteristic—in this case, she found that there was one, race; 2) substantial interference—in this case she found that there was substantial interference because the target became very upset and went to her guidance counselor and stated that she felt that the climate of the school was racist; and 3) violation of rights. With regard to this last category, Maier testified that there had been much debate about this among her colleagues, but she felt that anyone who belonged to a protected category has a right to enter into the "school climate" free from harassment, intimidation, and bullying. Thus, due to the racial nature of the word the target overheard, Maier found that the target's rights in this case were violated. Maier testified that the target in this instance did not know J.J., even after identifying his picture in the yearbook to Brady. Maier testified that she felt that the target's rights were violated even though the statement in question was not directed at the target and the target did not know the alleged bully.

Maier then testified that she viewed the closed-circuit video surveillance from the schoolyard on the morning in question, and that the events appeared to play out as J.J. described them during his testimony. J.J. is standing in a small group of students and the target is standing a few feet away with her back to them. At some point, the target turns around, sees J.J., and then turns to her friend and says something. The recording did not include sound, and Maier testified that one could not ascertain who, if anyone, uttered the "n" word.

On February 7, 2019, Maier interviewed four student witnesses, including the target. None of the witnesses confirmed that J.J. made the statement in question. One of the witnesses interviewed, B., who was among the small group of friends J.J. was with on the morning in question, told Maier that nothing offensive at all was uttered by anyone in the group on the morning in question.

Maier then interviewed J.J., on February 8, 2019. Maier stated that J.J. said he didn't remember anything in particular happening on the morning in question. Maier stated that she believed him. She then testified that J.J. admitted after questioning that he had, from time to time, used the word "niggah" informally in private conversations, and never with the intent to insult anyone. He noted that that version of the word could be heard used by his schoolmates hundreds of times a day, and noted, "that's how people talk." J.J. added that if someone were to be offended by eavesdropping on a private conversation, then that would be "their problem." Maier then testified that she took this comment as a tacit admission that he did, in fact, use the "n" word on the morning in question, though, she noted, not with the intent to offend anyone. She noted that this usage was "not ok."

On cross-examination, Maier testified that she called J.J.'s mother after interviewing J.J. and informed her that there was an ongoing HIB investigation regarding her son and that there was an assumption that J.J. violated the code of conduct regarding foul language. Maier testified, "We determined that we thought he said that." She further testified that she

provided no further details of the HIB investigation to Mrs. J. When Mrs. J. asked what her son was accused of, Maier told her only that "we are investigating it as an HIB but that the consequence was determined due to our assumption that he violated the code of conduct," and "the consequence was for offensive language because we determined that we thought he said that." Maier further testified that it is standard practice to have a student serve a period of suspension before the parents receive any information regarding the investigation, as long the district "believes there is a code-of-conduct violation." She noted that the punishment for the code-of-conduct violation (the fifteen-day suspension) is separate and apart from the HIB investigation.

When questioned with regard to the "substantial disruption" aspect of the HIB statute, Maier testified that she feels that any student that becomes incensed enough to lodge a complaint with the administration has experienced a substantial disruption. She added that the target here experienced a violation of her right to come to a school where she does not hear "that word."

Robert Presuto

Robert Presuto (Presuto) is the superintendent of schools for the Town of Boonton, a position he has held for five years.

Presuto first became involved in the current matter when his office received the HIB investigation report for review. He testified that the HIB statute is a law, and that as superintendent he is charged with making sure all appropriate laws and protocols, including those surrounding HIB, are followed. He testified that he ultimately affirmed the HIB-violation finding, and that the Board also affirmed this finding. Presuto explained that the Board is given the HIB investigation report after he reviews it, and that he gives the Board a brief synopsis of the report before it makes its determination. This synopsis is usually supplied by the bullying specialist. The Board then votes on whether to affirm, overturn, or ask for additional information. Presuto stated that these processes are statutorily prescribed.

Presuto testified that, in this case, the parents followed an appeal process, which occurs after the Board takes a second vote, this vote being at a public meeting, and the parents are notified.

Presuto testified that Boonton is extremely diverse and is surrounded by much less diverse communities. He stated that there are many languages spoken in the district, and that, after Spanish, the next three most common second languages are "Arabic in nature." Presuto testified that he takes the idea very seriously that the children "do not come to a school district where they feel discriminated against on any level."

Presuto then testified as to the distinction between a code-of-conduct violation and an HIB violation. He affirmed that in this case, the penalty, i.e., the fifteen-day suspension, was imposed for the code-of-conduct violation and not for the HIB violation. Presuto noted that he felt that this aspect was one of the most confusing aspects for parents to understand, that the code-of-conduct violation/penalty is not necessarily connected to the HIB investigation. He went on to say that the HIB statute specifically states that punishment for a code-of-conduct violation in the process of an HIB investigation can be put into effect immediately, even before there is a determination regarding the HIB investigation.

On cross-examination, Presuto testified that no information surrounding the HIB investigation was provided to J.J.'s parents early on. He noted that this was likely because the parents did not request any information, or they did not know that they could request such information. Presuto went on to testify that it is common practice for parents of a child accused of an HIB violation not to be provided with any information regarding the investigation while it is ongoing, because it taints the investigation. He explained that the parents of the accused HIB violator are provided with no details about the HIB investigation until after the investigation is concluded, a report is generated and reviewed by the superintendent, and a determination has

been made by the superintendent and voted on by the Board. Presuto testified that he was not intimately involved in the HIB investigation, and that his purpose was to make sure the law was followed, and a proper determination was made.

FACTUAL DISCUSSION

On the morning of February 6, 2019, J.J., a middle-school student within the district, was dropped off in front of his school by his parent. Before entering the school, he greeted a small group of classmates and waited with them for the school bell to ring. The group engaged in light conversation. Another student, the target, was standing with her back to the group and heard what she believed to be the "n" word uttered by someone behind her. Though she did not know the identity of the individual, she became upset and complained to her guidance consular, and an HIB investigation ensued.

The district acknowledges that the utterance, regardless of who said it, was not directed at the target. The district further admits that the target did not initially know the identity of the bad actor. Yet, armed with this knowledge, the district decided to conduct an HIB investigation anyway, and aided in this investigation by staging a line-up of sorts by having the target flip through photos of students until she fingered a bully.

Upon questioning, J.J. denied having said the "n" word on the morning in question, a position he reiterated under oath at the hearing. The district did not present the target as a witness, nor any other individual that heard the alleged utterance on the date in question. The only witness offered by the district that had any direct involvement in the HIB investigation, Christine Maier, testified that, aside from the target, all other students that were interviewed as part of the investigation deny that J.J. uttered any such word. Further, Maier testified that the target's back was to the group of students when the word was uttered, and affirmed that the target did not actually see any individual utter the word. Based on the foregoing, I **FIND** that J.J. did not utter the "n" word on the morning in question.

LEGAL DISCUSSION AND CONCLUSION

Under the ABRA, "harassment, intimidation or bullying" means any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as being motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property. See N.J.S.A. 18A:37-14. It must also substantially disrupt or interfere with, among other things, the orderly operation of the school. Ibid. Although the ABRA does not limit "distinguishing characteristic" to those specified in the statute, it has consistently required such a perceived motivation. See K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011). "Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying." Ibid.

The definition of "harassment, intimidation, or bullying" is reproduced below in full:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

> **a.** a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> **b.** has the effect of insulting or demeaning any student or group of students; or
>
> **c.** creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

[N.J.S.A. 18A:37-14.]

Here, the respondent Board has failed to establish that J.J. even uttered the "n" word on the morning in question. I, therefore, **CONCLUDE** that any resulting HIB violation and/or code-of-conduct violation must be overturned.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that any finding of an HIB violation and any corresponding code-of-conduct violation are hereby **OVERTURNED**, and any allegations of an HIB violation against J.J. are dismissed.

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

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

unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B10.

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

April 9, 2020

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 4/9/20

Date Mailed to Parties:

ld

APPENDIX

LIST OF WITNESSES

For Petitioner:

J.J.

Mrs. J.

For Respondent:

Christine Maier

Robert Presuto

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

None

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

KEVIN DEHMER
Interim Commissioner

July 14, 2020

VIA EMAIL

Amod S. Antarkar
81 Hartwick Drive
Skillman, New Jersey 08558

Rita F. Barone, Esq.
Purcell Mulcahy Flanagen
One Pluckemin Way
P.O. Box 754
Bedminster, New Jersey 07921

Re: *A.A., on behalf of minor child, A.A. v. Board of Education of the Township of Montgomery, Somerset County, OAL Dkt. No. EDU 04273-19, Agency Dkt. No. 238-9/18.*

Dear Parties:

I have considered the papers filed in connection with the petitioner's request for interlocutory review of this matter and the Administrative Law Judge's oral Order on June 9, 2020. Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.

Sincerely,

Kevin Dehmer
Interim Commissioner

c: Clerk. Office of Administrative Law

146-20L

148-20

New Jersey Commissioner of Education

Final Decision

G.S. and C.S., on behalf of minor child, D.S.,

Petitioners,

v.

Board of Education of the Township of Holland, Hunterdon County,

Respondent.

Synopsis

Petitioners challenged the location of the school bus stop that the respondent Board established for D.S., located one-half mile from their home, and sought an order directing the Board to provide D.S. with a bus stop at their driveway. Petitioners asserted that the Board is bound by the doctrine of *res judicata* to provide a bus stop at their driveway as a result of a prior controversy between the parties. Further, the petitioners argued that the Board acted in an arbitrary, capricious and unreasonable manner when it assigned D.S. to a bus stop that requires her to walk one-half mile along a winding rural road with no sidewalks or shoulders. The Board contended that it did not act improperly in assigning D.S. to her current bus stop because the Board is only required to provide D.S. with a safe bus stop, and that the Board is not responsible for providing D.S. with a safe walking route to and from the bus stop. The Board also denied that *res judicata* applies in this case, as material circumstances have changed since the prior controversy was decided.

The ALJ found, *inter alia*, that: the route that D.S. must walk to reach her bus stop remains hazardous; prior case law has determined that the safety of a child's route to the bus stop is a factor the Board must consider when establishing bus routes and stops, though other factors such as the safety of the children on the bus must be taken into consideration; the propriety of a school bus stop decision depends on the totality of circumstances in a given case; the Board in this case abused its discretion by providing non-remote, courtesy busing students with bus pick up at the closest point to their home where a hazard no longer exists, while refusing to extend the same consideration to remote students, who have to walk along a hazardous route to and from their bus stops; and the Board's failure to consider the safety of D.S.'s route to her bus stop was not consistent with precedent. Accordingly, the ALJ ordered the Board to provide a bus stop in front of petitioners' home.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this case. The Commissioner left the precise mechanism for complying with this decision to the Board's discretion, provided that D.S.'s bus stop is located at petitioners' driveway.

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

July 16, 2020

OAL Dkt. No. EDU 10265-15
Agency Dkt. No. 144-6/15

New Jersey Commissioner of Education

Decision

G.S. and C.S., on behalf of minor child, D.S.

Petitioner,

v.

Board of Education of the Township of Holland, Hunterdon County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by both parties pursuant to *N.J.A.C.* 1:1-18.4 and both parties' replies thereto.

In this matter, petitioners challenge the Board's refusal to provide their minor child with a bus stop at their driveway. Petitioners' challenge is made on two grounds: 1) that the Board is bound by the doctrine of *res judicata* to provide a bus stop at their driveway as a result of a prior controversy between the parties; and 2) that the Board acted in an arbitrary, capricious, or unreasonable manner by assigning D.S. to a bus stop that requires her to walk one-half mile along an allegedly hazardous route.

In the prior matter, petitioners sought to require the Board to provide a bus stop at their driveway for their minor children.[1] *G.S. and C.S., J.G., and C.J. v. Board of Education of*

[1] The prior matter involved petitioners' two sons, who are now adults. In 2013, petitioners adopted their granddaughter, D.S., who was not born at the time of the decision in the prior matter.

the Township of Holland, Hunterdon County, State Board of Education Decision No. 49-96 (April 2, 1997). The State Board of Education issued an order requiring the Board to provide a bus stop at petitioners' driveway.[2] After adopting D.S. in 2013, petitioners again sought a bus stop at the end of their driveway, and the Board refused. The parties agreed that there have been no material changes to the roads or their conditions in the twenty years since the prior decision, which the prior ALJ and the State Board of Education found to present significant safety issues.

In the current matter, the ALJ found that the doctrine of *res judicata* did not apply because there were material factual differences in the cases, namely that the current case did not involve evidence of another minibus stop close to petitioners' house, and that the Board's transportation policy has changed since the prior case.

The ALJ thoroughly reviewed the testimony and determined that the route D.S. must walk to reach her bus stop remains hazardous. The ALJ also detailed a long line of cases involving the location of school bus stops and determined: that the safety of the child's route to the bus stop is a factor that the Board must consider when establishing bus routes and stops, although other factors – including the safety of the children already on the bus – must also be taken into consideration in establishing bus stops; that a school board may not treat similarly situated children differently when establishing bus stops; and that the propriety of a school bus stop decision depends on the totality of the circumstances in a given case.

The ALJ found that the Board abused its discretion by providing hazardous busing to nonremote students at the closest point where the hazard no longer exists, without extending the same consideration to remote students who have to walk along a hazardous route to and from their bus stops. The ALJ also concluded that the Board's failure to consider the

---

[2] At the time of the prior matter, the State Board of Education had the authority to hear appeals from decisions of the Commissioner of Education. In 2008, the Legislature removed that authority and conferred final decision making authority on the Commissioner. *N.J.S.A.* 18A:6-9.1.

safety of D.S.'s route to the bus stop was not consistent with precedent. Accordingly, the ALJ ordered the Board to provide a bus stop in front of petitioners' home.

Petitioners filed exceptions regarding the ALJ's decision on the issue of *res judicata*. Petitioners argue that the circumstances in the current case are virtually identical to those in the prior case. According to petitioners, they are seeking the same relief – relocation of the bus stop – for the same reasons that led to the prior decision in their favor, and the mere fact that the Board updated its transportation policies in the intervening years is insufficient to support the ALJ's conclusion that *res judicata* does not apply.

In reply, the Board argues that there are factual differences between the two cases that support the ALJ's conclusion that *res judicata* does not apply. In the prior case, a minibus stopped near petitioners' home, and the State Board of Education found that it was arbitrary, capricious, or unreasonable for the Board to refuse to extend the minibus service to petitioners' home even though petitioners offered to construct a turnaround in their driveway. In the current case, a full-size bus is used to transport the students at D.S.'s bus stop, and – according to the Board – a full-size bus cannot safely traverse the roadway where petitioners' home is located. The Board also notes that it would be unreasonable to apply a twenty-year-old decision, which required the Board to provide a bus stop in the driveway for petitioners' children, to a child who was not adopted by petitioners until sixteen years later.

The Board also filed exceptions, arguing that the ALJ erroneously found that it failed to consider D.S.'s safety and pointing to the testimony of its witnesses demonstrating that they did consider student safety in selecting the route and the bus stop. The Board contends that it also considered all of the surrounding circumstances, including: 1) the full-size buses it currently uses to pick up D.S. at her assigned bus stop, which could not safely travel to petitioners' driveway; 2) the fact that the Board does not currently use minibuses to extend

stops closer to students' homes; 3) the additional cost to the Board of approximately $17,000 to have a minibus pick up D.S. at her driveway; and 4) the fact that other pupils living in the area have used D.S.'s assigned bus stop without incident. According to the Board, granting petitioners' request would not mean simply extending a bus stop, but rather would require the creation of an entirely new bus route. The Board argues that its decision was not arbitrary, capricious, or unreasonable, and that the ALJ improperly substituted her opinion for that of the Board, contrary to case law establishing the standard of review for board of education decisions. Finally, the Board contends that the Initial Decision sets a "dangerous precedent" for a "never-ending series of requests for customized transportation routes. . ." .Respondent's Exceptions at 32.

The Board also argues that remote and nonremote students cannot be similarly situated and, even if they were, the Board treats all students in a fair and equitable manner. The Board contends that the only students who could be similarly situated to D.S. are the other students who are assigned to her bus stop. The Board notes that it is statutorily required to provide transportation to remote students, while it is authorized – but not required – to provide transportation to nonremote students. According to the Board, even putting aside the legal distinction between the two groups of students, there are sufficient factual differences between D.S.'s route and the courtesy busing routes along the town's main highway to overcome a conclusion that the groups could be similarly situated. Moreover, the Board contends that it considers the safety of all students, and thus has not treated D.S. differently. Finally, the Board takes exception to the ALJ's decision to allow petitioners to testify as expert witnesses in the area of school bus transportation because they are biased in favor of their own case and do not have sufficient expertise; further, the Board also takes exception to certain items admitted into evidence.

In reply, petitioners argue that the record contradicts the Board's assertion that it considers the safety of all students equally, pointing to testimony that the Board considered the safety of walking routes for courtesy busing students but that the only considerations for mandatory busing routes were whether the stops themselves were safe. Petitioners contend that the $17,000 cost cited by the Board is misleading, because it assumes D.S. will be the only student on the new route, when that route – and the cost – would cover multiple students at a per pupil rate lower than the district's current transportation cost. Moreover, petitioners argue that the district can extend an existing minibus route, which already operates on the road on which petitioners' home is located, rather than creating a new one. Finally, petitioners contend that the ALJ properly exercised her discretion to admit their expert testimony and evidence and to accord them whatever weight she deemed appropriate.

Upon review, the Commissioner concurs with the ALJ that *res judicata* does not apply here. The prior decision was based on the existence of an active minibus stop three-tenths of one mile from petitioners' home – a material fact – and the resulting conclusion that the Board had acted in an arbitrary, capricious, or unreasonable manner by refusing to extend the minibus service to a stop at petitioner's driveway. Critically, that bus stop no longer exists, nor does a minibus currently serve D.S.'s route. Moreover, petitioners allege an additional wrong by the Board, claiming that the courtesy busing policy developed by the district since the conclusion of the prior matter results in discrimination against remote students who receive mandatory busing services. With these significant differences in both a material fact and the theory of recovery, the Commissioner cannot conclude that *res judicata* applies. *See Culver v. Ins. Co. of N. America*, 115 *N.J.* 451, 461-62 (1989) (citations omitted).

Turning to the location of the bus stop, the Commissioner concurs with the ALJ's detailed analysis, as well as the analysis of the ALJ and the State Board in the prior matter, that

D.S.'s walking route is hazardous.[3] Furthermore, the Commissioner agrees with the ALJ that the Board abused its discretion by treating courtesy and mandatory busing students differently. A student who lives within two miles of school receives courtesy busing under the Board's hazardous busing policy if the route they would have to walk to get to school is unsafe, and their bus stop is located at the point closest to their home at which the hazard no longer exists.[4] "Although boards of education have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious, or unreasonable." *R.D. and V.D., on behalf of C.D., a minor, and M.H and M.H., on behalf of M.H. and S.H., minors v. Board of Education of the Twp. of Bernards*, 97 N.J.A.R.2d (EDU) 414 (citations omitted). While the Board is not required to provide courtesy busing for hazardous routes, when it chooses to do so, its policies must be applied equitably. It is discriminatory for the Board to require that a remote student must walk along a hazardous route, while a student who receives courtesy busing does not.[5]

The legal distinction between mandatory busing and courtesy busing does not preclude a conclusion that the two groups of students are similarly situated for purposes of this decision. D.S. is a Holland Township student who must walk along a hazardous road in order to get to school. This makes her similarly situated to all courtesy busing students who receive busing under the Board's hazardous busing policy. Moreover, while the facts underlying those hazards may be different, the fact that both the highway and petitioner's road are hazardous

[3] The Commissioner is not persuaded by the Board's arguments that other students have used D.S.'s bus stop without incident. The fact that students have successfully avoided the hazards of the route in the past does not mean that the route is not hazardous. The Commissioner further notes that the parties agreed that the conditions of the road have not materially changed since they were found to be hazardous in the prior matter.

[4] Despite the fact that the hazardous busing policy requires stops to be at the closest point where the hazard no longer exists – which would be at intersections of the highway that constitutes the hazardous route – the testimony demonstrated that several bus stops are situated within neighborhoods, closer to the homes of the students.

[5] The Board is not absolved of responsibility because D.S.'s parents could drive her from their home to the bus stop. Students who receive courtesy busing could also be driven to school; yet, by implementing a hazardous busing policy, the Board has chosen to assist those students in avoiding a hazardous walking route.

walking routes is the same. And although the Board contends that it considers all students' safety, it also argues that it is not responsible for the safety of D.S.'s route from her home to her bus stop, demonstrating that it applies disparate standards when considering student safety for each group. Therefore, the Commissioner concludes that the Board treats mandatory busing students differently than courtesy busing students because it does not locate the stops for mandatory busing students at the closest location to their home at which a walking hazard no longer exists.

The Commissioner does not find the Board's exceptions, which substantially reiterate arguments made before the ALJ, to be persuasive. Initially, the Commissioner finds that the ALJ, who was in the best position to evaluate the testimony and exhibits, appropriately exercised her discretion in allowing petitioners to testify as expert witnesses and admit their evidence. The Commissioner disagrees with the Board's contention that the ALJ improperly substituted her judgment for that of the Board. The cases cited by the Board for this proposition pertain to the Board's weighing of safety concerns between the assigned bus stop and the requested bus stop, and do not address questions of discriminatory treatment between two groups of students. Nor is the Commissioner persuaded by the Board's "slippery slope" argument and agrees with the State Board of Education's express rejection of that argument in the prior matter. In both matters, the decision is limited to these particular facts for these particular petitioners, and the situations of any other students are immaterial to the decision. Furthermore, the Board's justifications related to cost are insufficient to overcome its discriminatory treatment of mandatory busing students. Finally, although the Commissioner recognizes that the Board considered the safety of the other students on the full-size bus that serves D.S.'s route, which cannot safely traverse the portion of the road leading to petitioners' home, extending the full-size bus service to petitioners' home is not the Board's only option for safely transporting D.S. to

school. The Commissioner leaves the precise mechanism for complying with this decision to the Board's discretion, provided that D.S.'s bus stop is located at petitioners' driveway.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED. [6]

COMMISSIONER OF EDUCATION

Date of Decision: 7/16/20
Date of Mailing: 7/16/20

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10265-15

AGENCY DKT. NO. 144-6/15

G.S. AND C.S., ON BEHALF OF MINOR CHILD, D.S.,

Petitioners,

v.

TOWNSHIP OF HOLLAND BOARD OF EDUCATION, HUNTERDON COUNTY,

Respondent.

Philip Stern, Esq., for petitioners (DiFrancesco, Bateman, Kunzman, Davis, Lehrer, and Flaum, attorneys)

Stefani C. Schwartz, Esq., for respondent (Weiner Law Group, LLP, attorneys)

Record Closed: September 9, 2019 Decided: April 17, 2020

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioners G.S. and C.S., on behalf of their adopted minor daughter, D.S., challenge the location of the school bus stop that respondent Holland Township Board

of Education (Board) established for D.S. one-half mile from their home. Petitioners seek an order directing the Board to provide D.S. with a bus stop at their driveway.[7]

Under N.J.S.A. 18A:39-1, a school board is required to provide transportation for elementary school students who live more than two miles, or remote, from school. This is known as mandatory busing. Petitioners live remote from D.S.' assigned elementary school and, as such, the Board provides her with publicly-funded transportation to and from her school. However, petitioners argue that the Board acted in an arbitrary, capricious, or unreasonable manner in assigning D.S. to a bus stop to which she must walk one-half mile along a winding rural road that has, among other hazards, no sidewalks or shoulders.

Petitioners also argue that the Board is required to provide D.S. with a bus stop at their house as a result of a prior bus stop controversy between the parties in G.S. v. Bd. of Educ. of Holland Twp., 96 N.J.A.R.2d (EDU) 795, 97 N.J.A.R.2d (EDU) 416, in which the State Board of Education issued a final decision ordering the Board to provide petitioners' children with minibus service to and from their home.[8] Thus, petitioners contend that, under the doctrine of res judicata, they should not have to relitigate a dispute over the location of D.S.' bus stop.[9]

In response, the Board argues that it did not act improperly in assigning D.S. her current bus stop because the Board is only required to provide D.S. with a safe bus stop, and that the Board is not responsible for providing D.S. with a safe walking route to and from the bus stop. The Board also denies that res judicata applies to this matter, because material circumstances have changed since the final decision in the prior controversy.

---

[7] Petitioners adopted D.S., who is also their natural granddaughter, in 2013.

[8] For many years, the State Board of Education, and not the Commissioner of Education, had final administrative decision authority in controversies and disputes arising under the school laws. However, in 2008 the Legislature removed the State Board's authority to hear appeals from Commissioner of Education decisions and instead conferred final decision authority on the Commissioner. N.J.S.A. 18A:6-9.1; N.J.A.C. 6A:4-1.1. Petitioners have two natural sons, and D.S. is the natural daughter of one of the sons. D.S. was not yet born at the time of the State Board's decision in the prior case.

[9] Typically, it is a defendant, and not a plaintiff, who raises the issue of res judicata. Also, res judicata serves to bar re-litigation of a case. Here, a hearing took place after petitioners' motion to apply res judicata was denied. Nonetheless, the parties have argued the issue in their post-hearing briefs.

PROCEDURAL HISTORY

On June 24, 2015, G.S. and C.S. filed an appeal of respondent's action citing their daughter's school bus stop at a distance from their home. Their petition was filed with the Department of Education's Bureau of Disputes and Controversies and on July 15, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case. On December 7, 2015, petitioners' motion for the application of res judicata was denied and respondent's cross-motion for summary decision was denied. Petitioners' requests for emergent relief were denied on August 24, 2016, and April 26, 2019. After telephone conferences, motion practice and a period for discovery, testimony was taken on December 16, 2015, March 3, May 26, and October 20, 2016. Additional testimony was taken on January 25, May 1, May 15, July 25, and September 28, 2017, as well as April 11, and June 7, 2018. A site visit occurred on July 2, 2018, and the parties appeared on February 7, 2019, after unsuccessful attempts at settlement. The record remained open for the submission of post-hearing memoranda and exhibits, closing on September 9, 2019. Extensions of time for the filing of the Initial Decision were granted.

FACTUAL DISCUSSION

Many of the material facts in this matter are not in dispute. G.S. and C.S., along with their adopted granddaughter D.S., reside on Shire Road in Holland Township, Hunterdon County, within a mandatory busing zone. Their home has a turnaround drive in the front of the property. D.S. is currently attending fifth grade at Holland Township School in respondent's K-8 district. Over twenty years ago, petitioners filed a similar petition on behalf of their minor children at that time, seeking a bus stop at their home. In that matter Administrative Law Judge (ALJ) Metzger ruled on behalf of petitioners and made findings regarding safety and the road conditions at issue, a decision upheld by the then State Board of Education. (See Exhibit C-1, the Metzger Decision.) When petitioners requested a bus stop at their home and the application of Metzger's ruling to D.S., respondent declined and this appeal ensued.

In this matter respondent does not challenge ALJ Metzger's findings regarding road conditions and the parties were advised that where relevant ALJ Metzger's factual findings regarding the roads at issue would be cited in this matter. The parties agreed there were no material changes to those roads and their condition.

In a factual change from the prior litigation respondent now contracts its bus service to the regional high school district to which it sends its students, Delaware Valley Regional (Delaware Valley). The Board works with Delaware Valley staff to determine the routes for its students and Delaware Valley is capable of providing whatever size bus a given route requires. The current bus stop for D.S. is at the intersection of Shire Road and Anderson Road and a large fifty-four-person-bus is used for the route. Petitioners' home is approximately a half-mile from that stop, along a stretch of road with no sidewalks or shoulder. The bus stop also serves a number of children from the area who also are provided mandatory bus service. As set forth in Metzger's decision, as well as in numerous days of testimony, Shire Road presents significant safety issues for a child walking along it. The District currently runs routes traveled by large school buses on other roads with dangerous driving conditions as described in Metzger's decision.

The record further shows that in addition to mandatory busing the Board has chosen to provide courtesy busing to students within the District. Holland Township is in a scenic, rural part of Hunterdon County with hilly topography and roads which are at times winding and narrow. The only school in the District sits on the main road through the Township, Route 519 and several neighborhoods near the school are served by courtesy busing. The justification for the courtesy busing by the Board has been the hazardous nature of travel on Route 519 to reach the school. Further, the Board has provided bus stops for courtesy busing on roads other than Route 519.

For much of the hearing petitioners represented themselves on a pro se basis. In support of their petition they presented a series of witnesses who testified to the hazardous nature of Shire and other roads traveled by the District's buses, the manner in which the Board devises its routes and the allocation of Board resources between its courtesy and mandatory bus programs.

G.S. and C.S., along with Mahlon Stuckley (Stuckley) and Beverly Early (Early) testified credibly regarding their experience driving vehicles along Shire Road, as well other roads in the area used in the District's bus routes. Stuckley has operated a large garbage truck along Shire Road, and other roads referenced in ALJ Metzger's opinion. He described Shire Road and other roads such as Alfalfa Hill and Bellis Road, which were discussed in that opinion, and agreed they were "harrowing" to drive but that they were traversed by large school buses. Early is a mail carrier who has serviced Shire Road for over seventeen years. In her testimony she corroborated Stuckley regarding the hazardous nature of Shire and other roads in the area. Similarly, G.S. and C.S, who operated a small bus company, and regularly drive school buses, testified as to the hazardous walking and driving conditions of Shire Road, including its lack of shoulders, blind spots, and curves. Additionally, G.S. and C.S. were qualified as experts in the area of school transportation and each opined credibly as to the hazardous nature of Shire Road. Further they opined that a large school bus could navigate Shire Road.

Additional testimony was taken from M.S., D.S.'s biological father, who was one of the children in Metzger's decision. He too testified credibly as to the hazardous nature of Shire Road and described the turnaround constructed in front of his parents' property. He stated there had been no changes to the road since the prior decision. In his testimony he identified photos of bears crossing Shire Road (P-28-29). Petitioners' neighbor on Shire Road, Nicole Yard (Yard) also testified. She is the mother of children attending the District's school and she credibly echoed other witnesses as to the winding, hilly nature of Shire Road and its lack of shoulders. She has observed cars driving at a fast speed around the curves and up the hills and would not walk on the road. She found the current bus stop which her children share with D.S. to be inconvenient and unsafe. She also stated that she does not allow her child on the morning bus as it goes down Alfalfa Hill, along a route she finds too dangerous.

Petitioners also presented a series of witnesses who testified to the Board's transportation policy, decision making process and its development of bus routes. Emil Suarez (Suarez), a former Acting Superintendent of the District testified regarding petitioners' notice that D.S. would be starting school, but stated that he retired before he

felt petitioners had "formally" requested the relocation of D.S.' bus stop. He opined that he was in agreement with the Board's decision not to relocate the stop. Dr. Nancy Yard (Dr. Yard), who succeeded Suarez as Acting Superintendent, was questioned regarding how petitioners' request for a relocation of the bus stop and their request to apply the Metzger were handled by the District.

Lorraine Scheibener (Scheibener), Laurie Hance (Hance), Casey Bickhardt (Bickhardt), Joseph Somers (Somers) and William Soucie, (Soucie) , past and present Board members, also testified. Scheibener explained that the Board votes on policies and procedures developed by its various committees, as well as the budget. The budget is developed by staff and the overall transportation costs are voted upon by the Board. Board members do not develop the bus routes, nor vote on them individually. She admitted that her children had the benefit of the District's courtesy busing, but that within her development there could be several children at a given bus stop. Scheibener stated that the Board relied upon its staff to develop the routes and that decisions on routes were made on an "equal and fair" standard as set forth in the Board's policy. She said the Board's decisions on courtesy **busing were based** on safety concerns, particularly the traffic on Route 519. With regard to mandatory bus routes, she stated that the only safety considerations were whether the bus stops themselves were safe.

When questioned concerning the safety of the bus stop assigned to D.S. and a number of other students, she acknowledged that she was aware of a Holland Township Police Department letter (P-1) which expressed concerns over the safety of that stop. Yet she stated that the stop's safety was not the Board's responsibility, as any traffic issues at the stop were the police's problem. With regard to D.S.' walking route to the stop, she would not allow her child to walk it alone, agreeing it was a dangerous route at points. While she emphasized that she relied on staff to develop and advise on routes, any issue regarding a route would require a cost analysis.

Hance is a Board member and Chair of the Board's Finance Committee. She testified that the committee approves bus routes presented to it by the superintendent, and its members do not micromanage the process of developing the routes. She said she is not familiar with individual routes and the factors which go into developing each

route. The routes are discussed in a report they receive from staff in August. She emphasized that she relies on the superintendent's recommendations and that the courtesy bus program is driven by safety issues on Route 519.

Further testimony was provided by Bickhardt, another Board member. She too is a member of the Finance Committee and she described the process for developing the transportation budget and bus routes. The Business Administrator and the Delaware Valley representative develop the routes based on the student populace and provide them to the superintendent. The routes and their cost are then presented to the committee and upon their approval are sent to the Board for a vote as part of the transportation budget process. When questioned regarding D.S.' walking route on Shire Road she admitted that she would not allow her child to walk it. She also was questioned regarding the Board's decision to approve a new bus route for a special needs child. The Board allowed the child's sibling to ride that route but denied D.S.' request to be included in it. While she acknowledged that permitting the sibling to ride on a special education bus was against policy, the Board was not willing to extend that exemption to D.S. Bickhardt was queried extensively on various bus routes and whether they fit within the Board's criteria for economy and efficiency. Citing the lack of sidewalks as a factor in the Route 519 approach to school, she admitted that buses go into neighborhoods such as Gridley Circle and pick up children within the development.

Another Board member testifying was Soucie who also served on the Finance Committee. He too insisted that the Board follows recommendations on bus routes provided by its staff and consultants. Soucie was a contentious and evasive witness who had to be directed to answer at times. He echoed the testimony of the other Board members that bus routes were formulated by staff and approved as part of the transportation costs by the Board. He did not find Shire Road to be a hazardous road and differed from all other witnesses on whether a child would be safer in a school bus or walking along the road. He found Shire Road to be a good place to walk and perfectly safe when shown pictures of the child's route. He also denied that the reason for the District's courtesy busing was to keep the children from having to walk and traverse Route 519. He acknowledged that his development had requested and received approval regarding a bus stop.

As with other Board members, Somers testified that the District's only obligation regarding bus stops is that they are safe. He noted not every parent can have a stop outside their home and that providing one would be too time consuming and expensive for the District.

The final witnesses in this matter were David Bailey (Bailey), Superintendent, Abby Postma (Postma), Business Administrator and Jeremiah Ford (Ford), Transportation Supervisor for Delaware Valley. Bailey initially testified regarding petitioners' letter request of March 2014, that D.S. be provided a bus stop at their home as set forth in Metzger's decision. As he had only begun as superintendent in April 2014, he did not respond immediately to the letter. In developing a response however, he consulted with Ford as the person who initially develops the bus routes and advises the District on transportation matters. Ford advised him that for safety reasons he would not run a large fifty-four-person-bus down that portion of Shire Road, but a smaller bus for a route along that road could be provided for approximately $17,000 a year. Ford left the decision on such a route to the District and Bailey advised petitioners in August their request was denied. Bailey testified that cost was one of the factors taken into account. He also cited the domino effect on other remotely bussed students if such an accommodation was provided to D.S. As for any hazardous conditions on the walk to the bus stop, Bailey stated that children were not required to walk. Their parents could drive them.

Much of Bailey's testimony revolved around the manner in which the District handles courtesy busing versus its mandatory busing. He emphasized the traffic on Route 519, the major artery through the Township and the fact that courtesy busing had been a long standing practice in the District. Under questioning he acknowledged that the courtesy busing does take place on roads other than 519, and that many courtesy bussed children have bus stops in front of their homes. He differentiated the hazards on Shire Road from those on Route 519, stating that while narrower and without shoulders, Shire Road had less traffic and a lower speed limit.

Postma, the District's Business Administrator provided testimony regarding the development of bus routes for the district. She stated that enrollment had declined in the District and that it generally employed six to eight buses in what she described as "looping routes." The transportation process begins in May or June when enrollment data is sent to Delaware Valley and routes are developed by Ford. In D.S.' case, she was assigned to the route for her area and petitioners' request for a different bus stop was turned down after review by Bailey. As with other witnesses she cited the hazardous nature of Route 519 as the basis for courtesy busing and distinguished it from Shire Road due to its traffic volume and higher speed limit. She also discussed the manner in which efficiency ratings for a district's transportation program were handled by the Department of Education and how the designation of a courtesy bus route as "hazardous" by the superintendent plays positively into those efficiency ratings.

According to Postma while safety is a consideration in bus routes, the only consideration for safety in a bus stop is visibility and that it is the parents' responsibility to get their children to and from the stop. Any complaints or issues regarding bus stops come to her office and are sent to Ford for review.

The final witness in this matter was Delaware Valley's Ford who testified regarding the bus routes and stops for Holland Township. He was qualified as an expert in school transportation and stated that the bus routes for the District were devised in a fair manner in line with its transportation policy. In his opinion only a smaller, sixteen passenger bus could safely run a route on D.S.' section of Shire Road and that such a bus could be provided at a cost of approximately $17,000 a year if the District so wished. When questioned regarding the large buses used on routes traversing Belllis Road or Alfalfa Hill, he said Shire Road presented more of a challenge. Under continued questioning, he admitted that a large bus traversed portions of those other hazardous roads. However he justified those routes as part of an "overall route plan" despite the danger presented to large school buses.

Ford also was questioned regarding the courtesy busing program in the District. As with other witnesses, he pointed to the hazardous nature of Route 519 as a basis for the program. He admitted that courtesy busing took place in neighborhoods off Route

519, with bus stops in the neighborhoods. He too cited the Department of Education's efficiency ratings for districts and noted that "hazardous" was only a designation for courtesy busing purposes. Ford also testified in response to questions regarding individual routes and whether such routes were efficient and cost effective, admitting that depending on the route, buses could service small numbers of students despite the bus size.

A review of the record as a whole here, including the Metzger decision, supports a finding that the route D.S. must walk to her bus stop is hazardous. Shire Road is a narrow, winding rural road without shoulders in an area in which wildlife such as bears are present. Further, the bus stop to which she is assigned has raised the concern of the local police department. The record further shows that respondent has determined that it has no responsibility for the safety of the route a child must take to reach its bus stop and that its only duty is to provide a safe bus stop.

Undisputed testimony further shows that the District has the ability to use either a small or large bus on a given bus route, although at present it generally uses large buses for the "looping routes" it has chosen to implement. However the District also uses smaller buses in situations such as the transport of special education students. While the District takes the position that for safety reasons it cannot use a large bus on the portion of Shire Road in question, the testimony of its expert witness Ford was equivocal on that point. Ford pointed out the hazardous nature of Shire Road, but failed to differentiate it from the equally, if not more hazardous nature of roads such as Alfalfa Hill, Bellis Road and the Narrows. When confronted with the dangerous portions of those roads he simply fell back on "overall route consideration" as a reason for using those roads. Those roads are regularly traversed by district buses and their dangerous nature was credibly testified to by a number of witnesses in this matter. It is noteworthy that the findings in Metzger's decision regarding those roads were not disputed by respondent. As Metzger wrote:

> The Board authorizes other trips and maneuvers that are patently more risky then a ride down Shire Road. The K turn on Bellis Road is scary. For most of that operation the driver cannot see oncoming traffic or be seen. The Board allows a full-size bus to travel the Narrows along

> River Road, which appears to be a harrowing ride. Alfalfa Hill Road is at least as steep, narrow and winding as Shire Road, and is probably worse. So long as the Board uses these routes, it cannot convincingly argue that it will not travel Shire out of an abundance of caution. (C-1)

The record further shows that respondent has a robust courtesy busing program for its students based on routes which it deems "hazardous." That program primarily services neighborhoods closer to the District's only school which are adjacent to Route 519. The bus routes for those children do not require that they all meet at stops nearest an intersection with Route 519, but includes stops within the neighborhoods. Further, the District does not have a similar designation for hazardous routes within its mandatory busing program.

LEGAL ANALYSIS

The first issue to be addressed in this matter is petitioners' position that Metzger's decision should be applied here pursuant to res judicata. Although petitioner's motion to apply the doctrine was denied at the outset of the hearing, the parties again addressed the issue in their post hearing memoranda. As held previously, the doctrine of res judicata does not apply here as there are material differences in the facts underlying the prior and current litigation. Therefore, the final decision in the parties' prior dispute does not preclude litigation of the parties' current bus stop dispute.

As the Supreme Court has explained, "[t]he term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated" and "provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Velazquez v. Frank, 123 N.J. 498, 505 (1991) (citing In re Coruzzi, 95 N.J. 557, 568; Roberts v. Goldner, 79 N.J. 82, 85 (1979)).

The "[a]pplication of res judicata 'requires substantially similar or identical causes of action and issues, parties, and relief sought,' as well as a final judgment." Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591, 606 (2015) (quoting Culver v. Ins. Co. of N.

Am., 115 N.J. 451, 460 (1989)). While "[t]he test for identity of a cause of action is the most difficult to determine," ibid., the following factors offer guidance:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the *material* facts alleged are the same.
>
> [Culver, 115 N.J. at 461-62 (quoting United States v. Athlone Indus. Inc., 746 F.2d 977, 984 (3d Cir.1984)).]

In G.S. v. Bd. of Educ. of Holland Twp., 96 N.J.A.R.2d (EDU) 795, 97 N.J.A.R.2d (EDU) 416, G.S. and C.S. challenged the Board's refusal to relocate their children's bus stop to their driveway as arbitrary and capricious and, as a result of that litigation, the State Board of Education issued a final decision finding that "[a] minibus currently stops approximately three-tenths of a mile" from petitioners' home, concluding that "the Board's action in refusing to extend its minibus service to [petitioners'] home was arbitrary and capricious," and ordering the Board to provide petitioners' children with minibus service at or near their home.[10] G.S., 97 N.J.A.R.2d (EDU) at 417. In that matter, the parties did not dispute that the walking route from petitioners' home to the children's assigned bus stop was dangerous.

Importantly, in reaching its conclusion, the State Board of Education specifically stated that:

> [T]he Board's action in this instance was arbitrary and capricious, particularly in view of [petitioners'] offer to construct a minibus turnaround on their property at their expense. As previously noted, our review herein is not limited to the safety of the existing bus stop or the Board's jurisdiction over safety conditions on the Township's roads. Rather the standard is whether the Board abused its

[10] It is unclear from any of the decisions issued in that matter the exact location of the children's disputed bus stop.

> discretion in refusing to extend minibus service to petitioners' home.
>
> [Ibid.]

Thus, the State Board's conclusion that the Board acted arbitrarily was based on the material facts that "[a] minibus currently stops approximately three-tenths of a mile" from petitioners' home and that petitioners offered to build a minibus turnaround in their driveway.

Here, res judicata does not act as a bar to the current litigation because, although the issue (location of a bus stop), the parties (G.S. and C.S. and the Board), and the relief sought (bus stop at petitioners' home) are the same in both matters, the two causes of action are not the same as the material facts are different to the extent that there initially was no evidence of existing minibus service near petitioners' home as was when petitioners filed the first cause of action. Additionally, the Board's transportation policy has since changed.[11]

First, while the Board acted arbitrarily in refusing to extend existing minibus service three-tenths of a mile to petitioners' home under the facts of the prior matter, the question becomes whether under the facts of this case, the Board acted arbitrarily, capriciously, or unreasonably in denying petitioners' request to relocate D.S.' bus stop.

There is another material fact that precludes application of res judicata to this matter. In 1999—after the State Board issued its final decision in the prior dispute—the Legislature enacted L. 1999, c. 310 (effective January 4, 2000), which is codified as N.J.S.A. 18A:39-1.5 and provides that "[a] school district that provides courtesy busing services shall adopt a policy regarding the transportation of students who must walk to and from school along hazardous routes." N.J.S.A. 18A:39-1.5(a).

---

[11] Contrarily, the fact that this matter involves petitioners' granddaughter, and not their natural children, and the fact that the Board no longer provides transportation with its own buses, do not necessarily represent material changes from the prior matter.
In their post-hearing submission petitioners assert that as a result of schedule changes there is no impediment to D.S. being assigned to a current bus route used by a smaller bus.

The Board currently has a transportation policy under which "[t]he Board of Education directs the Superintendent to supervise development of bus routes to provide safe, economical, and reasonably expeditious transportation for . . . 4. For students whose route to the school is deemed hazardous by the Superintendent, the closest point to their home for pick-up and drop-off where the hazardous condition no longer exists." Holland Twp. Bd. of Educ., District Policy, 8600 – Transportation (March 31, 2010).

This policy represents a material fact that did not exist at the time of the prior dispute and could affect the outcome of this case, such that the Board may be abusing its discretion in establishing bus stops if the Board provides busing to nonremote students who would otherwise have to walk to and from school along a hazardous route at "the closest point to their home for pick-up and drop-off where the hazardous condition no longer exists," but does not do the same for D.S., who is a remote student who has to walk along a hazardous route to get to and from her bus stop. For these reasons, the doctrine of res judicata does not apply to this matter.

The main issue in this matter, therefore, is whether the Board acted in an arbitrary, capricious or unreasonable manner in refusing to relocate D.S.' bus stop. A leitmotif in school bus stop disputes between parents and school boards is child safety. This case is no different. And like other bus stop disputes, the parties in this matter disagree whether and to what extent a school board must consider child safety in establishing bus stops. Petitioners argue that the Board should move D.S.' bus stop because her walking route to the stop is unsafe, while the Board maintains that its statutory transportation responsibility for remote students includes providing D.S. with a safe bus stop, and not a safe walking route to the bus stop.

A review of previous administrative decisions shows that a child's safety is certainly a factor in determining whether a school board acted in an arbitrary, capricious, or unreasonable manner in setting bus routes and stops for children who live remote from school. While "unsafe conditions such as the absence of safe walkways is the responsibility of the municipality, not the school district," a school board may not "turn a blind eye to such situations when establishing school bus stops." R.D. & V.D. ex

rel. C.D. v. Bernards Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 481, 486; 97 N.J.A.R.2d (EDU) 414. Instead, a school board "may evaluate conditions involving the safety of school pupils in their journey to and from school" and "must make reasonable classifications with respect thereto and all children must be treated in an equitable manner." Walters v. Bd. of Educ. of the Twp. of Mendham, 1977 S.L.D. 854, 857. Importantly, the scope of an inquiry into the propriety of a school board's refusal to relocate a bus stop "is not limited to the relative safety of the school bus stop" or a school board's lack of "jurisdiction over safety conditions of sidewalks and roadways" in a municipality; "[r]ather, the broader issue is whether the Board abused its discretion in denying petitioner's request [in a] particular case." Peary v. Bd. of Educ. of the Twp. of Barnegat, 93 N.J.A.R.2d (EDU) 798. Thus, although school boards "have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious or unreasonable." Ibid.

In several administrative decisions, a school board's choice of bus stops has been upheld despite safety concerns regarding a particular child. For example, in Lemma v. Bd. of Educ. of the Twp. of Branchburg, EDU 8953-97, Initial Decision (June 8, 1998), adopted, Comm'r (July 22, 1998) <https://njlaw.rutgers.edu/collections/oal>, the school board reasonably rejected petitioner's request to move his children's bus stop because, even though his children had to walk "through a half-mile uninhabited area with no sidewalks or street lighting and along an often foggy 50 MPH road with blind curves" to get to their assigned stop, the board's decision was based on "its expert's analysis of traffic and hazardous driving conditions," "the safety of the children already on the bus," and "information leading them to believe that the bus stop met the requirements for [petitioner's] children's safety." Moreover, the school board "reasonably concluded that [the narrow, dead end street on which the requested stop was located] was different from the other roads on the bus route because the shoulders were soft and thus hazardous, and the bus must execute a K-turn to exit," and petitioner failed to show that his "children were treated differently from children similarly situated."

Similarly, in Mandaglio v. Bd. of Educ. of the Twp. of Mendham, 1990 S.L.D. 1380, the petitioning parents failed to show that the school board abused its discretion

in relocating their children's bus stop from a cul-de-sac to a spot that required the children to walk three-quarters of a mile along a fifty-mile-per-hour road without sidewalks because the board's "policy prohibiting a school bus from turning around in a cul-de-sac" due "to the inherent dangers of backing up a school bus on a cul-de-sac" was not unreasonable and because "the policy was applied in a nondiscriminatory and consistent manner." Id. at 1386.

In those cases, the dangers that would have been posed to the school bus (and the children on it) while driving to a requested bus stop outweighed the potential risks for the petitioners' children while walking to their assigned bus stop. In another case, R.M. & K.M. ex rel. Bd. of Educ. of the Twp. of Franklin, EDU 14237-16, Initial Decision (September 26, 2017) <https://njlaw.rutgers.edu/collections/oal>, adopted, Comm'r (November 3, 2017) <https://nj.gov/education/legal/commissioner/>, the petitioners failed to show that their children's walking route to their bus stop on a rural road put their safety at risk, and thus the school board reasonably relocated the children's bus stop nine-tenths of a mile from their home because the old stop required the school bus to cross a bridge for which it exceeded the weight limit and make a K-turn in petitioners' driveway, which contravened the board's policy against such turns in private driveways.

However, the safety concerns arising from a particular child's assigned bus stop may be so great as to render arbitrary, capricious, or unreasonable a school board's decision not to relocate the child's bus stop. For example, in Nielsen v. Bd. of Educ. of the Morris Hills Reg'l Sch. Dist., EDU 3936-98, Initial Decision (December 21, 1999), adopted, Comm'r (May 19, 2000) <http://njlaw.rutgers.edu/collections/oal>, the school board acted unreasonably in putting a student's bus stop at an abandoned landfill that was frequented by hunters and bears and that required the student to walk on a road with "blind curves, lack of sidewalks or shoulders, no lighting, and isolation from neighbors" in order to get to and from the stop. The arbitrariness of the school board's decision was underscored by the availability of a school van that already traveled near the child's home and "would require no more than fifteen extra minutes to pick [her] up" and drop her off at her house.

Finally, a school board may be found to have acted arbitrarily if the evidence does not support the purported reasons for the school board's bus stop action or if the school board treated a particular child differently from other similarly situated children.

For example, in Peary, 93 N.J.A.R.2d. (EDU) 798, the Barnegat school board abused its discretion in rejecting petitioner's request to move his son's bus stop from an unsafe county road to the front of their home on Old Brookville Road in Barnegat because its decision was unsupported by the facts and discriminatory. As the State Board explained, the school board "predicated its denial of petitioner's request upon its contention that a local ordinance prohibited buses from using Old Brookville Road, that the condition and width of Old Brookville Road precluded buses from operating thereon, and that time constraints prevented the bus from using Old Brookville Road," but the evidence contradicted the school board's justifications, such that the ordinance "expressly exclude[d] school buses from its prohibition" and "school buses routinely have picked up and discharged students on Old Brookville Road." Id. at 799. The State Board also noted that the school board "had granted [another family's] request every year to relocate their children's bus stop from [the unsafe county road] to a location in front of their home," and thus the school board had discriminated against petitioner's child in declining to do the same for him. Ibid.

And in R.D., 96 N.J.A.R.2d (EDU); 97 N.J.A.R.2d (EDU) 414, a school board arbitrarily and discriminately provided minibus service to nonremote public students on their street due to safety concerns, but not to private school students who lived on the same street and were required to walk along an unsafe road to get to their bus stop. In so ruling, the State Board of Education stated:

> The record reveals that the Bernards Township Board does not allow public school children to enter or exit minibuses on Hardscrabble Road due to safety concerns and yet, citing the $675 cap in N.J.S.A. 18A:39-1, exposes nonprofit private school students to the dangers of *walking* on Hardscrabble Road to a bus stop. Given the history and purpose of the statute, the $675 cap in N.J.S.A. 18A:39-1 cannot reasonably be viewed as permitting district boards to treat nonprofit private school students in a manner which denies

> them the same basic safety considerations afforded similarly-situated public school students.[12]
>
> [Id. at 416.]

The takeaway from all of these cases is that a child's safety when walking to and from her bus stop is a factor that school boards need to consider when establishing bus routes and stops for remote children, but that other factors, including the safety of the children already on the bus, may outweigh the safety concerns for the child seeking to have her bus stop relocated; that a school board may not treat similarly situated students differently when establishing bus stops; and that, in the end, the propriety of a school board's bus stop decision depends on the totality of circumstances in a particular case.

The cases discussed above involved safety concerns in the context of mandatory busing of remote children under N.J.S.A. 18A:39-1. School boards may also, but are not required to, provide transportation for nonremote students, or students who live less than two miles from school. N.J.S.A. 18A:39-1.1 to -1.3. This is known as "courtesy busing." There is also a subset of courtesy busing known as "hazardous busing," which is addressed by N.J.S.A. 18A:39-1.5. Under that provision, "[a] school district that provides courtesy busing services shall adopt a policy regarding the transportation of students who must walk to and from school along hazardous routes." N.J.S.A. 18A:39-1.5(a). Hazardous busing is not required, but "[w]henever a district board of education agrees to provide nonmandated transportation to and from school for reasons of hazard, the board shall adopt a hazardous busing policy[.]" N.J.A.C. 6A:27-1.5(c).

---

[12] N.J.S.A. 18A:39-1 set a limit for transportation costs per private school pupil at $675 for the 1992-1993 school year. Under N.J.S.A. 18A:39-1a, "[f]or the 2002-2003 school year, the maximum amount of nonpublic school transportation costs per pupil provided for in N.J.S.18A:39-1 shall equal $735 and this amount shall be increased in each subsequent year in direct proportion to the increase in the State transportation aid per pupil in the year prior to the prebudget year compared to the amount for the prebudget year or by the CPI, whichever is greater."

In R.D., a former superintendent had testified that "if petitioners' children were public school children, he would have put them on one of the minibuses or gotten another minibus, if necessary," but "claimed that his hands were tied since the estimated cost of transportation for use of the minibuses was approximately $1,000 per pupil." Id. at 415.

One issue that has yet to be addressed in any reported decision is whether the prohibition against differential treatment of similarly situated children in establishing bus stops is implicated when a school board agrees to provide hazardous busing to nonremote students who would otherwise have to "walk to and from school along hazardous routes," N.J.S.A. 18A:39-1.5(a), but requires remote students to walk along hazardous routes in order to get to and from their bus stops.

This issue is particularly important in this matter because, under the Board's transportation policy, "[t]he Board of Education directs the Superintendent to supervise development of bus routes to provide safe, economical, and reasonably expeditious transportation for . . . 4. For students whose route to the school is deemed hazardous by the Superintendent, the closest point to their home for pick-up and drop-off where the hazardous condition no longer exists." Holland Twp. Bd. of Educ., District Policy, 8600 – Transportation (March 31, 2010).

If the Board provides hazardous busing to nonremote students who would otherwise have to walk to and from school at "the closest point to their home for pick-up and drop-off where the hazardous condition no longer exists," but does not extend the same consideration to remote students who have to walk along a hazardous route to get to and from their bus stops, then it would follow that the Board is abusing its discretion by giving preferential treatment to nonremote children who must travel along hazardous routes over similarly situated remote children who must travel along hazardous routes.

CONCLUSION AND ORDER

In this matter D.S. must walk a half-mile along a hazardous section of Shire Road to reach her bus stop. The Board's position that it has no responsibility to take safety issues into consideration in determining her route is at odds with the precedent discussed above. The Board's failure to consider safety in D.S.' route to her bus stop was arbitrary, capricious and unreasonable.

It also is at odds with the manner in which it conducts its courtesy busing program. While respondent ostensibly has structured its busing program to be as cost efficient as possible, it has chosen to expend significant resources on a courtesy busing program in which hazardous conditions are not only taken into consideration, but are the primary factor. The disparity in its treatment of remotely bussed students with students in its courtesy busing program is an additional reason for determining the Board's actions were arbitrary capricious and unreasonable when it refused to provide D.S. with a different bus stop.

Based on the record as a whole, respondent acted in an arbitrary, capricious and unreasonable manner by failing to address hazardous conditions for D.S., when it sited her bus stop.

It is hereby **ORDERED** that petitioners' request for a bus stop in front of their home is **GRANTED**.

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

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

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

April 17, 2020
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency:

Date Mailed to Parties:

/mel/mph

APPENDIX

WITNESSES

For Petitioner:

Mahlon Stuckley
Beverly Early
C.S.
G.S.
Emil Suarez
Nancy Yard
Lorraine Scheibener
Jeremiah Ford
Nicole Yard
Laurie Hance
Casey Bickhardt
M.S.
William Soucie
David Bailey
Joseph Somers

For Respondent:

Abigail Postma
Jeremiah Ford
William Soucie

EXHIBITS

Court Exhibits:

C-1 Decision of ALJ Metzger

For Petitioner:

P-1 Videos Depicting Respondent School Buses Traveling on Alfalfa Hill, The "Narrows," and Bellis Road
P-2A Photos of Mahlon Stuckley's Garbage Truck
P-2B Photos of Mahlon Stuckley's Garbage Truck
P-3 Photos of D.S. Between Car and Retaining Wall
P-4 Photo of County Route 519 with the Front of Holland Township Elementary School
P-5 1996 Video of Sixteen Passenger Bus Operating on Shire Road
P-6 Video of April 23, 2013, Board meeting
P-7 April 23, 2013, Meeting Minutes; Letter to Former Superintendent Suarez
P-8 Video of Shire Road
P-9 Video of Shire and Anderson Bus Stop and Surrounding Area
P-10 Letter from Chief of Police to Superintendent David Bailey
P-11 Map of Holland Township
P-12A Video of Bus Stop Located on Hawk Schoolhouse Road (Courtesy Bus)
P-12B Video of Bus Stop Located at Gridley Circle (Courtesy Bus)
P-13 Holland Township Board Transportation Regulation 8600
P-14 Holland Township Board Transportation Policy 8600
P-15A-E Videos of Courtesy Bus Routes and Stops
P-16 Respondent's Answer to Interrogatories
P-18 Judge Metzger's May 1996 Decision
P-19 1997 Video of Bus Route and D.S. Walking to her Current Bus Stop
P-20A-B 2016 Video of Bus Route and D.S. Walking to her Current Bus Stop

P-21A-G Photos of D.S. on Shire Road

P-22 May 21, 2015 Email Correspondence Between Jerry Ford and Petitioner, G.S.

P-23 Video of D.S. Walking on County Route 519

P-24A-B Photos of Small Buses in Front of Holland Township Elementary School

P-25 August 12, 2014 Letter from Superintendent Bailey to Petitioner

P-28 Photo of Bear Walking on Shire Road

P-29 Photo of Bear Laying Down on Shire Road

P-31 Respondent's Answer to Interrogatories

P-32 November 29, 2016 Letter from Respondent's Counsel to Petitioners

P-33 November 23, 2016 Letter from Respondent's Counsel to Petitioners

P-34 Respondent's Amended Answers to Interrogatories

P-39 NJ.gov Printout Regarding Hazardous Bussing

P-40 State Board of Education Decision ,dated April 2, 1997

P-42 June 27, 2017, Medical Note from Dr. Carla Jardim, MD

P-43 March 11, 2014, Letter from Petitioners Requesting Bus Stop

P-44 February 27, 1997, Engineering Report

P-45 Photo of D.S. on Shire Road

For Respondent:

R-1 Holland Township Board of Education District Policy 8600-Pupil Transportation

R-2 Holland Township Board of Education District Regulation 8600-Pupil Transportation



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10265-15
AGENCY DKT. NO. 144-6/15

G.S. AND C.S., ON BEHALF OF MINOR CHILD, D.S.,

Petitioners,

v.

TOWNSHIP OF HOLLAND BOARD OF EDUCATION, HUNTERDON COUNTY,

Respondent.

Philip Stern, Esq., for petitioners (DiFrancesco, Bateman, Kunzman, Davis, Lehrer, and Flaum, attorneys)

Stefani C. Schwartz, Esq., for respondent (Weiner Law Group, LLP, attorneys)

Record Closed: September 9, 2019 Decided: April 17, 2020

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioners G.S. and C.S., on behalf of their adopted minor daughter, D.S., challenge the location of the school bus stop that respondent Holland Township Board

of Education (Board) established for D.S. one-half mile from their home. Petitioners seek an order directing the Board to provide D.S. with a bus stop at their driveway.[1]

Under N.J.S.A. 18A:39-1, a school board is required to provide transportation for elementary school students who live more than two miles, or remote, from school. This is known as mandatory busing. Petitioners live remote from D.S.' assigned elementary school and, as such, the Board provides her with publicly-funded transportation to and from her school. However, petitioners argue that the Board acted in an arbitrary, capricious, or unreasonable manner in assigning D.S. to a bus stop to which she must walk one-half mile along a winding rural road that has, among other hazards, no sidewalks or shoulders.

Petitioners also argue that the Board is required to provide D.S. with a bus stop at their house as a result of a prior bus stop controversy between the parties in G.S. v. Bd. of Educ. of Holland Twp., 96 N.J.A.R.2d (EDU) 795, 97 N.J.A.R.2d (EDU) 416, in which the State Board of Education issued a final decision ordering the Board to provide petitioners' children with minibus service to and from their home.[2] Thus, petitioners contend that, under the doctrine of res judicata, they should not have to relitigate a dispute over the location of D.S.' bus stop.[3]

In response, the Board argues that it did not act improperly in assigning D.S. her current bus stop because the Board is only required to provide D.S. with a safe bus stop, and that the Board is not responsible for providing D.S. with a safe walking route to and from the bus stop. The Board also denies that res judicata applies to this matter, because material circumstances have changed since the final decision in the prior controversy.

---

[1] Petitioners adopted D.S., who is also their natural granddaughter, in 2013.

[2] For many years, the State Board of Education, and not the Commissioner of Education, had final administrative decision authority in controversies and disputes arising under the school laws. However, in 2008 the Legislature removed the State Board's authority to hear appeals from Commissioner of Education decisions and instead conferred final decision authority on the Commissioner. N.J.S.A. 18A:6-9.1; N.J.A.C. 6A:4-1.1. Petitioners have two natural sons, and D.S. is the natural daughter of one of the sons. D.S. was not yet born at the time of the State Board's decision in the prior case.

[3] Typically, it is a defendant, and not a plaintiff, who raises the issue of res judicata. Also, res judicata serves to bar re-litigation of a case. Here, a hearing took place after petitioners' motion to apply res judicata was denied. Nonetheless, the parties have argued the issue in their post-hearing briefs.

PROCEDURAL HISTORY

On June 24, 2015, G.S. and C.S. filed an appeal of respondent's action citing their daughter's school bus stop at a distance from their home. Their petition was filed with the Department of Education's Bureau of Disputes and Controversies and on July 15, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case. On December 7, 2015, petitioners' motion for the application of res judicata was denied and respondent's cross-motion for summary decision was denied. Petitioners' requests for emergent relief were denied on August 24, 2016, and April 26, 2019. After telephone conferences, motion practice and a period for discovery, testimony was taken on December 16, 2015, March 3, May 26, and October 20, 2016. Additional testimony was taken on January 25, May 1, May 15, July 25, and September 28, 2017, as well as April 11, and June 7, 2018. A site visit occurred on July 2, 2018, and the parties appeared on February 7, 2019, after unsuccessful attempts at settlement. The record remained open for the submission of post-hearing memoranda and exhibits, closing on September 9, 2019. Extensions of time for the filing of the Initial Decision were granted.

FACTUAL DISCUSSION

Many of the material facts in this matter are not in dispute. G.S. and C.S., along with their adopted granddaughter D.S., reside on Shire Road in Holland Township, Hunterdon County, within a mandatory busing zone. Their home has a turnaround drive in the front of the property. D.S. is currently attending fifth grade at Holland Township School in respondent's K-8 district. Over twenty years ago, petitioners filed a similar petition on behalf of their minor children at that time, seeking a bus stop at their home. In that matter Administrative Law Judge (ALJ) Metzger ruled on behalf of petitioners and made findings regarding safety and the road conditions at issue, a decision upheld by the then State Board of Education. (See Exhibit C-1, the Metzger Decision.) When petitioners requested a bus stop at their home and the application of Metzger's ruling to D.S., respondent declined and this appeal ensued.

In this matter respondent does not challenge ALJ Metzger's findings regarding road conditions and the parties were advised that where relevant ALJ Metzger's factual findings regarding the roads at issue would be cited in this matter. The parties agreed there were no material changes to those roads and their condition.

In a factual change from the prior litigation respondent now contracts its bus service to the regional high school district to which it sends its students, Delaware Valley Regional (Delaware Valley). The Board works with Delaware Valley staff to determine the routes for its students and Delaware Valley is capable of providing whatever size bus a given route requires. The current bus stop for D.S. is at the intersection of Shire Road and Anderson Road and a large fifty-four-person-bus is used for the route. Petitioners' home is approximately a half-mile from that stop, along a stretch of road with no sidewalks or shoulder. The bus stop also serves a number of children from the area who also are provided mandatory bus service. As set forth in Metzger's decision, as well as in numerous days of testimony, Shire Road presents significant safety issues for a child walking along it. The District currently runs routes traveled by large school buses on other roads with dangerous driving conditions as described in Metzger's decision.

The record further shows that in addition to mandatory busing the Board has chosen to provide courtesy busing to students within the District. Holland Township is in a scenic, rural part of Hunterdon County with hilly topography and roads which are at times winding and narrow. The only school in the District sits on the main road through the Township, Route 519 and several neighborhoods near the school are served by courtesy busing. The justification for the courtesy busing by the Board has been the hazardous nature of travel on Route 519 to reach the school. Further, the Board has provided bus stops for courtesy busing on roads other than Route 519.

For much of the hearing petitioners represented themselves on a pro se basis. In support of their petition they presented a series of witnesses who testified to the hazardous nature of Shire and other roads traveled by the District's buses, the manner in which the Board devises its routes and the allocation of Board resources between its courtesy and mandatory bus programs.

G.S. and C.S., along with Mahlon Stuckley (Stuckley) and Beverly Early (Early) testified credibly regarding their experience driving vehicles along Shire Road, as well other roads in the area used in the District's bus routes. Stuckley has operated a large garbage truck along Shire Road, and other roads referenced in ALJ Metzger's opinion. He described Shire Road and other roads such as Alfalfa Hill and Bellis Road, which were discussed in that opinion, and agreed they were "harrowing" to drive but that they were traversed by large school buses. Early is a mail carrier who has serviced Shire Road for over seventeen years. In her testimony she corroborated Stuckley regarding the hazardous nature of Shire and other roads in the area. Similarly, G.S. and C.S, who operated a small bus company, and regularly drive school buses, testified as to the hazardous walking and driving conditions of Shire Road, including its lack of shoulders, blind spots, and curves. Additionally, G.S. and C.S. were qualified as experts in the area of school transportation and each opined credibly as to the hazardous nature of Shire Road. Further they opined that a large school bus could navigate Shire Road.

Additional testimony was taken from M.S., D.S.'s biological father, who was one of the children in Metzger's decision. He too testified credibly as to the hazardous nature of Shire Road and described the turnaround constructed in front of his parents' property. He stated there had been no changes to the road since the prior decision. In his testimony he identified photos of bears crossing Shire Road (P-28-29). Petitioners' neighbor on Shire Road, Nicole Yard (Yard) also testified. She is the mother of children attending the District's school and she credibly echoed other witnesses as to the winding, hilly nature of Shire Road and its lack of shoulders. She has observed cars driving at a fast speed around the curves and up the hills and would not walk on the road. She found the current bus stop which her children share with D.S. to be inconvenient and unsafe. She also stated that she does not allow her child on the morning bus as it goes down Alfalfa Hill, along a route she finds too dangerous.

Petitioners also presented a series of witnesses who testified to the Board's transportation policy, decision making process and its development of bus routes. Emil Suarez (Suarez), a former Acting Superintendent of the District testified regarding petitioners' notice that D.S. would be starting school, but stated that he retired before he

felt petitioners had "formally" requested the relocation of D.S.' bus stop. He opined that he was in agreement with the Board's decision not to relocate the stop. Dr. Nancy Yard (Dr. Yard), who succeeded Suarez as Acting Superintendent, was questioned regarding how petitioners' request for a relocation of the bus stop and their request to apply the Metzger were handled by the District.

Lorraine Scheibener (Scheibener), Laurie Hance (Hance), Casey Bickhardt (Bickhardt), Joseph Somers (Somers) and William Soucie, (Soucie) , past and present Board members, also testified. Scheibener explained that the Board votes on policies and procedures developed by its various committees, as well as the budget. The budget is developed by staff and the overall transportation costs are voted upon by the Board. Board members do not develop the bus routes, nor vote on them individually. She admitted that her children had the benefit of the District's courtesy busing, but that within her development there could be several children at a given bus stop. Scheibener stated that the Board relied upon its staff to develop the routes and that decisions on routes were made on an "equal and fair" standard as set forth in the Board's policy. She said the Board's decisions on courtesy **busing were based** on safety concerns, particularly the traffic on Route 519. With regard to mandatory bus routes, she stated that the only safety considerations were whether the bus stops themselves were safe.

When questioned concerning the safety of the bus stop assigned to D.S. and a number of other students, she acknowledged that she was aware of a Holland Township Police Department letter (P-1) which expressed concerns over the safety of that stop. Yet she stated that the stop's safety was not the Board's responsibility, as any traffic issues at the stop were the police's problem. With regard to D.S.' walking route to the stop, she would not allow her child to walk it alone, agreeing it was a dangerous route at points. While she emphasized that she relied on staff to develop and advise on routes, any issue regarding a route would require a cost analysis.

Hance is a Board member and Chair of the Board's Finance Committee. She testified that the committee approves bus routes presented to it by the superintendent, and its members do not micromanage the process of developing the routes. She said she is not familiar with individual routes and the factors which go into developing each

route. The routes are discussed in a report they receive from staff in August. She emphasized that she relies on the superintendent's recommendations and that the courtesy bus program is driven by safety issues on Route 519.

Further testimony was provided by Bickhardt, another Board member. She too is a member of the Finance Committee and she described the process for developing the transportation budget and bus routes. The Business Administrator and the Delaware Valley representative develop the routes based on the student populace and provide them to the superintendent. The routes and their cost are then presented to the committee and upon their approval are sent to the Board for a vote as part of the transportation budget process. When questioned regarding D.S.' walking route on Shire Road she admitted that she would not allow her child to walk it. She also was questioned regarding the Board's decision to approve a new bus route for a special needs child. The Board allowed the child's sibling to ride that route but denied D.S.' request to be included in it. While she acknowledged that permitting the sibling to ride on a special education bus was against policy, the Board was not willing to extend that exemption to D.S. Bickhardt was queried extensively on various bus routes and whether they fit within the Board's criteria for economy and efficiency. Citing the lack of sidewalks as a factor in the Route 519 approach to school, she admitted that buses go into neighborhoods such as Gridley Circle and pick up children within the development.

Another Board member testifying was Soucie who also served on the Finance Committee. He too insisted that the Board follows recommendations on bus routes provided by its staff and consultants. Soucie was a contentious and evasive witness who had to be directed to answer at times. He echoed the testimony of the other Board members that bus routes were formulated by staff and approved as part of the transportation costs by the Board. He did not find Shire Road to be a hazardous road and differed from all other witnesses on whether a child would be safer in a school bus or walking along the road. He found Shire Road to be a good place to walk and perfectly safe when shown pictures of the child's route. He also denied that the reason for the District's courtesy busing was to keep the children from having to walk and traverse Route 519. He acknowledged that his development had requested and received approval regarding a bus stop.

As with other Board members, Somers testified that the District's only obligation regarding bus stops is that they are safe. He noted not every parent can have a stop outside their home and that providing one would be too time consuming and expensive for the District.

The final witnesses in this matter were David Bailey (Bailey), Superintendent, Abby Postma (Postma), Business Administrator and Jeremiah Ford (Ford), Transportation Supervisor for Delaware Valley. Bailey initially testified regarding petitioners' letter request of March 2014, that D.S. be provided a bus stop at their home as set forth in Metzger's decision. As he had only begun as superintendent in April 2014, he did not respond immediately to the letter. In developing a response however, he consulted with Ford as the person who initially develops the bus routes and advises the District on transportation matters. Ford advised him that for safety reasons he would not run a large fifty-four-person-bus down that portion of Shire Road, but a smaller bus for a route along that road could be provided for approximately $17,000 a year. Ford left the decision on such a route to the District and Bailey advised petitioners in August their request was denied. Bailey testified that cost was one of the factors taken into account. He also cited the domino effect on other remotely bussed students if such an accommodation was provided to D.S. As for any hazardous conditions on the walk to the bus stop, Bailey stated that children were not required to walk. Their parents could drive them.

Much of Bailey's testimony revolved around the manner in which the District handles courtesy busing versus its mandatory busing. He emphasized the traffic on Route 519, the major artery through the Township and the fact that courtesy busing had been a long standing practice in the District. Under questioning he acknowledged that the courtesy busing does take place on roads other than 519, and that many courtesy bussed children have bus stops in front of their homes. He differentiated the hazards on Shire Road from those on Route 519, stating that while narrower and without shoulders, Shire Road had less traffic and a lower speed limit.

Postma, the District's Business Administrator provided testimony regarding the development of bus routes for the district. She stated that enrollment had declined in the District and that it generally employed six to eight buses in what she described as "looping routes." The transportation process begins in May or June when enrollment data is sent to Delaware Valley and routes are developed by Ford. In D.S.' case, she was assigned to the route for her area and petitioners' request for a different bus stop was turned down after review by Bailey. As with other witnesses she cited the hazardous nature of Route 519 as the basis for courtesy busing and distinguished it from Shire Road due to its traffic volume and higher speed limit. She also discussed the manner in which efficiency ratings for a district's transportation program were handled by the Department of Education and how the designation of a courtesy bus route as "hazardous" by the superintendent plays positively into those efficiency ratings.

According to Postma while safety is a consideration in bus routes, the only consideration for safety in a bus stop is visibility and that it is the parents' responsibility to get their children to and from the stop. Any complaints or issues regarding bus stops come to her office and are sent to Ford for review.

The final witness in this matter was Delaware Valley's Ford who testified regarding the bus routes and stops for Holland Township. He was qualified as an expert in school transportation and stated that the bus routes for the District were devised in a fair manner in line with its transportation policy. In his opinion only a smaller, sixteen passenger bus could safely run a route on D.S.' section of Shire Road and that such a bus could be provided at a cost of approximately $17,000 a year if the District so wished. When questioned regarding the large buses used on routes traversing Belllis Road or Alfalfa Hill, he said Shire Road presented more of a challenge. Under continued questioning, he admitted that a large bus traversed portions of those other hazardous roads. However he justified those routes as part of an "overall route plan" despite the danger presented to large school buses.

Ford also was questioned regarding the courtesy busing program in the District. As with other witnesses, he pointed to the hazardous nature of Route 519 as a basis for the program. He admitted that courtesy busing took place in neighborhoods off Route

519, with bus stops in the neighborhoods. He too cited the Department of Education's efficiency ratings for districts and noted that "hazardous" was only a designation for courtesy busing purposes. Ford also testified in response to questions regarding individual routes and whether such routes were efficient and cost effective, admitting that depending on the route, buses could service small numbers of students despite the bus size.

A review of the record as a whole here, including the Metzger decision, supports a finding that the route D.S. must walk to her bus stop is hazardous. Shire Road is a narrow, winding rural road without shoulders in an area in which wildlife such as bears are present. Further, the bus stop to which she is assigned has raised the concern of the local police department. The record further shows that respondent has determined that it has no responsibility for the safety of the route a child must take to reach its bus stop and that its only duty is to provide a safe bus stop.

Undisputed testimony further shows that the District has the ability to use either a small or large bus on a given bus route, although at present it generally uses large buses for the "looping routes" it has chosen to implement. However the District also uses smaller buses in situations such as the transport of special education students. While the District takes the position that for safety reasons it cannot use a large bus on the portion of Shire Road in question, the testimony of its expert witness Ford was equivocal on that point. Ford pointed out the hazardous nature of Shire Road, but failed to differentiate it from the equally, if not more hazardous nature of roads such as Alfalfa Hill, Bellis Road and the Narrows. When confronted with the dangerous portions of those roads he simply fell back on "overall route consideration" as a reason for using those roads. Those roads are regularly traversed by district buses and their dangerous nature was credibly testified to by a number of witnesses in this matter. It is noteworthy that the findings in Metzger's decision regarding those roads were not disputed by respondent. As Metzger wrote:

> The Board authorizes other trips and maneuvers that are patently more risky then a ride down Shire Road. The K turn on Bellis Road is scary. For most of that operation the driver cannot see oncoming traffic or be seen. The Board allows a full-size bus to travel the Narrows along

> River Road, which appears to be a harrowing ride. Alfalfa Hill Road is at least as steep, narrow and winding as Shire Road, and is probably worse. So long as the Board uses these routes, it cannot convincingly argue that it will not travel Shire out of an abundance of caution. (C-1)

The record further shows that respondent has a robust courtesy busing program for its students based on routes which it deems "hazardous." That program primarily services neighborhoods closer to the District's only school which are adjacent to Route 519. The bus routes for those children do not require that they all meet at stops nearest an intersection with Route 519, but includes stops within the neighborhoods. Further, the District does not have a similar designation for hazardous routes within its mandatory busing program.

LEGAL ANALYSIS

The first issue to be addressed in this matter is petitioners' position that Metzger's decision should be applied here pursuant to res judicata. Although petitioner's motion to apply the doctrine was denied at the outset of the hearing, the parties again addressed the issue in their post hearing memoranda. As held previously, the doctrine of res judicata does not apply here as there are material differences in the facts underlying the prior and current litigation. Therefore, the final decision in the parties' prior dispute does not preclude litigation of the parties' current bus stop dispute.

As the Supreme Court has explained, "[t]he term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated" and "provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Velazquez v. Frank, 123 N.J. 498, 505 (1991) (citing In re Coruzzi, 95 N.J. 557, 568; Roberts v. Goldner, 79 N.J. 82, 85 (1979)).

The "[a]pplication of res judicata 'requires substantially similar or identical causes of action and issues, parties, and relief sought,' as well as a final judgment." Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591, 606 (2015) (quoting Culver v. Ins. Co. of N.

Am., 115 N.J. 451, 460 (1989)). While "[t]he test for identity of a cause of action is the most difficult to determine," ibid., the following factors offer guidance:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the *material* facts alleged are the same.
>
> [Culver, 115 N.J. at 461-62 (quoting United States v. Athlone Indus. Inc., 746 F.2d 977, 984 (3d Cir.1984)).]

In G.S. v. Bd. of Educ. of Holland Twp., 96 N.J.A.R.2d (EDU) 795, 97 N.J.A.R.2d (EDU) 416, G.S. and C.S. challenged the Board's refusal to relocate their children's bus stop to their driveway as arbitrary and capricious and, as a result of that litigation, the State Board of Education issued a final decision finding that "[a] minibus currently stops approximately three-tenths of a mile" from petitioners' home, concluding that "the Board's action in refusing to extend its minibus service to [petitioners'] home was arbitrary and capricious," and ordering the Board to provide petitioners' children with minibus service at or near their home.[4] G.S., 97 N.J.A.R.2d (EDU) at 417. In that matter, the parties did not dispute that the walking route from petitioners' home to the children's assigned bus stop was dangerous.

Importantly, in reaching its conclusion, the State Board of Education specifically stated that:

> [T]he Board's action in this instance was arbitrary and capricious, particularly in view of [petitioners'] offer to construct a minibus turnaround on their property at their expense. As previously noted, our review herein is not limited to the safety of the existing bus stop or the Board's jurisdiction over safety conditions on the Township's roads. Rather the standard is whether the Board abused its

[4] It is unclear from any of the decisions issued in that matter the exact location of the children's disputed bus stop.

> discretion in refusing to extend minibus service to petitioners' home.
>
> [Ibid.]

Thus, the State Board's conclusion that the Board acted arbitrarily was based on the material facts that "[a] minibus currently stops approximately three-tenths of a mile" from petitioners' home and that petitioners offered to build a minibus turnaround in their driveway.

Here, res judicata does not act as a bar to the current litigation because, although the issue (location of a bus stop), the parties (G.S. and C.S. and the Board), and the relief sought (bus stop at petitioners' home) are the same in both matters, the two causes of action are not the same as the material facts are different to the extent that there initially was no evidence of existing minibus service near petitioners' home as was when petitioners filed the first cause of action. Additionally, the Board's transportation policy has since changed.[5]

First, while the Board acted arbitrarily in refusing to extend existing minibus service three-tenths of a mile to petitioners' home under the facts of the prior matter, the question becomes whether under the facts of this case, the Board acted arbitrarily, capriciously, or unreasonably in denying petitioners' request to relocate D.S.' bus stop.

There is another material fact that precludes application of res judicata to this matter. In 1999—after the State Board issued its final decision in the prior dispute—the Legislature enacted L. 1999, c. 310 (effective January 4, 2000), which is codified as N.J.S.A. 18A:39-1.5 and provides that "[a] school district that provides courtesy busing services shall adopt a policy regarding the transportation of students who must walk to and from school along hazardous routes." N.J.S.A. 18A:39-1.5(a).

---

[5] Contrarily, the fact that this matter involves petitioners' granddaughter, and not their natural children, and the fact that the Board no longer provides transportation with its own buses, do not necessarily represent material changes from the prior matter.
In their post-hearing submission petitioners assert that as a result of schedule changes there is no impediment to D S. being assigned to a current bus route used by a smaller bus.

The Board currently has a transportation policy under which "[t]he Board of Education directs the Superintendent to supervise development of bus routes to provide safe, economical, and reasonably expeditious transportation for . . . 4. For students whose route to the school is deemed hazardous by the Superintendent, the closest point to their home for pick-up and drop-off where the hazardous condition no longer exists." Holland Twp. Bd. of Educ., District Policy, 8600 – Transportation (March 31, 2010).

This policy represents a material fact that did not exist at the time of the prior dispute and could affect the outcome of this case, such that the Board may be abusing its discretion in establishing bus stops if the Board provides busing to nonremote students who would otherwise have to walk to and from school along a hazardous route at "the closest point to their home for pick-up and drop-off where the hazardous condition no longer exists," but does not do the same for D.S., who is a remote student who has to walk along a hazardous route to get to and from her bus stop. For these reasons, the doctrine of res judicata does not apply to this matter.

The main issue in this matter, therefore, is whether the Board acted in an arbitrary, capricious or unreasonable manner in refusing to relocate D.S.' bus stop. A leitmotif in school bus stop disputes between parents and school boards is child safety. This case is no different. And like other bus stop disputes, the parties in this matter disagree whether and to what extent a school board must consider child safety in establishing bus stops. Petitioners argue that the Board should move D.S.' bus stop because her walking route to the stop is unsafe, while the Board maintains that its statutory transportation responsibility for remote students includes providing D.S. with a safe bus stop, and not a safe walking route to the bus stop.

A review of previous administrative decisions shows that a child's safety is certainly a factor in determining whether a school board acted in an arbitrary, capricious, or unreasonable manner in setting bus routes and stops for children who live remote from school. While "unsafe conditions such as the absence of safe walkways is the responsibility of the municipality, not the school district," a school board may not "turn a blind eye to such situations when establishing school bus stops." R.D. & V.D. ex

rel. C.D. v. Bernards Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 481, 486; 97 N.J.A.R.2d (EDU) 414. Instead, a school board "may evaluate conditions involving the safety of school pupils in their journey to and from school" and "must make reasonable classifications with respect thereto and all children must be treated in an equitable manner." Walters v. Bd. of Educ. of the Twp. of Mendham, 1977 S.L.D. 854, 857. Importantly, the scope of an inquiry into the propriety of a school board's refusal to relocate a bus stop "is not limited to the relative safety of the school bus stop" or a school board's lack of "jurisdiction over safety conditions of sidewalks and roadways" in a municipality; "[r]ather, the broader issue is whether the Board abused its discretion in denying petitioner's request [in a] particular case." Peary v. Bd. of Educ. of the Twp. of Barnegat, 93 N.J.A.R.2d (EDU) 798. Thus, although school boards "have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious or unreasonable." Ibid.

In several administrative decisions, a school board's choice of bus stops has been upheld despite safety concerns regarding a particular child. For example, in Lemma v. Bd. of Educ. of the Twp. of Branchburg, EDU 8953-97, Initial Decision (June 8, 1998), adopted, Comm'r (July 22, 1998) <https://njlaw.rutgers.edu/collections/oal>, the school board reasonably rejected petitioner's request to move his children's bus stop because, even though his children had to walk "through a half-mile uninhabited area with no sidewalks or street lighting and along an often foggy 50 MPH road with blind curves" to get to their assigned stop, the board's decision was based on "its expert's analysis of traffic and hazardous driving conditions," "the safety of the children already on the bus," and "information leading them to believe that the bus stop met the requirements for [petitioner's] children's safety." Moreover, the school board "reasonably concluded that [the narrow, dead end street on which the requested stop was located] was different from the other roads on the bus route because the shoulders were soft and thus hazardous, and the bus must execute a K-turn to exit," and petitioner failed to show that his "children were treated differently from children similarly situated."

Similarly, in Mandaglio v. Bd. of Educ. of the Twp. of Mendham, 1990 S.L.D. 1380, the petitioning parents failed to show that the school board abused its discretion

152-20

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION
OF THE TENURE CHARGES
between

PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT

Petitioner

-and- **DOE DOCKET NO. 75-4/19**

BRUCE BASSETTI ,

Respondent.

BEFORE: SUSAN WOOD OSBORN, ARBITRATOR

DATES OF HEARING: May 30-31, 2019

DATE OF AWARD: July 17, 2020

APPEARANCES:

For the Petitioner:
Comegno Law Group, P.C.
(Mark J. Toscano, Esq. and Jeffrey R. Caccese, Esq.)

For the Respondent:
Selikoff & Cohen, P.A.
(Keith Waldman, Esq. and Hop T. Wechsler, Esq.)

Witnesses:
CT, Student
NB, Student

charges and suspended Respondent Bruce Bassetti (Bassetti) for 120 days without pay in accordance with N.J.S.A. 18A:6-14. After the expiration of the 120 suspension without pay, Mr. Bassetti has and continues to be on a suspension with pay.

2. True and correct copies of the complete arbitral record (transcripts, exhibits, and post-hearing briefs) are included with this stipulation as Exhibit A. The parties specifically agree that the arbitral record for the present arbitration is the arbitral record as it existed before Arbitrator Peter Adomeit as of August 22, 2019, that the arbitral record including the charges, the statement of position and the answer (including all exhibits to the pleadings), the transcripts, the exhibits and the parties' post-hearing briefs.

3. On August 19, 2019, the Board voted to withhold Bassetti's employment and adjustment increments for the 2019-2020 school year. See Exhibit B.

4. At all times the Board has taken the position that termination is the only appropriate penalty in this case; however, the Board maintains that its decision to withhold Bassetti's employment and adjustment increments is a matter of procedure taken to preserve the arbitrator's ability to award an increment withholding prior to any contractual increases. The Board contends that this is the practice and procedure in any tenure case regardless of the facts of the case and is not in any way meant to imply that the Board believes that the withholding of Bassetti's increment is an appropriate penalty.

5. Bassetti disagrees with the Board's position and maintains that if you find that the Board has proven that he engaged in conduct unbecoming, that lesser discipline in the form of a suspension and/or an increment withholding is appropriate.

6. On or about September 3, 2019, the parties first became aware of Arbitrator Peter Adomeit's Opinion and Award, which was dated August 23, 2019. See Exhibit C. The parties specifically agree that Arbitrator Adomeit's opinion and award dated August 23, 2019 is not part of the present arbitral record.

7. On September 4, 2019, Keith Waldman, Esq., Bassetti's attorney, informed Arbitrator Adomeit of the Board's vote to withhold Bassetti's increments. On September 5, 2019, Arbitrator Adomeit responded that he has no jurisdiction to hear appeals from increments disputes. See Exhibit D.

8. On November 7, 2019, Bassetti filed a Verified Petition of Appeal, Docket No. 292-11/19, with the Commissioner of Education contesting the increment withholding. See Exhibit E.

9. On November 27, 2019, the Board filed a Verified Complaint with the Superior Court of New Jersey, Chancery Division, Salem, Cumberland, and Gloucester Counties, seeking to vacate Arbitrator Adomeit's Award under the New Jersey Arbitration and Award Act, N.J.S.A. 2A:24-8. See Exhibit F.

10. On January 2, 2020, Bassetti filed an Answer and Counterclaim with the Court. See Exhibit G.

11. On January 9, 2020, Bassetti withdrew his Petition of Appeal with the Commissioner. See Exhibit H.

12. On the same day, January 9, 2020, Bassetti withdrew Count II of his Counterclaim. See Exhibit I.

13. Following briefing, the parties appeared for oral argument before the Hon. Robert P. Becker, Jr., P.J.Ch., on February 27, 2020. After oral argument, Judge Becker issued a Order vacating Arbitrator Adomeit's award and referring the matter to the Commissioner for the selection of a new arbitrator. The Order also excludes from evidence all statements made by Bassetti without union representation during the Board's investigation of the allegations. The parties specifically agree that Judge Becker's Order was not the subject of any appeal and is binding. See Exhibit J. A transcript of Judge Becker's decision is also included as Exhibit K.

The tenure charges certified to the Commissioner by the Board on April 16, 2019, allege that Bassetti engaged in Unbecoming Conduct in violation of district policies when he used a racial slur in front of students.[2] The Board further charges Bassetti with Incapacity, alleging that the use of the slur makes it impossible for him to return to his teaching duties in the District, because such a return would cause "acrimony with students, staff and community", thereby rendering him incapable of performing his duties. Finally, the Board charges Other Just Cause for termination of Bassetti's employment with the District exists because returning him to the classroom would violate the public trust, and fail to ensure the well-being of students in a safe environment where they are not subjected to racial slurs.

An arbitration hearing was conducted on May 30-31, 2019, before Arbitrator Peter Adomeit, at which time thirteen witnesses testified under oath. Witnesses were sequestered during the hearing. The parties also presented documentary evidence. The parties filed post-hearing briefs. Arbitrator Adomeit issued an Opinion and Award dated August 23, 2019. The parties became aware

[2] Portions of the tenure charges filed by the Board refer to and are dependent upon statements alleged to have been made by Bassetti during the Board's investigation while he was not accompanied by an Association representative. Judge Becker's Order excluded these statements from evidence, and I have therefore not referred to this material in the recital of charges made by the Board (Exhibit J).

of Arbitrator Adomeit's Opinion and Award on or about September 3, 2019 (Exhibit J-2 Para.6).

N.J.A.C. 6A:6.3 provides that the decision in this matter shall be issued within 45 days of the beginning of the hearing, and that the decision shall be final and binding. On June 11, 2020, I requested an extension of time to submit my award. The Department of Education granted my extension request to July 17, 2020.

ISSUE IN DISPUTE

The record contains no information with respect to a stipulation by the parties or a formulation of the issue by the parties. In view of this, I have determined that the issue in dispute is as follows:

Did the Board of Education prove that tenure charges brought against Bruce Bassetti amounted to sufficient cause for his termination?

STATUTORY AND REGULATORY CONSIDERATIONS

N.J.S.A. 18A:6-10: Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

> (a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or
>
> (b) If he is or shall be under tenure of office, position or

employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub article, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this sub article provided.

* * *

N.J.S.A. 18A:6-16 Proceedings before commissioner; written response; determination

* * *

...If, however, [the Commissioner of Education] shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, . . .

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S.A. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

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

* * *

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S.A. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10.

RELEVANT BOARD POLICIES

Board Policy 4111.1,"Nondiscrimination/Affirmative Action/Sexual Harassment" provides in relevant part as follows:

The Board of Education guarantees to all persons equal access to all categories of employment, retention and advancement in this district, regardless of any and all conditions or any of the protected classes as proscribed in NJSA 10:5-1, et.seq or any other federal or state law(s) and/or statutes.

* * *

Harassment and Favoritism

The Board of Education is an affirmative action employer and holds all its employees responsible for maintaining a working environment that is free from all discriminatory practices. Harassment or

favoritism on any basis included in the Board's statement of equal access to employment, retention and advancement is prohibited. Board Policy 4119., "Duties/Responsibilities" provides in relevant part as follows:

Teaching staff members, because of their proximity to students, are frequently confronted with situations that, if handled incorrectly, could result in liability to the district and personal liability to the staff member. It is the purpose of this policy to direct the preparation of guidelines that would minimize that possibility. Major duties of each professional employee are delineated below:

A. To carry out duties and responsibilities set forth by New Jersey statutes, Title 18A, and New Jersey Administrative Code.
B. To abide by rules and regulations as established by the Board of Education.
C. To carry out specific job responsibilities as established by the Board of Education.
D. To uphold rules and regulations as established by the Superintendent of Schools and other school administrators.
E. To properly channel all negative criticism about the district or its employees.
F. To adhere to prescribed curricula and courses of study.
G. To adhere to the specific job description for the contracted position.

It is the responsibility of the Superintendent of Schools to prepare regulations to ensure the maintenance of the following standards:

A. Each teacher must maintain a standard of care for supervision, control and protection of students commensurate with assigned duties and responsibilities.

* * *

Board Policy 4119.25 "Unbecoming Conduct" provides in relevant part as follows:

The personal life of an employee is not an appropriate concern of the Board except as it may directly prevent the employee from

performing his/her properly assigned functions during the workday or affect his/her professional relationship with the pupils.

Unbecoming Conduct

When an employee, either within the school or outside normal duties, creates conditions under which the proper operation of the school is affected, the Board, upon recommendation of the Superintendent of Schools, and in accordance with statute, shall determine whether such acts or lack of actions constitute conduct unbecoming a school employee, and if so, will proceed against the employee in accordance with law. Unbecoming conduct sufficient to warrant Board review may result from a single flagrant incident or from a series of incidents.

Board Policy 6121 "Nondiscrimination/Affirmative Action" provides in relevant part as follows:

No pupil enrolled in the district schools shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in any educational program or activity of this district on the basis of any and all conditions or any of the protected classes as proscribed in NJSA 10:5-1 et. seq or any other federal or state law(s) and/or statutes. The affirmative action officer shall be responsible for planning, implementing and monitoring the district's affirmative action program with respect to school and classroom practices.

* * *

B. Staff Training

He/she shall suggest a program of in-service training for school personnel designed to identify and solve problems of bias in all aspects of the school program. An affirmative action/equity in-service program shall be held for teaching staff annually; for each support staff member at least once every three years; and for parents and community members, as needed to facilitate participation and support.

* * *

POSITIONS OF THE PARTIES

The Board maintains that it had just cause to terminate Bassetti due to his use of a racial epithet during a class, and his refusal to accept responsibility for making the remark. The Board argues that he cannot return to a teaching position in the district due to the egregious nature of his conduct.

The Union urges that the Board has not met its burden of proving just cause for any discipline of Bassetti. The Union asserts that the Board conducted a procedurally defective investigation of the alleged incident, and that even if the allegation were proven, the penalty of removal is disproportionate to the conduct. Bassetti should be returned to the classroom.

FINDINGS OF FACT

In reaching these findings of fact, I have reviewed the stipulated record (Exhibit J-2), the transcripts of testimony given over two days of hearing on May 30 and 31, 2019, and the exhibits entered into evidence. I have not read or considered any testimony which refers to statements made by Bassetti during investigatory proceedings where a union representative was not present. I have not considered any part of an exhibit in evidence which refers to such statements.

Bruce Bassetti testified that he had been employed by the Penns Grove-Carneys Point Regional school district for fifteen years during the 2018-2019

academic year (2T-294). He stated that he is certified as a teacher of "secondary biological sciences", and that he had been employed in education for seventeen years (2T-294).[3] He testified that, other than a verbal warning for missing an afternoon duty station during the 2018-2019 school year, he had no prior disciplines (2T-295). Bassetti stated that his evaluations had been "Proficient" (2T-294 to 295).

Bassetti testified that on February 27, 2019, he was teaching a seventh grade science class at the District middle school (2T-298). The class was using Chromebooks, which were distributed to students for use during class, and returned to Bassetti at the end of class (2T-308). During class, Bassetti noticed JS[4], who was seated in the back of the classroom. Bassetti noticed that JS's computer was "teetering" on top of materials on JS's work area. Bassetti asked that all the computers be placed flat on the desk. JS looked up at Bassetti, but did not alter the position of his Chromebook. After giving JS time to comply, Bassetti stated that he got up, walked to where JS was seated, and reached out to take the computer (2T-300 to 301). As he did so, JS slid the Chromebook across the table

[3] IT refers to the transcript of the hearing on May 30, 2019; 2T refers to the transcript of the hearing on May 31, 2019.

[4] The names of the students are contained in the transcripts of the hearing, however due to their age and privacy concerns, they will be identified only by their initials in this decision.

to CO, who was seated next to him, keeping the computer out of Bassetti's reach (2T-300 to 301; 1T113).

The students in Bassetti's classroom are seated with up to four students at a table, rather than at individual desks. Bassetti's desk was at the front of the room, near the door to the classroom (2T-302; Exhibit Bassetti-11).

Bassetti stated that, rather than cause a disruption in the classroom, or engage JS, he went back to his desk and continued reviewing test papers (2T-301).

During class, Bassetti testified that he told the students that the science fair project which had been assigned would count for 50% of their grade, and would be posted on the interim reports for the marking period, with a comment if the project had not been turned in. Bassetti testified that about half the students had a look of "fear and panic"(2T-298 to 299).

Bassetti stated that at the end of the class period, students brought their Chromebooks to him so that he could check them back in(2T-301). He noted that JS had gotten up, leaving the computer behind. Bassetti testified that he asked JS to please bring the computer to him, and JS responded "are you lazy, come get it yourself" (2T-301). Bassetti stated that this occurred as the bell rang for the end of class, so he smiled at JS, who did a "double take"; Bassetti said he wanted JS to reflect on whether there would be some disciplinary action in response to his comment (2T-301).

I credit Bassetti's testimony as to the incident with JS and CO involving the Chromebook, as well as to the comment which Bassetti testified was made by JS about Bassetti being "lazy". I also credit Bassetti's testimony that he spoke to the class about the interim grade reports and the impact of the Science Fair project grade on those reports.

Students Report Bassetti

Students CT, NB, GM and BO were all seated together at a table in Bassetti's classroom on February 27, 2019. CT and NB were seated closest to the aisle (1T-18). All four are seventh grade students at Penns Grove Middle School who were 13 years old at the time of the hearing in this matter (1T-15; 1T-50; 1T 71 to 72; 1T-90). All four testified at the hearing.

CT testified that approximately 15 minutes before the end of class, Bassetti said "I'm not dealing with you niggers". CT stated he and the others at the table "froze", and that they decided they would go to the principal's office after class (1T-18 to 19; 1T-25; 1T-41). CT recalled that Bassetti was standing about halfway between the table where JS was seated and the location of CT's table, at an approximate distance of 8 to 10 feet from CT when Bassetti made the statement in a low voice (1T-19 to 24).

After class ended, CT stated that he proceeded to the principal's office together with NB, GM and BO (1T-25).[5] The students met with Vice Principal Roy S. Wright (1T-25).

Roy Steven Wright, Jr.

Wright testified that he became a vice principal at Penns Grove Middle School in September 2017, having previously spent 22 years as a special education teacher in another district, and 3 years as an assistant principal and athletic director at Burlington City High School (1T-180 to 181). He testified that he holds a graduate degree in Education Administration (1T-180). Wright testified that his graduate degree in Education Administration did not include any training in Equal Employment Opportunity/ Affirmative Action, and that his training in that area was confined to an estimated three-hour workshop which took place while he was working for a previous employer (1T-196 to 197).

Wright stated that he was in his office on February 27, 2019 when 3 students appeared on their way to lunch, stating that they needed to speak with him about an incident which had occurred in Bassetti's fifth period class(1T-181; Exhibit Board-9). Wright did not recall the names of the students, but stated that he asked them what was going on, and they responded that Bassetti had used a

[5] I note that CT's testimony that BO was with CT, GM and NB when the group proceeded to the Office immediately following Bassett's class is in conflict with the testimony of Wright and BO. I find that CT is mistaken in his recollection on this point.

racial epithet during class, directed toward another student (1T-183). Prior to their appearance in his office, Wright stated that he did not know the 3 students (1T-184). Wright testified that he told them he was going to have each of them write a statement; he then directed them to leave his office, and began calling them in one by one to take statements from the three students who had presented themselves to him (1T-183).

Wright stated that the first student he spoke with was GM (1T-183). He testified GM told him that the N-word was the epithet that the students attributed to Bassetti (1T-184). After he obtained statements from CT, NB and GM, Wright said that he sent the students back to either lunch or recess, depending on what period they had for lunch(1T-184).

Wright then contacted his direct supervisor, Principal Luis Amberths, to advise him about the situation, as well as his intention to get statements from the other students in the class. Wright's announced plan was to get a statement from Bassetti once the students had all given statements (1T-184 to 185).

CT Statement and Testimony

CT recalled giving a statement, and I will not repeat his testimony which is recounted above concerning the events of February 27, 2019 in Bassetti's classroom. CT stated that he and GM explained to Wright what had happened, then Wright gave them a form to write down what they heard. CT recalled that all

4 students, himself, GM, NB and BO were seated in chairs in the hallway when they wrote the statements (1T-26 to 27). CT stated that they did not discuss anything other than the spelling of each other's names (1T-27). CT recalled that Wright interviewed him for about 10 minutes after CT did the written statement, and that Wright asked only about what was said, not about anything else that might have happened in class (1T-38 to 39).

CT's statement recited that Bassetti said "I am not trying to deal with you niggers" (Exhibit Board-1 at 1T16). CT also recalled that NB and BO went to lunch prior to being interviewed by Wright (1T-39 to 40).

At arbitration, CT also identified a drawing he had made of Bassetti's classroom, but after reviewing it and another depiction done by Bassetti, CT agreed that Bassetti's was more accurate (Exhibit Board 2, 1T-19 to 20; 1T-31 to 32;Exhibit Bassetti-1). When asked to review an exhibit with the layout of the classroom, and place where Bassetti was when he first had the conversation with JS and CO, CT placed a "B1" near the desk occupied by JS and CO nearest to CO. He stated that when he heard Bassetti's remark, Bassetti was returning from the back of the room, facing toward the front of the room, and facing but behind the table where CT, BO, NB and GM were seated. CT marked Bassetti's location when CT heard the remark with a "B2". CT marked Bassetti's route of travel with a dotted line showing Bassetti proceeding down an aisle nearest to the door, and

finally ending near Bassetti's desk at a point CT marked as "B3" (1T-33 to 34; Exhibit Bassetti-1).

CT testified that as of February 27, 2019 he thought his grade in Bassetti's class was a C, and that it was now a B (1T-35 to 36). He stated that he turned in his science project late, after Bassetti followed up with CT and his mother (1T-36 to 37).

CT also stated that, in addition to discussing the need to report Bassetti's comment to the principal with his tablemates NB, GM and BO, he also spoke with JS and CO, the two students who were involved in the Chromebook incident (1T-43). CT also spoke with Board counsel in the presence of Superintendent Cobain in preparation for the hearing (1T-45 to 48)[6].

NB Statement and Testimony

NB testified that on February 27, 2019 two students were not doing work, being "irritating" to everyone, and Bassetti started looking "aggravated", walked away and "said the n-word" (1T-52). NB stated that he heard Bassetti say the word, but kept doing his work, then discussed it with GM and CT who were sitting

[6] Each student except KR was asked a series of questions about whether they had met with Board Counsel in the presence of Superintendent Cobian prior to the hearing, and all provided essentially the same responses, including that they had been directed to tell the truth. The students met individually with Counsel and Cobian. KR merely confirmed that a meeting with Board Counsel occurred in response to a single question.

with him at the same table(1T-53to 54). He discussed going to the administration, but nothing else with his tablemates (1T-55 to 56).

After class ended NB stated that he went to see Wright along with CT and GM (1T-56). NB testified that Wright did not ask him questions but told him to write down his statement, which said in part that "Mrs." (sic) Bassetti "very quietly" said "nigger" and I thought he did not really say it but my classmates heard him say it" (1T-63;Exhibit Board-3, 1T-22 to 23; Exhibit F to Board Statement of Evidence/Tenure Charges). NB testified that Wright did not tell him what to write, and that he did not discuss what happened with anyone other than his parents, CT and GM (1T-53;1T-57 to 58).

NB stated that the incident with JS and CO and the Chromebooks occurred about the middle of class, with approximately 10 minutes left in the class (1T-59 to 60). He testified that as of February 27, 2019 he was doing "pretty good" in Bassetti's science class with a C or D; he currently has a C in the class (1T-62). NB did not recall a science fair project (1T-62). NB testified that Bassetti had moved NB's seat "a couple times" for excessive talking, and was "pretty sure" that he had been seated near the sink at one point (1T-70 to 71). He was moved to the table he was seated at on February 27, 2019 after assuring Bassetti that he would continue working (1T-71).

When shown an exhibit which depicted the layout of Bassetti's classroom, NB placed himself, CT, GM and BO at the table where they were seated, and also indicated where JS and CO were seated. He placed a "B2" at the location where Bassetti was when NB heard him make the remark, which was on the side of the room near the door, almost adjacent to the table where NB was seated. NB placed an arrow to show Bassetti's direction of travel, which shows Bassetti moving from the back of the room toward the front, where Bassetti's desk is located (1T-58 to 61; Exhibit Bassetti-2).

GM Statement and Testimony

GM testified that Bassetti walked over to JS and CO and told them to turn their Chromebooks off because class was ending and the computers were being collected. GM said that the Chromebooks were placed in a cart at the end of class (1T-88). When Bassetti walked away, GM stated that he heard him say "I can't deal with these n-word"(1T-74). After hearing this, GM testified that he stopped and looked at NB, CT and BO, but did not say anything (1T-75).

After class, GM went to the main office, and he, NB and CT went into Wright's office. He was unsure if anyone else was with them (1T-76). GM stated that all of them spoke with Wright, and he filled out a statement in the hallway outside Wright's office (1T-85; Exhibit Board-4 1T-73 to74). GM's statement said in part that Bassetti "said the N- word softly", and he testified that it was said

softly enough that the whole class could not hear it (1T-77 to 78). Specifically, the N-word he heard ended in "er" (1T-84). GM said that no one, including Wright, told him what to write (1T-78). He did not discuss what happened with anyone other than his parents (1T-78).

When directed to place a "B1" on a diagram of the classroom at the location where Bassetti was when he made the remark, GM placed Bassetti as standing in the front of the classroom in front of the table where GM was seated, along with BO. NB, GM and CT. GM then placed a dotted line indicating that after Bassetti made the remark he continued across the front of the classroom toward his desk, where GM placed a "B2" (1T-79 to 81; Exhibit Bassetti-3).

At the time of the incident, GM stated that he had a D or an F in Bassetti's class, and that he currently has a B in science (1T-85). GM did not turn in a science project to Bassetti (1T-86).

After obtaining the statements of CT, NB and GM, and touching base with Amberths, Wright started calling the other students from Bassetti's fifth period to his office. He directed each student to sit outside his waiting room to do their statements. He did not recall that students were waiting together in the hallway at any time (1T-201). When the statement was done, Wright read it over, and asked if there were any additions or deletions. Wright testified that he told each student not to discuss his or her interview with other students (1T-203). Wright

believed that it took him until 9:00 a.m. on February 28, 2019 to finish all 22 students who were in Bassetti's class (1T-185). Wright testified that he did not tell any of the students what Bassetti was alleged to have said prior to reading their statements (1T-186).

Wright testified that overall, he found the students' to be credible, however there were some he did not find credible. Specifically, he stated that he believed CS made the whole thing up, and did not see or hear anything. SH had told him that he wasn't in the room, and then made a statement that he heard it. JS provided a statement that he heard the comment after previously telling Wright that he did not hear himself being called the alleged word (1T-186 to 187).

With respect to the three students who initially came to his office, CT, NB and GM, Wright stated that they appeared to have been concerned or upset about something. Wright found all three to be credible (1T-187).

Among the students who were summoned after Wright received the information from CT, NB and GM, were the following:

Statement and Testimony of BO

BO also provided a statement about the events of February 27, 2019 (Exhibit Board-5; 1T-91 to 92). BO testified that February 27 was a normal day, until he saw his friend CO "playing around" and refusing to give a computer to Bassetti. BO stated that Bassetti "got mad" and said, "I'm done with you niggers"(

1T-93). BO's statement reflects that he "heard Mr. Bassetti say "I'm done with you niggers", and further that "Everyone in my table looked at each other and we were talking on how we heard the same word (1T-93; Exhibit Board -5).[7] BO recalled that Bassetti spoke "pretty softly" when he made the statement, but BO could not remember at what point during the class the statement was made (1T-99 to 100). BO stated that when Bassetti made the remark, he and his friends "just looked at each other in shock and just were like, oh, did you hear that?" (1T-93). BO clarified that the friends he was referring to were NB, GM and CT, and that the only further discussion was about reporting the comment to the office (1T-94; 1T-103 to 104).

When asked to place a "B1" on a diagram of the classroom where Bassetti was standing when he went to speak with JS and CO, BO placed Bassetti in the back of the room, nearest to the wall where the door is located, next to the table where he indicated JS and CO were seated. BO placed a "B2" where Bassetti was when BO heard the remark; BO placed it alongside the table where he was seated, on the right side of the room near the door, indicating that Bassetti had walked in a straight line from his "B1" position near JS and CO, toward the front of the room (1T-96 to 99; Exhibit Bassetti-4).

---

[7] BO was sitting at a table with CT, NB and GM.

BO stated that after Bassetti's class ended, he proceeded to the rest of his classes until he was called to the office later in the day and asked to write the incident report (1T-94). BO later clarified that he actually was called to Wright's office to make a statement on February 28, not the day when the incident occurred. When BO went to the office, he encountered two other students, SA and J (no last name or initial in transcript)(1T-105). He met with Wright, who told him to write down what happened and make sure to put down the word that Bassetti used; Wright did not tell BO what word had allegedly been used (1T-95; 1T-105 to 106).

BO also stated that prior to the incident, he did not have any problems with Bassetti, who was "pretty nice" to him (1T-96). He first stated that he believed that he had a C in Bassetti's class in February 2019, but later said the grade was maybe a B or an A (1T 101; 1T109). He stated that he did not turn in a science fair project (1T-101). His current grade in science is an A (1T-108).

Statement and Testimony of CO

CO was seated next to JS, and stated that he and JS were "messing around" passing the Chromebook back and forth because Bassetti wanted it " 'cause it was on a book"(1T-113). CO testified that Bassetti was getting upset and then walked away and said he was tired of all these niggers (1T-113).

When shown a diagram of the classroom and asked to place a "B1" where Bassetti was standing when he was trying to retrieve the Chromebook, CO placed Bassetti in the aisle leading from the right of Bassetti's desk to the back of the room, at the front corner of the table where CO and JS were seated. CO placed a "B2" at the right side of Bassetti's desk in the front of the classroom when asked to show where Bassetti was standing when CO maintained he heard the remark (1T-118 to 119; Exhibit Bassetti-5). CO also place a "B3" near the doorway marking where Bassetti was at the end of class (1T-120; Exhibit Bassetti-5).

After class, while CO was at lunch, CO stated that CT came up to him and said he had heard the comment and had gone to Wright(1T-114; 1T-117). In addition to speaking with CT, CO also said that he spoke with JS, who had been seated next to him in class (1T-114). CO stated that JS told him that he also heard the comment (1T-114 to 115).

CO said that he was summoned to the office, and when he arrived several students were there, including CS, JH, J (no last name in transcript) and CT; CO stated that he did not have a discussion about what happened with any of them (1T-155 to 116). Wright directed CO to write a statement, but did not tell him what to write other than telling him to write the words he heard Bassetti say (1T-116; 1T-121). CO's statement said that Bassetti "mumbled under his breath..I'm done with these n****" (1T-111 to 112;Exhibit Board 6; Exhibit H to Board

Statement of Evidence/Tenure Charges). CO could not remember how much time was left in class when the statement was made (1T-119).

CO could not remember if he turned in a science fair project or how much of his grade it would count for (1T-125).

Statement and Testimony of JH

JH is 12 years old and was in Bassetti's seventh grade science class (1T-129 to 130). She provided a statement, which erroneously indicated that the incident occurred on 3/27/29; JH was unsure when the events happened but stated she was "pretty sure" in March ; however she later stated that she made the statement on the day after Bassetti made the remark(1T-130 to 132; Exhibit Board-7; Exhibit I to Board Statement of Evidence/ Tenure Charges; 1T-139 to 140).[8]

JH testified that two boys in the back of the room were on their Chromebooks and when Bassetti tried to take it they refused, and Bassetti got "mad" (1T-132). She stated that Bassetti walked away "mumbling" that he was "tired of putting up with us niggers"(1T-132 to 133; 1T-139). When Bassetti said it JH stated she was sitting in the middle row of the classroom (1T-133). She placed

[8] JH noted that there was some writing on the statement which was not hers in the portion of the statement for person's name and persons in conflict (1T-141 to 142).

AS, L (no last name or initial in transcript), and GM at a table to her right and CT, J (no last name or middle initial in transcript) and BO at a table to her left (1T-134).

When asked to mark "B1" at the place on a diagram of the classroom where Bassetti was during the Chromebook incident, JH placed Bassetti in the aisle closest to the right side of his desk, at the corner of the table where she placed CO, JS and S (no last name in transcript). JH placed a "B2" at the spot where Bassetti was when she heard him use the racial epithet, which was in the same aisle where he had been standing when he went to get the Chromebook, closer to the front of the room between the table where she was seated and the table across the aisle, where she placed BO and CT (1T-137 to 139; Exhibit Bassetti-6).

JH stated that she did not react when Bassetti made the statement, and did not speak with anyone about it after class (1T-134 to 135).

When JH was called to the office, she stated that she met with Wright, gave him an account of what happened, and then wrote her statement (1T-147 to 149). The statement recited that Bassetti said "I am tired of putting up with these niggas" (1T-141; Exhibit Board ; Exhibit I to Board Statement of Evidence/Tenure Charges; 1t-). However, JH maintained that the actual word Bassetti used was "niggers" not "nigga"(1T-141).

JH testified that other than her mother and counsel, she did not speak to anyone after she wrote her statement about what happened (1T-135 to 137). However, JH then stated in response to a question that she had given an interview to a television station about the incident (1T-146; 1T-160 to 162).

JH stated that she had been "doing fine" in Bassetti's class before the incident and that she had handed in her science project. She denied that her grades were lower than they had been in the past or that there had been a discussion about her science project having been poorly completed (1T-144).

Statement and Testimony of KR

KR is a 12-year-old seventh grade student at the Penns Grove Middle School (1T-164). She stated that when she was leaving Bassetti's classroom on February 27, 2019 Bassetti was walking to his desk and she heard him "say something under his breath". KR testified that she did not recall the "first part" but thought she heard him say "the N-word" (1T-166). She stated that Bassetti made the remark quietly, "like he was talking under his breath" (1T-167).

When she was asked to indicate on a diagram of the classroom where she was sitting on February 27, 2019, KR placed herself at the aisle side of a table at the back of the room, in the same row where JS and CO were seated, but at the opposite side of the classroom. She placed herself at the door of the classroom when she heard Bassetti make the remark by adding "K2" to the diagram, and

Bassetti at the right side of his desk when he made the remark, but adding "B2" to the diagram. She also placed her route of travel from her seat to the door by adding a dotted line connecting "K1" and "K2." She also placed Bassetti near the corner of JS and CO's table during the Chromebook incident by adding "B1" to the diagram, and indicated that he moved from there to the front of the room by his desk at the position she had previously designated "B2" (1T-174 to 175; Exhibit Bassseti-8).

She was called to Wright's office on February 28. KR testified that from the time that Bassetti's class ended until she was called to Wright's office, she did not speak with anyone about the incident, and did not talk to her parents about it until she went home after being called to Wright's office (1T-168). When KR arrived in Wright's office, she stated that BO, S (no last name in transcript) and SA were already there. She testified that she did not speak to the other students about what happened in Bassetti's class (1T-168).

KR testified that when she met with Wright, he said that it had been reported that Bassetti had said something and that it might have been a bad word (1T-169). Wright did not tell her what the word was. KR stated that she told Wright that she heard Bassetti say a bad word, but did not repeat the word because she didn't want to say it (1T-169).

KR wrote a statement which stated in part that while leaving the classroom "it sounded like he said a bad word but I don't know if he was talking to a student cause I was leaving the classroom" (1T-165; Exhibit Board 8; Exhibit K Board Statement of Evidence/Tenure Charges). After she gave her written statement, KR testified that she spoke with some other students asking if they had been called to the office (1T-171).

KR stated that during Bassetti's class, a student did not put a Chromebook away. She did not recall who the student was, and did not hear what Bassetti said other than to put the Chromebook away (1T-172). She stated that she guessed that about 5 minutes passed between the time of the Chromebook incident and the comment she heard Bassetti make while she was leaving the classroom (1T-172 to 173; 1T-178).

After carefully reviewing the testimony and statements of the students, I find their testimony about Bassetti's use of the word "nigger" to be credible. In reaching this conclusion, I am mindful of the inconsistencies in their testimonies, including differences among them about where Bassetti was standing when he muttered the word, the time in class when he made the statement, and the exact sentence that he formulated. Despite these inconsistencies, I find that the immediacy of the students' response to Bassetti's use of the word "nigger" and the manner in which they expressed their reactions persuasive; for example, BO

said that when Bassetti said the word, he and the students at his table "just looked at each other in shock"(1T-93). Three of the students immediately went to the office to report what happened, which seems courageous, since middle school students were reporting serious misconduct by a teacher to high level administrators and could not know if they would be believed.

I also note that the testimony from the students is absolutely consistent that the racial slur was used, and that it was made in a soft voice, which may partially account for the differences in what was heard by students in the rest of the sentence. The word which riveted their attention was "nigger." The lack of absolute consistency in what they report about the other muttered words tends to support their credibility rather than undermine it. Identical testimony in this situation would more likely be the product of rehearsal than recollection.

While there are differences in where the students say that Bassetti was located when he used the racial slur, with the exception of GM, KR and CO, the students place Bassetti toward the rear or middle of the classroom, proceeding toward the front of the classroom (Exhibits Bassetti -1 through 6; Bassetti-8).

I also am not persuaded that some of the students were motivated to lie about Bassetti due to their failure to produce a Science Fair project. While their grades would clearly be negatively impacted on their interim reports by virtue of a failure to hand in the project, the remainder of the marking period would

provide time to counteract that failure and raise a low grade. In addition, in order to carry out such a plan, the students would have had to conceive of a story about Bassetti using a racial slur, persuade other students to join the plan, and then carry it out through a process which included questioning by Vice Principal Wright, and testifying under oath. That is simply implausible in view of the age of the students, and the number of co-conspirators which would be required in order to carry out the plan.

Wright concluded the interviews with the students in Bassetti's class about 9:17 a.m. on February 28, 2019 (1T-179; Exhibit Board 9).

Wright testified that he did not request or assist the student who came to him with the initial complaint about Bassetti-whom he believed to be GM-in making a written claim of discrimination (1T-200). Wright acknowledged that the students he interviewed were not completely consistent about the words Bassetti spoke before or after the racial epithet, but stated that it was attributable to the circumstance that the students were 11, 12, and 13 years old (1T-206 to 207; 1T-212 to 213). He did not attempt to resolve the inconsistencies in the statements (1T-207). Wright testified that he encouraged the students to write the actual words that Bassetti uttered, but did not tell them what Bassetti was alleged to have said (1T-207).

Wright and Amberths Meet With Bassetti

On February 28, after obtaining statements from the students in Bassetti's class, Wright testified that he spoke with Principal Luis Amberths, and went over the statements with him (1T-188). Wright testified that he believed Amberths spoke with Superintendent Cobain, but he was not a party to that conversation.

Wright stated that Bassetti was called to come to Wright's office sometime in the afternoon on February 28th. Amberths was also present at the meeting (1T-188 to 189). Wright conducted the meeting, and Amberths acted as a witness (1T-189). Wright testified that the purpose of the meeting was to get a verbal statement from Bassetti about what transpired and to follow up with a written statement from Bassetti (1T-189). Wright stated that when Bassetti arrived, he explained the reason for the meeting, told him what the alleged remark was, and advised him of the need for a verbal statement followed up by a written statement. Wright testified that he told Bassetti that "if it will go any further...you will be called back and at that point you can have union representation" (1T-189 to 190; 1T-210). Wright also shared the name of the alleged victim with Bassetti (1T-190). He did not provide Bassetti with a written complaint, including a District Affirmative Action Form (1T-208). Wright stated that the meeting lasted approximately 10 minutes (1T-191).

Due to the judicial Order with respect to statements made by Bassetti without union representation, as stipulated by the parties, I make no findings with

respect to Bassetti's participation in the meeting other than to note that he cooperated by providing an oral and written statement. I have not considered the content of either the transcript or any exhibits which concern Bassetti' s verbal or written statements arising from this meeting (Exhibit J-2, Paragraph 13).

Wright testified that a few days after the meeting with Bassetti, he became aware of a rumor that there may have been a video of the incident. Wright stated that he brought the students in, and no one was able to corroborate that there was a camera or a phone taking pictures or video. After completing this follow up, Wright stated that he compiled everything and gave it to Amberths. Wright testified that he was interviewed by Michael Ostroff, the District's Affirmative Action Officer about the meeting with Bassetti (1T-192 to 193).

Wright stated that although he was unsure about whether he could make a determination about whether Bassetti should go back to the classroom, he believed that it would be impossible for Bassetti to return to a classroom in the Middle School due to community outrage about the incident (1T-193 to 194). Wright also stated that he felt that it would not be a "good situation" for Bassetti's "personal safety" since threats had been made against him (1T-194). He stated that he was familiar with the Board's policy concerning allegations of harassment, but had not memorized Board Policy 4118.1, Title IX (IT-197 to 198;

that the manner in which Bassetti addressed the students and failed to care for them also violated Board Policy 4119.25 "Unbecoming Conduct" (1T-258 to 259; Exhibit Board-14). Finally, Cobian stated that Bassetti violated the first sentence of Board Policy 4111.1 "Nondiscrimination/Affirmative Action/Sexual Harrassment", which provides in part that the Board guarantees "equal access to all categories of employment, retention and advancement" in the district without regard to whether an individual belongs to a protected class (1T-258 to 261; Exhibit Board 15).[10]

Cobian testified that she did not file tenure charges due to community pressure to do so (1T-262 to 263). She stated that Walter Hudson, a former Board member, is a community activist (1T-263). Cobian testified Hudson is permitted on school property only when he has a child in a school due to claims he had an incident with a teacher (1T-263 to 264). She stated that there was an incident between Hudson and a police officer which she thought resulted in criminal charges; there was a civil judgment against Hudson arising from the incident (1T-264).

Cobian could not recall if Hudson appeared at a Board meeting to call for immediate action to fire Bassetti , but stated that he has publicly called for

---

[10] I note that Cobain testified that her determination about a violation of Board Policy 4111.1 was based in part on a statement alleged to have been made by Bassetti which are excluded from evidence. I have not considered this aspect of her testimony.

Bassetti to be fired (1T-264-265). She testified that she was aware of numerous posts by Hudson calling for Bassetti to resign (1T-265). Cobian reviewed a packet containing 14 documents including Hudson's internet posts, and selected those which which she had previously seen (1T-265 to 272; Exhibit Bassetti-10).

Cobian identified the following documents from Exhibit Bassetti-10 which she had previously seen: Hudson post with biblical quotation and an attached video of a Board meeting with subtitle referring to Board's response to Bassetti incident (page 3 of Bassetti-10); Hudson post with picture of Bassetti with "Bruce Bassetti Resign Now" printed across the picture (page 5 of Bassetti-10); Hudson post with Bassetti picture as described above and post purporting to be from a student in the class (page 6 of Bassetti-10); Hudson post with pictures of Bassetti and "school district tries to fire tenured teacher over alleged racial slur" (page 11 of Bassetti-10); Hudson post commenting that if Association president Lehr fights for Bassetti, Hudson will have media and activists in front of Lehr's house and the middle school and "WE WILL SHUT IT DOWN !" (page 13 of Bassetti-10; capitalization in original).

Cobian testified that she did not consider the posts in deciding whether to file tenure charges because she had already made her decision to do so before she saw the posts (1T-272 to 273). Cobian maintained that Hudson calls for the termination or resignation of teachers in the district "all the time" (1T-285). She

stated that she was repeatedly contacted by the media about the Bassetti incident, including NJ.Com, Courier-Post, and Channel 6, but testified that she was not influenced by these contacts in making her decision to file tenure charges (1T-273 to 274). Cobian also stated that she gave no statements to the press because it was a personnel matter (1T-274).

With respect to Board Policy 4111.1, Cobian testified that this policy is for staff, but applies to "all", and that students may file a grievance under this Policy (1T-275; Exhibit Board 15). She maintained that the first paragraph of Board Policy 4111.1 is a general statement, and while it does not mention students, the word "student" is "implied" (1T-278 to 279).

She stated that when students make claims against staff members, the complaint goes to the principal, because principals are part of the Affirmative Action subcommittees in the schools (1T-276). She maintained that although Wright had testified that he had approximately 2 hours of EEO training, she was not concerned that he might be able to reconcile inconsistencies in statements, because he consulted with the principal, who had training (1T-276).

With respect to the steps she followed in crafting tenure charges, Cobian stated that she worked with counsel to draft the charges, which are then presented to the Board along with all the evidence, and the Board then decides whether to file the charges (1T-282). A statement of position from Bassetti is

requested by counsel for the Board, and that statement is part of the material considered while the Board deliberates about proceeding with tenure charges (1T-282 to 283).

Cobian stated on cross-examination that she made the decision about whether to file tenure charges against Bassetti on February 28, 2019 when she had all the statements in hand, not on the previous evening following negotiations (1T-284).

Affirmative Action Investigation

Michael Ostroff is the Director of Curriculum and Instruction in the Penns Grove-Carneys Point Regional district, a position he had held since August 2018. He is also the Affirmative Action Officer for the district (1T-223). Prior to his employment with the Board was employed by the Mount Holly school district, where among other duties he was the Affirmative Action Officer (1T-223).

Ostroff testified that his training in being an Affirmative Action Officer is limited to guidance from the superintendent in Mount Holly and Cobian, both of whom had served in that capacity prior to Ostroff assuming the role (1T-223 to 224). He stated that he also read policy, regulations, and handbooks. (1T-232).

Ostroff prepared an Affirmative Action Report, dated March 22, 2019, on the Bassetti incident (1T-224; Exhibit Board-10). At the portion of the Report captioned "Allegations" the phrase "per attached sheets" appears, which he

testified were student, administrator and teacher written statements (1T-225). The Report states that Bassetti violated the "affirmative action policy" by uttering a racial slur, but does not specifically refer to any Board Policy by number or title (Exhibit Board-10),

Ostroff stated that he was not present for any of the student interviews conducted by Wright, nor did he interview Bassetti (1T-227). He testified that he made a judgment call not to re-interview the students, because he felt their statements, together with Bassetti's,[11] were a "complete picture" of the claims (1T-229). He testified that he did not interview Bassetti because Bassetti was suspended (1T-231).

Ostroff stated that if someone made a complaint about an offensive comment which would fall under the affirmative action policies of the district, the complaint would go directly to him if the victim or the person claiming the offense reported it directly to him (1T-234). He testified that if that sort of allegation were reported to someone else, the allegation should be reported to him, but he maintained that in some circumstances, the building administrators had the right to investigate a claim made by a student(s) about a teacher (1T-235).

Bruce Bassetti

[11] Bassetti's statement is excluded from evidence based on the judicial Order which is previously referenced in the Joint Stipulation (Exhibit J-2, Paragraph 13).

Bassetti testified that he did not use the word "nigger" during his fifth period class on February 27, 2019 (2T-288; 2T-309[12]. He stated that the accusation has caused him to become upset, angry and worried (2T-288 to 289; 2T-324).

Bassetti testified that on February 27th he mentioned to his fifth period science class that the science fair grade was to be posted on the interim reports for the marking period, and that the project counted for 50% of the grade. That year there was a school directive sent to parents advising that the projects were mandatory. He estimated that science fair projects take 3 to 4 months to complete, and noted that in 2019 he had 10 student who had done projects which were good enough to be considered to go to the Salem County Science Fair (2T-298). Bassetti testified that the deadline for submission of the project had passed, and noted that he had extended the deadline for his students (2T-298 to 300).

On the 27th, Bassetti stated that he had just passed back the tests he had graded, and gave the students an opportunity to correct the test grade so that they could perhaps raise their grade for the interim report (2T-299).

[12] In fact, he denied that he made any comment about students.

Bassetti reviewed a diagram, not to scale, that he had prepared showing the tables and where students in his classroom were sitting on the day in question (2T-302 to 304; Exhibit Bassetti-11).

The diagram shows Bassetti's desk at the end of the room near the door, and three rows of tables with up to four students seated at the tables. There are aisles from the front to the back of the room (Exhibit Bassetti-11). Bassetti testified that when the incident with the Chromebook and JS and CO, he was at first seated at his desk, then walked up the aisle between the tables occupied by CT, NB, BO and GM, which would have been to his right as he walked toward the back of the room; the table across from them was where JH was seated as well as two other students (2T-305; 2T-325). NB and GM were seated directly across from CT and BO, with their backs to where JS was seated. CT and BO were seated facing toward JS (2T-327). Bassetti stated he stopped at the back of the room and stood in the aisle beside JS, then turned around to face the front of the room while attempting to see what JS was working on (2T-305 to 306).

After Bassetti attempted to grab the Chromebook, but was thwarted when JS passed it to CO, Bassetti testified that he retraced his steps down the aisle and back to his desk (2T-306; Exhibit Bassetti-11). He stated that the incident occurred about halfway through the fifth period class (2T-307).

Bassetti testified that CT was seated facing the back of the room where JS was seated, and GM faced the front of the room where Bassetti's desk was located (2T-306 to 307).

Bassetti testified that he was summoned by security to a meeting with Wright on February 28th, and that Amberths joined the meeting. He stated that Wright informed him that Amberths was there as a witness. Wright informed him that a student had accused him of using the N-word (2T-310). Bassetti's responses are not in evidence; however he stated that Wright and Amberths directed him to fill out a written statement, and I find that Bassetti complied with their direction. I also find that no union representative was present at the meeting, since the testimony of both Wright and Bassetti establishes that only Wright, Bassetti and Amberths were present (1T-188 to 189; 2T-310 to 312).

Bassetti stated that he is involved in community activities, and that he volunteers his time at programs for at-risk youth in the community. He testified that he is also a merit badge counselor for the Boy Scouts of America (2T-313). Bassetti maintained that his involvement in supporting at risk students bolsters his assertion that he is not a racist (2T-313).

On February 28th, Bassetti testified that he was escorted off the middle school property and told to go to the district office. He was met there by NJEA Representative Jennifer Lehr who told him they were going to see the

Superintendent. Bassetti stated that Lehr informed him the Cobain would read a letter to him, and give him a copy. He testified that Lehr told him that all he should say is that he understood what Cobian read to him (2T-314).

Bassetti stated he and Lehr then went to the meeting with Cobian, who read him a letter, which he confirmed that he understood. He stated that he sensed that the meeting was a formality rather than an investigatory session (2T-315).

With respect to GM, Bassetti testified that GM might be motivated to lie because Bassetti was in "constant contact" with GM's mother about whether GM was on task in class. Bassetti stated that due to his repeated contacts with GM's mother, GM was "a little afraid" of Bassetti. Bassetti stated that GM had not turned in a science fair project (2T-315).

Bassetti reviewed a gradebook spreadsheet of the students in his 5th period science class as of May 29, 2019 and testified that the grades were not an accurate depiction of the grades of the students as they existed on February 27, 2019 (2T-316 to 317; Exhibit Bassetti-13). He stated that the science fair project grade that he entered had been removed(2T-317). Bassetti explained that if a student turned in a satisfactory project, he gave a grade of 90 or 100. If the project was less than satisfactory, the grade was 80. If no project was turned in, the lowest grade he gave was 50 (2T-317). He stated that in the gradebook the numeric grades he entered had been replaced with Es (2T-317; 2T-343). Bassetti

clarified that the area which was altered was on the last page, under the column that says SF final project test (2T-318).

Bassetti stated that CO did not do any work in class, and that he had been in email contact with CO's mother about his work; he maintained that CO's mother was unable to motivate him (2T-319). Bassetti testified that CO had not turned in a science fair project (2T-319 to 320). He also described an incident when CO took the pencil sharpener cover which was full of filings and shook them out over the head of a female student. Bassetti stated that from his vantage point, it appeared that the female student had been hit in the head with the sharpener cover, so he reported it to the office. Security then took both CO and the other student to the office, however Bassetti was later advised that the female student said she had not been hit in the head with anything other than the pencil shavings (2T-320).

Bassetti maintained that CT had a "long history" of mishearing things in class, to the point that Bassetti had to contact his mother. He stated that he had a long string of email history with CT's mother(2T-322). According to Bassetti, CT refuses to write directions down and then mixes them up. When Bassetti contacts CT's mother and provides directions, Bassetti testified that CT convinces his mother that the directions are wrong, and then does "what he wants to do" (2T-

322). He stated that CT was "more apt to misconstrue directions" than other 12-13 year old students (2T-341; 2T-348).

JH talks constantly in class, Bassetti stated, and gets nothing done due to her continual conversation. (2T-323).

Bassetti testified that during the 2018-2019 school year, there was no computer cart in his classroom. During the 2017-2018 school year, he had a computer cart in his classroom (2T-321).He also stated that of the students who had testified, CT, GM, BO and KR had been in his class for more than one year (2T-321).

Bassetti stated that the students were mistaken about hearing him say "nigger", but agreed that if he had walked between the desks where CT, NB, BO,GM and JH were seated, the students would be able to hear something that he said "if the room was quiet enough" (2T-328).

Bassetti stated that it was inappropriate to use the word "nigger" in class, and that someone who did so should be disciplined and probably should not be a teacher (2T-342). He also stated that he made the statement from the perspective of a teacher that would be suffering from burnout, and did not consider whether the teacher had an otherwise blemish free career or the body of relevant case law (2T-349 to 350).

I credit Bassetti's testimony, with the exception of his denial that he made a statement in the 5th period science class on February 27, 2019 which included the word "nigger" or "niggers."

Jennifer Lehr

Jennifer Lehr, then president of the Association, testified that when she arrived for the meeting with Cobian and Bassetti, she went into Cobian's office and was briefed by the Superintendent, and advised that Bassetti would be receiving a letter of suspension (2T-362). She stated that she left Cobian's office, spoke with Bassetti, and then they returned to her office and began the meeting. Lehr testified she had told Cobian that she had advised Bassetti to just listen to what Cobian said, answer only direct questions, and not to give a statement at that time (2T-362).

Lehr recalled that when Cobian spoke with them, she explained the allegations, and then said that Bassetti would be suspended with pay. She stated that Cobian gave Bassetti a copy of the letter of suspension, and advised him that he would be able to get his personal items. Lehr did not think that Cobian read the letter out loud, but stated that she read it while sitting in the meeting (2T-365).

Lehr testified that to the best of her recollection, Cobian did say that she would like to know what happened, but understood that the advice of the

Association was not to make a statement at that time (2T-363). Lehr stated that she was unsure about the exact words Cobian used, and specifically whether Cobian said that she was aware that the Association had advised Bassetti not to give a statement. Lehr testified that it was the understanding at the time of the meeting among the three participants that Bassetti would not give a statement (2T-363 to 365).

Luis F. Amberths

I note that Luis F. Amberths, principal of the Penns Grove Middle School, testified briefly. The primary purpose of his testimony was to authenticate a document he prepared to summarize the meeting he and Wright had with Bassetti on February 28, 2019 (2T-358 to 359; Exhibit Board-16). I find that Amberths testified that he was at the meeting.

Tenure Charges

On April 16, 2019 the Board certified tenure charges against Bassetti and suspended him for 120 days without pay pursuant to N.J.S.A. 18A:6-14 (Exhibit J-2, Para. 1).[13] The tenure charges are as follows:

[13] After the expiration of the 120 day suspension without pay, Bassetti has been and continues to be on a paid suspension (Exhibit J-2, Par.1).

Charge One (Unbecoming Conduct): Bassetti used the word "nigger" in front of a class of 7th grade science students, which is intolerable conduct requiring the termination of his employment.

Charge Two (Incapacity): Bassetti's use of a racial slur in the presence of students makes it impossible for him to effectively teach in the District. His return would cause acrimony with students, staff and the community; therefore, he is incapable of continuing his employment with the Board.

Charge Three (Other Sufficient Cause): Bassetti's use of a racial slur mandates that his employment with the Board must be terminated because his return to teaching would violate the public trust to ensure the care and well-being of the students and maintain a safe environment where they are not subjected to racial slurs by their teachers.

ANALYSIS

On February 27, 2019 Bruce Bassetti was teaching a science class at Penns Grove Middle School. During class, two students, JS and CO, frustrated Bassetti's efforts to retrieve a Chromebook, which was placed in a precarious position on top of a pile of materials in front of JS, by passing the computer out of his reach. As Bassetti returned from his fruitless errand, he muttered under his breath words to the effect that he "was done dealing with these niggers", a remark

which was heard by students. Bassetti denies having made any remark at all, and I have already found that the seven students who testified that they heard the racial slur are credible. I will not repeat the reasons which were outlined as part of that finding of fact here, but simply restate that despite inconsistencies as to where Bassetti was when he made the remark, the time during class when it was made, and the exact sentence he uttered, I find the testimony of the students and their written statements more credible than Bassetti's assertion that he said nothing at all.

The use of the racial epithet, the Board maintains, and Bassetti's deceitful refusal to acknowledge or accept accountability for his actions, make it impossible for the Board to trust that he will use good professional judgment in the future. In addition, the Board urges, Bassetti's comment is widely known in the community as well as by staff and students, rendering him incapable of functioning as a teacher in the District. The Board maintains that despite Bassetti's lack of a disciplinary history, the only appropriate penalty for his actions is removal, since his continued employment in the District has the potential to compromise the safety and well-being of students.

The Union maintains that the Board has failed to meet its burden of proving just cause for the termination of Bassetti's employment with competent credible

evidence. The Union asserts that the students' testimony lacks credibility, due to the multiple inconsistencies present in the testimony of the students, together with the motivation of some of the students to remove Bassetti from the classroom and thus improve their grades.

Additionally, the Union urges that the Board's investigation was flawed because it was not conducted by the Affirmative Action Officer, but instead by Wright, who lacked both training and objectivity.[14] The Union points out that when Ostroff learned of the allegations made by the students, he failed to interview the students or Bassetti, but merely relied on the students' written statements. The Union urges that the Board's investigation was procedurally and substantively deficient, and inherently unfair to Bassetti. The tenure charges should be dismissed.

The Union also argues that even if the Board proved the allegation against Bassetti, the penalty of termination would be unwarranted. Consistent with case law, the Union maintains, factors including the impact of termination on Bassetti's teaching career, his 14 year record of good evaluations and no discipline, as well as the provocation of JS and CO's classroom misbehaviors should weigh in

[14] The Union also makes an argument concerning violation of Bassetti's Weingarten rights during the course of the investigation. However, in view of the Order which excludes from evidence any statements made by Bassetti during the investigatory process when he was without union representation, I will not discuss this issue, since the Court's remedy essentially renders the issue moot.

Bassetti's favor and preclude his removal. The Board failed to follow progressive discipline, the Union argues, in seeking Bassetti's termination, and the penalty is both disproportionate to the alleged conduct, and inconsistent with penalties imposed for similar conduct in recent tenure cases. If the Board sustained its burden of proof, which the Union does not concede, it asserts that a lesser penalty of suspension would be reasonable based on recent precedent.

Investigation

The Union argues that the Board's investigation was not impartial, and that the manner in which it was conducted was procedurally deficient. The Association maintains that due to the deficiencies in the investigation, it did not produce facts which support just cause for the tenure charges against Bassetti. To be sure, the investigation was flawed in some respects.

The investigation effectively began on February 27, when NB, GM and CT arrived in the main office and were directed to Wright. Faced with their unannounced arrival, Wright met with each of them, and directed that they reduce their complaints to writing.

It does not appear that NB, GM and CT were sequestered from each other during the period that they were in the vicinity of Wright's office, although it is clear that Wright spoke with each student individually outside the presence of the other students. In retrospect, Wright should have assured that the students were

not in a position to discuss their recollections of what had occurred while they waiting to see him, however as a practical matter, once students left Bassetti's classroom and continued with their schedules, they were free to discuss what had happened as circumstances permitted. However, Wright could not have known in advance the nature of the students' complaints, and took the course of getting their recollections reduced to writing quickly, while still fresh in their minds.

Wright shared what had happened with Amberths, who approved Wright's proposed plan of action, to get the statements of the other students in Bassetti's class; Amberths then discussed the situation with Cobian, who directed that statements be taken promptly. There is nothing in the record which indicates that either Amberths or Cobian thought to reach out to the Affirmative Action Officer to assume responsibility for the investigation. I note that Cobian testified that she had been the District's Affirmative Action Officer prior to Ostroff assuming the job, and that Amberths had received training in affirmative action (1T-276).

Wright completed meeting with and procuring statements from the other students in Bassetti's class by the morning of February 28. Wright and Amberths met with Bassetti later in the day on the 28th.

Ostroff did not learn about the complaint against Bassetti until the weekend after the incident (1T-228). Although he was out of the office at training, there is nothing in the record which indicates that an attempt was made

to reach out for him or to seek his assistance prior to that time. Ostroff himself had no specific training in conducting affirmative action investigations, other than some advice and mentoring from a superintendent for whom he had previously worked, as well as Cobian (1T-223 to 224). Ostroff's report indicates that he did not speak with any of the students, or with Bassetti. The only interview he conducted was with Wright (Exhibit Board-10).

Although the Report concluded that Bassetti had violated the District's affirmative action policies, it did not specify those policies by name or policy number. Neither Board Policy 4111.1 "Nondiscrimination/Affirmative Action/Sexual Harassment" or Board Policy 6121 "Nondiscrimination/Affirmative Action", which Cobian maintained had been violated by Bassetti's comment, contain any procedures concerning the processing of complaints, or the conduct of investigations (Exhibits Board 15 and 12). The only reference to student complaints in Board Policy 4111.1 pertains to the filing of sexual harassment complaints by students (Exhibit Board-15, Section B, paragraph 5, page 3).

The testimony from Ostroff and Wright concerning the proper procedure for reporting complaints of affirmative action violations was contradictory, with Ostroff testifying that he would conduct investigations when complaints were made directly to him, but that building administrators were also empowered to conduct investigations of complaints made by students against teachers(1T-234

to 235). Wright testified that when a complaint came to him from a student, he would investigate it before referring it to the Affirmative Action Officer (1T-215; 1T 216 to 218). Based upon the record before me, it does not appear that the District has clear procedures in place for the processing of affirmative action complaints. The investigation was essentially completed once Wright had obtained statements from the students, and met with Bassetti.

However, the Association's argument that the investigation was so flawed and lacking in objectivity that the Board failed to meet the just cause standard in preferring tenure charges against Bassetti misses the mark. The Board had credible evidence from multiple students which supported the conclusion that Bassetti had used a racial epithet in the classroom. The Board's investigation, which was primarily conducted by Wright, proceeded quickly to get the statements of students while the incident was fresh in their minds. The students who testified all stated that Wright directed them to write down what had happened, and did not tell them what word Bassetti was alleged to have said. Wright testified that he did make some credibility assessments, and did not merely take each student's statements as factual (1T-186 to 187). The record reflects that Wright conducted himself in an objective fashion while interviewing and collecting statements from the student witnesses. Wright testified that when rumors of a video which pertained to the Bassetti incident may have existed, he

followed up by checking with students, and determining that he could not corroborate that a video existed (1T-191 to 192). Whatever his personal feelings may have been with respect to what Bassetti may have said, he clearly gathered information in a thorough manner.

I also note that the investigation of the Bassetti matter was not complex, since it involved a single statement, at a known place and time, with a defined universe of potential witnesses. In a more complex situation, the kind of procedural missteps which were present here might be fatal to the integrity of an investigation.

Unbecoming Conduct

Count 1 of the tenure charges alleges that Bassetti's use of a racial epithet during a class is intolerable, and caused a loss of credibility with students and staff.

I have already made credibility findings which substantiate that Bassetti used the word "nigger" during a 5th period science class on February 27, 2019. In reaching this determination, I considered the arguments about the students' credibility which were raised by the Association, but did not find them persuasive. I have articulated my reasoning in the factual findings section of this decision, and will not repeat them here.

The charge of "Unbecoming Conduct" is an elastic term which includes conduct which "adversely affects the morale or efficiency of [a school district or that] has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services," Appeal of Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (quoting Zeber Appeal, 398 Pa. 35, 43 (Sup. Ct. 1959). Behavior which constitutes unbecoming conduct does not have to violate a specific rule or regulation, but can be based on "the implicit standard of good behavior which develops upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992)(citations omitted).

Bassetti is a tenured teacher; the tenure statute is designed to protect educators from dismissal for "unfounded, flimsy or political reasons." Wright v. Bd. of Educ. Of E. Orange, 99 N. J. 112, 118 (1985) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962) cert. denied 371 U.S. 956, 83 S. Ct. 508 (1963). Tenured teachers must act in a professional manner and serve the welfare of the students in their care. Tenure charges may be sustained based upon a pattern of unprofessional conduct, or a single incident which is found to be "sufficiently flagrant." In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

Board Policy 4119.25 "Unbecoming Conduct" (Exhibit Board 14) provides that when an employee "creates conditions under which the proper operation of

the school is affected", the Board, with the recommendation of the Superintendent, will determine whether the conduct constitutes conduct unbecoming a school employee. The Policy further provides that a "single flagrant incident" may be sufficient to warrant Board review of an employee's conduct.

It is apparent that when Bassetti used a racial slur while conducting a class with students present, his conduct violated norms of professional behavior and common decency. Teachers not only communicate information; they are role models for the students in their care. Teachers are expected to maintain appropriate and professional conduct as a legitimate requirement for employment due to their position as both role models for students and public employees. In re Sammons, 1972 S.L.D. 302; Saunders v. N.J. Dep't. of Educ., 91 N.J.A.R. 2d (EDU)12.

Bassetti's use of the term "nigger" had no legitimate pedagogical purpose, and was evidently an expression of his annoyance at the misbehavior of JS and CO. NB, BO, CO and JH all testified that Bassetti appeared to be "aggravated" (NB; 1T-52), "got mad" (BO;1T-93; JH; 1T-32) or "upset"(CO; 1T-113) after the Chromebook incident. I infer that Bassetti was annoyed by the disrespectful behavior of JS and CO, annoyance which was justified. However, when he chose to express that annoyance by muttering words to the effect that he was done

with those "niggers" he crossed a line. The students' behaviors were objectionable, and deserved to the admonished. Behaviors can be corrected, but immutable characteristics, such as race or sex, cannot. By using a racial epithet to admonish behavior, Bassetti communicated to the class that individual behavior was the result of belonging to a particular race, rather than to choices about conduct. Simply put, he modeled racism.

As the Commissioner observed in Sammons,

> By virtue of the unique position they occupy, educators must be held to enhanced standards of behavior. [Teachers] are professional employees to whom people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. In re Sammons, 1972 S.L.D. 302, 321

I have used the word that Bassetti uttered-"nigger"- throughout this decision to underscore the brutality and potency of the term. Words have power, and I note that this particular word is so reviled that even adults who testified in this proceeding often elected to use the term "N-word" instead of what Bassetti actually said. Bassetti himself conceded that use of the slur in a classroom by a teacher was inappropriate (2T-342).

The Board also alleges that Bassetti's conduct violated Board Policy 4119.3 "Duties/Responsibilities." Cobian testified that Bassetti's comments violated his

duty to maintain an appropriate standard of care for supervision, control and protection of students (1T-256 to 257; Exhibit Board 13, Paragraph 3 A). I find that Bassetti's conduct violated his duty to protect the students under his care by subjecting them to racially discriminatory language directed toward members of the science class.

Ostroff's Affirmative Action Report stated that Bassetti had violated the District's Affirmative Action policies by uttering the racial slur, but did not specify which policies were implicated. Cobian testified that she concluded that Bassetti's comment violated both Board Policy 4111.1 "Nondiscrimination/Affirmative Action/Sexual Harassment" and Board Policy 6121 Nondiscrimination/Affirmative Action" (Exhibits Board 15 and 12).

With respect to Board Policy 4111.1, Cobian stated that although the Policy is intended for staff, the inclusion of students is "implied"(1T-278 to 279). The first paragraph of the Policy is a general statement which states that the Board guarantees equal access to employment, retention and advancement in the district without regard to any condition or membership in protected classes as defined by state and federal law. It also covers Harassment and Favoritism, Sexual Harassment and Whistleblower Protection. The only mention of students occurs in the Sexual Harassment portion of the Policy, which provides that students, as well as employees, may file formal sexual harassment grievances. The Policy is

clearly directed toward employees of the district, rather than toward students. I decline to include them by inference, as proposed by Superintendent Cobian. The Policy is clear and unambiguous in its language. While Bassetti's comment was discriminatory in impact, I do not believe that it violated the provisions of Board Policy 4111.1.

I conclude that the Board has met its burden of proof that Bassetti's use of a racial epithet in the classroom on February 27, 2019 violated Board Policies 4119.25 "Unbecoming Conduct", 4119.3 "Duties/Responsibilities", and 6121 "Nondiscrimination/Affirmative Action." The Board did not meet its burden of proof that Bassetti's statement violated Board Policy 4111.1"Nondiscrimination/Affirmative Action/Sexual Harassment.

The Board also maintains that Bassetti violated the provision of Board Policy 6121 "Nondiscrimination/Affirmative Action" which states that "[n]o pupil enrolled in the district schools shall be...subjected to discrimination in any educational program or activity of this district on the basis of any and all conditions or any of the protected classes" defined by state or federal law (Exhibit Board Policy 12). Cobian testified that Bassetti's use of a racial slur subjected the students in his science class to a discriminatory statement which violated the Policy (1T-255 to 256). There can be no doubt that the use of a racial epithet in the circumstances here is an act of discrimination which violates the Policy.

Incapacity

Charge Two alleges that Bassetti's use of a racial slur in the classroom makes it impossible for him to effectively return as a teacher because it would cause acrimony with students, staff and the community. In view of this concern, the Board maintains, Bassetti is incapable of continuing his employment with the District.

The Board argues that the focus of the term "incapacity" in the statute is broad, and considers not only classroom proficiency, but also a teacher's impact and effect upon the students. In re Grossman, 127 N.J. Super. 13 (App. Div. 1974). In the Board's view, once Bassetti uttered a racial epithet in the classroom, he compromised the integrity of the District. In addition, the Board maintains, his refusal to acknowledge his conduct removed any chance at remediation. Bassetti's return to teaching, in the Board's view, had the potential to compromise the safety and well-being of students.

The record reflects that Bassetti had been employed by the Board for 15 years when the incident occurred, and that he received "Proficient" evaluations during that time (2T-294 to 295). He has no disciplinary record, but testified that he was verbally counseled on one occasion for missing an afternoon duty station (2T-295). The record also reflects that Bassetti was an engaged teacher who maintained contact with the parents of GM and CO in an effort to increase their

motivation in class, and with CT's mother to clarify confusion about directions and assignments (2T-315; 2T-319; 2T-320). Bassetti also testified that he volunteers in community programs providing support to at risk children (2T-313).

Incapacity generally connotes a lack of ability. On the facts before me, there is no evidence that Bassetti cannot competently teach. The Board's position that he is incapacitated rests on a concern that Bassetti would make another similar comment to future students, and that there is thus the *potential* for harm to future students of his. This is purely speculative. Based on the entirety of Bassetti's otherwise unblemished record of conduct, it is at least equally likely that he would not repeat the conduct which has been substantiated here.

I note that the facts in Grossman, which is the sole case cited by the Board in support of its legal position, are distinguishable from the instant matter in one important aspect. Grossman was a teacher who transitioned from male to female and sought to continue teaching in the same district after the transition was completed. The Court determined that Grossman's mere presence in the classroom as a woman posed a continuing danger to students unrelated to her academic proficiency. Grossman, supra at 32. I note that the case was decided in 1974, at a time when issues of gender fluidity were less openly discussed or accepted. I infer that the Court agreed that students would have difficulty being in

the presence of a transgender teacher, supporting the Board's position that Grossman was incapacitated from teaching.

The Board's justifications for deeming Bassetti incapable of teaching are more supportive of their proposed penalty-termination-than of a charge of incapacity. The Board's arguments in support of Bassetti's incapacity are essentially circular; Bassetti's comment requires that his employment be terminated, and because he must be fired he cannot teach.

The Board has not met its burden of proving that Bassetti is incapacitated from teaching. Charge Two is dismissed.

Other Just Cause

The Board maintains that Bassetti's use of a racial slur in the presence of students violated the public trust, which requires that the District ensure that students learn in a safe environment, where they are not subjected to racial epithets.

The record reflects that the allegation that Bassetti used a racial slur in the classroom was the subject of one televised news story as well as a newspaper article (1T-145 to 146; Exhibit Bassetti-7). A community activist and former Board member also urged that Bassetti be fired in multiple Facebook posts which were seen by the Superintendent (1T-266 to 273; Exhibit Bassetti 10). In her capacity as

the public face of the District, Cobian testified that she was contacted repeatedly by various media outlets about the Bassetti incident (1T-273 to 274).

Wright testified that he could not support Bassetti's return to teaching in the middle school due to community outrage about the incident. Wright also stated that "some threats" had been made against Bassetti, which caused Wright to feel concerned about Bassetti's physical safety if he returned to the building (1T-193 to 194). Cobian testified that Bassetti's comment had not only damaged students and staff, but had created a "bad perception" which permeated "into the entire community." (1T-262). She also expressed concern that Bassetti's presence in the district would be detrimental to him. I note that the perceptions of both Wright and Cobian are based in part on information which has been excluded from the record.

I am persuaded by the evidence before me that Bassett's conduct has become well known to the school community, and the community at large. That information would be of concern to parents and students alike, as well as to the staff and school administrators. I conclude therefore that Bassetti has created a circumstance where public trust and confidence in the Board's ability to provide an educational environment which is free from racial slurs has been impaired. The Board has met its burden of proving that Other Just Cause to discipline Bassetti has been met.

Penalty

The parties have strongly held positions with respect to the appropriate penalty for the substantiated conduct which are reflected in the stipulated record. The Board stipulates that it has always taken the position that termination is the only appropriate penalty, and that the Board's decision to withhold Bassett's employment and adjustment increments was merely procedural (Exhibit J-2, Par.4). The Association disagrees with the Board's position and maintains that even if the Board's tenure charges are proven, the appropriate penalty is a suspension and/or increment withholding.

The Association points out that the Board failed to follow progressive discipline in seeking to terminate Bassetti's employment. The Board does not dispute that it did not utilize progressive discipline with respect to the penalty it seeks to impose for Bassetti's conduct.

Progressive discipline is a foundational principle of public sector discipline in New Jersey. West New York v. Bock, 38 N.J. 500, 522 (1962). Underlying the concept of progressive discipline is the idea that discipline is designed to correct behavior, rather than to punish. The incremental disciplinary steps are designed to permit time for the employee to correct the problematic behavior before increasing the sanction for failing to do so. However, tenure charges can be

sustained if a single incident of unbecoming conduct is "sufficiently flagrant." In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

Superintendent Cobain testified that the decision she made to recommend termination of Bassetti's employment rather than to follow progressive discipline was based on her assessment that his conduct was "so pervasive that progressive discipline will not suffice" (1T2-61 to 1T-262). She stated that as she read the students' statements, she "was just completely taken away." (1T-252 to IT-253). Cobian was so concerned with the content of the students' statements that she discussed the situation with the Board president and labor counsel, and received approval from the Board president to suspend Bassetti on the evening of the 27th, prior to the meeting Bassetti had with Wright and Amberths (1T-245; 1T-246 to 248). I credit her testimony that she effectively decided to suspend Bassetti on the evening of the 27th (1T-248). On her way home, Cobian reached out for the Association's president to provide her with notice that it was likely she would be suspending Bassetti on the 28th (1T-249). I infer from Cobian's testimony that her reaction to the student statements she read on the 27th was both immediate and visceral. As she testified, Cobian found Bassetti's use of a racial slur in the presence of students both denigrated and belittled them (1T-252 to 253).

Based upon Cobian's assessment of the seriousness of Bassetti's conduct and its impact upon the students, as well as on the community, I conclude that

Bassetti's use of "nigger" in the classroom is an instance of conduct which is sufficiently flagrant to warrant a sanction which is inconsistent with progressive discipline.

The Association also urges that the Board's recommended penalty of termination is grossly disproportionate and unwarranted under both the Fulcomer standards, and when compared with other recent tenure cases which involve the use of a racial slur.

Under the Teacher Effectiveness and Accountability for the Children of New Jersey Act, (TEACHNJ Act)), L. 2012, c. 26 (N.J.S.A. 18A:6-117 to 129), as well as its predecessor, the Tenure Employees Hearing Law (TEHL), L. 1967, c. 271 (N.J.S.A. 18A:6-1- to 18.1), a fact finder in a tenure hearing should consider when determining the appropriate penalty "the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and ...any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." Fulcomer, 93 N.J. Super. at 422. In addition, Fulcomer also establishes additional criteria, including "the impact of the penalty on [the teacher's]...career" as well as the teacher's record and teaching ability, together with any prior discipline. Id.

With respect to Bassetti, the record establishes that he is a teacher with no prior discipline, good evaluations, and a lengthy career with the Board. The racial epithet he used was in response to disrespectful behavior by two students, JS and CO, and doubtless provoked by their conduct. Although I have found that a single incident of unbecoming conduct occurred, the incident is serious and had a significant impact on the students in his class, as well as on the larger community, including at the very least the families of the students who heard the remark. The termination of his employment by the Board for unbecoming conduct would have a deleterious impact on Bassetti's teaching career.

The Association and the Board have provided decisions by fact finders which involve allegations similar in nature to Bassetti's comment in support of their respective positions. I have reviewed and considered all of them. The Association urges that recent tenure cases involving allegations that a teacher used the word "nigger" or a related term resulted in lesser discipline than termination, or involved more serious repeated conduct than Bassetti's single instance of inappropriate conduct.

Some of the cases cited by the parties are distinguishable based on their facts. There is no suggestion that the use of the racial epithet by Bassetti occurred as part of a relevant discussion of curricular material, or any credible evidence that the students who testified in this mater were motivated by Bassetti's

demanding academic standards or strict classroom management. (See In re Tenrue Hearing of Regina Dzwonar, Agency Docket No. 246-10/13 (Feb 20, 2014) (Brent, Arb). The racial epithet used by Bassetti was not directed toward another staff member, but in front of students. (See In re Tenure Hearing of Lauren Cooke, OAL Dkt. No. EDU 74-09, Agency Dkt. No. 357-12/08, 2010 WL 2947135, initial decision (July 22, 2010); 2010 WL 8020415, Comm'r. Decision (Nov. 22, 2010). While racist comments made to peers are objectionable, they do not have the same impact as when made by a teacher to students; teachers are role models for impressionable students, a consideration which is not necessarily present among colleagues.

Other cases involved teachers who had committed multiple acts of inappropriate conduct, some related to racial epithets, but received lesser penalties than termination (See In re Tenure Hearing of Barbara Emri, OAL Dkt. No. EDU 4579-00, Agency Dkt. No. 18-6/00, 2002 WL 31042788, initial decision (Aug. 30, 2002); 2002 WL 32590922, Comm'r. decision (Oct. 21, 2002 discipline final decision (Dec. 5, 2003);)(racially inappropriate comments and multiple acts of inappropriate behavior involving students, colleagues and parents, insubordination, failure to follow progressive discipline); In re Tenure Hearing of Adelphia Poston, OAL Dkt. No. EDU 03876-05, Agency Dkt. No. 78-3/05, WL 2645094, initial decision (Aug. 15, 2006) (use of homophobic slur); In re Geiger,

No. A-1409-13T2, 2015 WL 7261458 (N. J. Super. Ct. App. Div Nov. 18, 2015)(Appellate Court noted past decisions in Emri, Cooke, Poston, supra established lesser sanctions than dismissal for comments the Court deemed to be less pejorative and also noting that the teachers did not address their comments to students who overheard them).

In contrast, other cases where terminations were upheld involved teachers who had made multiple comments which were derogatory or demeaning, and had been the subject of progressive discipline (In re Tenure Hearing of Demetrio Surace, OAL Dkt. No. EDU 04400-12, Agency Dkt. No. 82-3/12, 2013 WL 8170523, initial decision (Sept. 16, 2013), made Facebook comments characterizing her first graders as "future criminals" and maintained that her conduct was not inappropriate (In re O'Brien, No. A-2452-11T4, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013).

While the determinations of other finders of fact may be instructive, facts in the record before me are the most relevant and persuasive in reaching a determination not only as to whether the charges alleged have been proven, but also in assessing an appropriate remedy. I am persuaded that in this case the Board's proposed disciplinary sanction of termination is warranted.

In reaching this conclusion I have considered all of the Fulcomer criteria, including Bassetti's lack of any disciplinary record, the fact that the conduct

AWARD

The grievance is denied. Penns Grove Carneys Point School District is directed to terminate the employment of Bruce Bassetti.

Susan W Osborn

Susan Wood Osborn
Arbitrator

DATED: July 17 , 2020
Trenton, New Jersey

State of New Jersey }
County of Mercer }

On this 17th day of July 2020 before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

JOHN PELLIZZARI
NOTARY PUBLIC OF NEW JERSEY
Commission # 50109398
My Commission Expires 7/24/2024

153-20

OAL Dkt. No. EDU 01214-20
Agency Dkt. No. 329-12/19

New Jersey Commissioner of Education

Final Decision

C.E., on behalf of minor child, R.W. and L.W.,

Petitioner,

v.

Board of Education of the Borough of Bay Hill, Ocean County,

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: 7/27/20
Date of Mailing: 7/28/20

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01214-20
AGENCY DKT. NO. 329-12/19

C.E. ON BEHALF OF MINOR CHILDREN, R.W. AND L.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BAY HEAD, OCEAN COUNTY,
Respondent.

C.E. on behalf of minor children, R.W. and L.W., petitioner, pro se

David M. Casadonte, Esq. for respondent

Record Closed: June 2, 2020 Decided: June 9, 2020

BEFORE **KIM C. BELIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 23, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. (J-1)

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

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

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

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

June 9, 2020
DATE

Kim C. Belin
KIM C. BELIN, ALJ

Date Received at Agency: 6/10/2020

Mailed to Parties: 6/10/2020

/vj

APPENDIX

EXHIBIT

Jointly Submitted:

J-1 Stipulation of Settlement

J-1

DAVID M. CASADONTE, Esquire
202 Main Street
Toms River, New Jersey 08753
(732) 244-4488
david@casadontelaw.com
Attorney ID #004141986
Attorney for Respondent,
Bay Head Board of Education, Respondent

RECEIVED
2020 JUN -2 A 8:27
STATE OF NEW JERSEY

Colleen Evans, Parent for L W and R W

Petitioner

vs.

BAY HEAD BOARD OF EDUCATION

Respondent

STIPULATION OF SETTLEMENT
OAL DOCKET NO: EDU-01214-2020 S

Agency Docket No.: 329-12-19

It is On The 29 Day of May, 2020 agreed as follows: This Stipulation of Settlement is intended by the settling parties to fully and forever resolve and settle all claims related to the pending case upon and subject to the terms and conditions set forth below David M. Casadonte, Esquire on behalf of the Respondent Bay Head Board of Education and Colleen Evans Pro Se.

1. The two minor children shall be permitted to complete the 2019-2020 school year at the Bay Head School.

2. The two minor children shall not be considered enrolled in the school after June 11, 2020 the last scheduled day of school. The petitioner shall execute the necessary documents withdrawing the two students from the school and to transfer the students to their new school district after June 11, 2020 but prior to July 1, 2020.

3. The respondent waives any costs for the reimbursement for tuition or other school related costs subject to the terms and conditions set forth above

By: David M. Casadonte
David M. Casadonte, Atty. for Respondent

Colleen Evans, Petitioner

154-20

New Jersey Commissioner of Education

Decision

Tajinder Tung,

Petitioner,

v.

Board of Education of the Township of Mount Olive, Morris County,

Respondent.

Synopsis

Petitioner – a tenured mathematics teacher in the respondent Board's school district – contended that his tenure rights were violated when the Board suspended him without pay in August 2019 without the filing of tenure charges and prior to his indictment in November 2019 on charges of stalking and harassing a female student. The Board filed a motion to dismiss in lieu of an answer. Petitioner opposed the motion to dismiss and filed a cross motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:6-10, no tenured employee shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing; *N.J.S.A.* 18A:6-8.3 provides that a tenured employee may be suspended without pay only if the employee was indicted or if tenure charges were certified against him; in this matter, the Board did not file tenure charges and petitioner was not indicted until November 6, 2019; and the Board's argument that the discipline imposed on petitioner prior to November 6, 2019 was "minor discipline" under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 to -43, is without merit. The ALJ concluded that petitioner's suspension without pay prior to November 6, 2019 was improper. Accordingly, the Board's motion to dismiss was denied; petitioner's motion for summary decision was granted; and the Board was ordered to reimburse petitioner for all compensation withheld between August 26, 2019 and November 6, 2019.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision is this matter. The Board was directed to reimburse petitioner for compensation withheld between August 26, 2019 and the date of petitioner's indictment on November 6, 2019.

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

154-20

OAL Dkt. No. EDU 01415-20
Agency Dkt. No. 311-12/19

New Jersey Commissioner of Education

Decision

Tajinder Tung,

Petitioner,

v.

Board of Education of the Township of Mount Olive, Morris County,

Respondent.

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

In August 2019, petitioner, a mathematics teacher, was charged with the fourth-degree crime of stalking a female student and the petty disorderly persons offense of harassing her. On August 26, 2019, the Board suspended petitioner without pay. Thereafter, on November 6, 2019, petitioner was indicted on charges of fourth-degree stalking and two counts of second-degree official misconduct. The Administrative Law Judge (ALJ) found that under *N.J.S.A.* 18A:6-8.3, a tenured employee may be suspended without pay only if the employee was indicted or if tenure charges were certified against him. The Board did not file tenure charges and petitioner was not indicted until November 6, 2019; accordingly, the ALJ found that the suspension without pay prior to that date was improper. The ALJ also explained that while *N.J.S.A.* 34:13A-24 permits boards to impose minor discipline – including fines and suspensions

without pay – if collectively bargained, petitioner's 72-day suspension cannot be considered minor discipline.

Upon review, the Commissioner concurs with the ALJ's conclusion that, in the absence of tenure charges or an indictment, the Board was not permitted to suspend petitioner without pay. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. The Board is directed to reimburse petitioner for compensation withheld between August 26, 2019 and his indictment on November 6, 2019.

IT IS SO ORDERED. [1]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: 7/27/20
Date of Mailing: 7/28/20

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01415-20
AGENCY DKT. NO. 311-12/19

TAJINDER TUNG,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,

Respondents.

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

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: June 16, 2020 Decided: June 19, 2020

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On August 26, 2019, respondent, Mount Olive School District Board of Education, suspended petitioner, Tajinder Tung, a tenured teacher, without pay because Tung had been arrested. Did the Board violate his tenure rights when no indictment had been issued, no tenure charges had been filed, and no authorization existed under the collective bargaining agreement? Yes. Caselaw holds that a school board may not

suspend a tenured teacher without pay unless the teacher is indicted, subject to tenure charges, or a collective bargaining agreement authorizes it.

PROCEDURAL HISTORY AND FINDINGS OF FACT

Tung has been continuously employed by the Mount Olive School District Board of Education as a mathematics teacher for approximately fourteen years and holds tenure as the term is defined by State law.

On or about August 20, 2019, Tung was arrested for allegedly stalking and harassing a female student. He was charged with violating N.J.S.A. 2C:12-10(b), a fourth-degree crime, and N.J.S.A. 2C:33-4(c), a petty disorderly persons offense. As a result, on August 26, 2019, the Board suspended Tung without pay.

No tenure charges had been served, and no hearing had been held.

On September 9, 2019, Tung requested reinstatement to the payroll and reimbursement for all wages withheld from him since the unpaid suspension.

On September 16, 2019, the Board denied the request.

On November 6, 2019, the Morris County Prosecutor's Office returned an indictment against Tung, State of New Jersey v. Tajinder Tung, Indictment No. 19-10-00882, charging him with two counts of official misconduct and one count of stalking.

Tung pled "not guilty" to all charges and maintains his innocence.

On November 26, 2019, Tung filed this appeal with the Commissioner of Education requesting reimbursement for "all compensation lost" from August 26, 2019, the date of his suspension), to November 6, 2019 (the date of his indictment).

On January 17, 2020, the Board filed a motion to dismiss this case instead of an answer under N.J.A.C. 6A:3-1.10, arguing that the Board's action was authorized by the

collective bargaining agreement, and that the Public Employment Relations Commission (not the Commissioner of Education) has jurisdiction over this case.

On January 29, 2020, the Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL), as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On February 20, 2020, Tung opposed the motion to dismiss and cross-moved for summary decision, arguing that no genuine issue of material fact exists and that he is entitled to prevail as a matter of law because the Board violated his tenure rights under the school laws, over which the Commissioner has jurisdiction, by taking such action before an indictment had been issued or tenure charges had been served, and because the collective bargaining agreement does not authorize the Board to suspend him without pay in the absence of an indictment or tenure charges.

CONCLUSIONS OF LAW

I.

Before transmittal of a case to the OAL, the Commissioner of Education, in his or her discretion, or upon motion to dismiss instead of an answer, may dismiss a petition because the petitioner has advanced no cause of action, even if the factual allegations are accepted as true, or because the Commissioner lacks jurisdiction, or for failure to prosecute or other good reason. N.J.A.C. 6A:3-1.10.

Similarly, after transmittal of a case to the OAL, a party may move for summary decision upon all or any of the substantive issues. N.J.A.C. 1:1-12.5(a). Any such motion shall be served with briefs and with or without supporting affidavits. N.J.A.C. 1:1-12.5(b). Ultimately, summary decision may be granted if the papers and discovery which have been filed, together with any affidavits, show that no genuine issue of material fact exists and the moving party is entitled to prevail as a matter of law. Ibid.

Accordingly, for an adverse party to prevail, that party must set forth specific facts in a responding affidavit showing that genuine issues of material fact exist which can only be determined in an evidentiary proceeding. Ibid.

In this case, I **CONCLUDE** that no genuine issue of material fact exists, and that petitioner is entitled to prevail as a matter of law, for the reasons set forth below.

II.

"[A] tenured teacher . . . is protected by the tenure provisions in the school laws, N.J.S.A. 18A:28-1 to -18 (Tenure laws), the purpose of which is to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (citing Viemeister v. Prospect Park, Passaic County, Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)).

Toward this end, no tenured employee shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing. See N.J.S.A. 18A:28-5; see also N.J.S.A. 18A:6-10.

Indeed, the statutory provision N.J.S.A. 18A:6-10, "Dismissal and reduction in compensation of persons under tenure in public school system," is explicit:

> No person shall be dismissed or reduced in compensation,
>
> > **(a)** if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
> >
> > **(b)** if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in

> any other educational institution conducted under the supervision of the commissioner;
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then **only after a hearing** held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.
>
> Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.
>
> [Emphasis added.]

The statutory provision N.J.S.A. 18A:6-8.3, "Suspended employee or officer of board of education; compensation; exceptions," is also explicit. That provision provides that a teacher "who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of [tenure] charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary[.]" Emphasis added.

For example, in Slater v. Board of Education of Ramapo-Indian Hills, 237 N.J. Super. 424, 426 (App. Div. 1989), the Appellate Division, citing N.J.S.A. 18A:6-14 and N.J.S.A. 18A:6-8.3, wrote, "a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education," but "[i]n all other circumstances, a suspension must be with pay."

As a result, the Appellate Division held that "[the] school board passe[d] a resolution validly suspending a tenured employee upon arrest, but the accompanying suspension of salary [was] invalid because defendant [had] not been indicted or had tenure charges certified[.]" Slater, 237 N.J. Super. at 427–28.

In this case, no tenure charges had been certified and Tung was not indicted until November 6, 2019; therefore, I **CONCLUDE** that Tung should not have been suspended without pay before that date.

III.

To overcome this statutory prohibition, the Board argues that the Commissioner does not have the authority to address this issue because the discipline the Board imposed before November 6, 2019, was "minor discipline" under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -43.

Under the Act, school boards may impose "minor discipline," including fines and suspensions without pay, if collectively bargained:

> a. Notwithstanding any other law to the contrary, and if negotiated with the majority representative of the employees in the appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the authority of the employer to impose, in the absence of a negotiated agreement regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.
>
> b. The scope of such negotiations shall include a schedule setting forth the acts and omissions for which minor discipline may be imposed, and also the penalty to be imposed for any act or omission warranting imposition of minor discipline.
>
> c. Fines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of N.J.S. 18A:6-10.
>
> [N.J.S.A. 34:13A-24.]

While the Act does define "minor discipline" as "various forms of fines and suspensions," see N.J.S.A. 34:13A-22, it specifically excludes tenure charges, increment withholdings, letters of reprimand, and suspensions with pay under N.J.S.A. 18A:6-8.3

and N.J.S.A. 18A:25-6, which really means the suspension without pay in this case because N.J.S.A. 18A:6-8.3, as discussed above, requires that suspensions be with pay before an indictment, unless a collective bargaining agreement permits it without pay.

In this case, the collective bargaining agreement does not permit it:

> B: The Board shall have the right to take disciplinary action for good and just cause. Disciplinary action may include but is not limited to:
>
> 1. verbal
> 2. reprimand
> 3. suspension
> 4. fine
> 5. demotion
> 6. termination
> 7. withholding of increment where taken for disciplinary reasons rather than educational proficiency reasons.
>
> [Collective Negotiating Agreement, Art. 19(B).]

Nonetheless, the Board relies on two administrative cases, Tave v. Board of Education of the Manalapan-Englishtown Regional School District, Agency Dkt. No. 112-4/00, Comm'r (July 13, 2000), aff'd, State Board No. 44-00 (November 1, 2000), https://www.nj.gov/education/legal/, and Ferreiro v. Board of Education of Elizabeth, EDU 3865-19, Initial Decision (June 11, 2019), adopted, Comm'r (July 22, 2019), http://njlaw.rutgers.edu/collections/oal/, to argue that the Commissioner does not have the authority to determine whether the discipline in this case is major or minor discipline in the first instance. Those two cases, however, are distinguishable. In short, the Board cannot mischaracterize major discipline as minor discipline to circumvent the school laws.

More pointedly, in Tave, the suspension without pay was only for eleven days, the collective bargaining agreement authorized the school board to suspend a tenured teacher without pay for such minor discipline, and as a result, the Commissioner dismissed the petition without prejudice:

> Upon a thorough review of this matter, I note that N.J.S.A. 34:13A-24 carves out a clear and unambiguous exception to N.J.S.A. 18A:6-10, authorizing a board to suspend teaching staff members without pay for minor discipline if negotiated with the majority representative of the employees in the appropriate bargaining unit. Since that appears to be the case in this instance, there is no basis on which I may order relief on the present appeal in the absence of a determination by a court or agency of appropriate jurisdiction [the Public Employment Relations Commission] that the Board's action against petitioner did not constitute "minor discipline" within the meaning of N.J.S.A. 34:13A-24.
>
> [Tave, Agency Dkt. No. 112-4/00, Comm'r (July 13, 2000), https://www.nj.gov/education/legal/.]

In this case, Tung was suspended for seventy-two days, which is tantamount to a fine of $17,000. Although the collective bargaining agreement permits fines or suspensions for minor discipline, it cannot be said that a suspension for seventy-two days without pay, or a fine of $17,000, constitutes minor discipline. Thus, Tave does not apply.

In Ferreiro, a school board fined the tenured teacher $1,033.83 for tardiness. The collective bargaining agreement, however, permitted such discipline. As such, the Commissioner held that the discipline was not a violation of tenure.

More important, the Commissioner reasoned that this kind of discipline is the very kind of discipline N.J.S.A. 34:13A-24 contemplates:

> [T]he docking of the petitioner's pay is the type of minor discipline contemplated by N.J.S.A. 34:13A-24, and in this circumstance, the minor discipline was negotiated and agreed upon by the Board and the Association, which represents the majority of teaching staff members in the district. As such, the docking of the petitioner's pay for excessive tardiness is not a violation of her tenure rights under N.J.S.A. 18A:6-10.
>
> [Ferreiro, EDU 3865-19, Comm'r (July 22, 2019), http://njlaw.rutgers.edu/collections/oal/.]

Again, this case is different in both degree and kind. Tung was indicted for having allegedly committed a crime, which is more severe than merely coming to school late,

and was effectively fined $17,000, which is more severe than merely being fined $1,033.83. Thus, Ferreiro does not apply.

Given this discussion, I **CONCLUDE** that the Commissioner is authorized to determine whether Tung should have been suspended without pay before he was indicted.

CONCLUSION

Based upon my findings of fact and conclusions of law, I **ORDER** that the Board's motion to dismiss is **DENIED**, that Tung's motion for summary decision is **GRANTED**, and that Tung be reimbursed for all the compensation the Board withheld from August 26, 2019, to November 6, 2019.

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

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

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

June 19, 2020
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: June 19, 2020

Date Mailed to Parties: June 19, 2020

dr

155-20

OAL Dkt. No. EDU 04600-20
Agency Dkt. No. 53-2/20

New Jersey Commissioner of Education

Final Decision

D.P. and G.P., on behalf of minor child, P.P,

Petitioner,

v.

Board of Education of the Borough of Demarest, Bergen County,

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: 7/27/20
Date of Mailing: 7/28/20



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04600-20
AGENCY DKT NO. 53-2/20

D.P. & G.P. ON BEHALF OF P.P.,
Petitioners,
v.
DEMAREST BOARD OF EDUCATION,
Respondent.

D.P. and **G.P.**, petitioners appearing pro se

Mark A. Wenczel, Esq. for respondent (Cleary Giacobbe Alfieri Jacobs, LLC)

Record Closed: June 18, 2020 Decided: June 22, 2020

BEFORE **NANCI G. STOKES**, ALJ:

This case was transmitted to the Office of Administrative Law (OAL) on May 8, 2020, for resolution as a contested case under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. On May 20, 2020, I conducted a telephone prehearing wherein the parties agreed to engage in settlement negotiations. The parties reached a tentative settlement that the Board approved at its meeting on June 16, 2020. Respondent submitted the fully executed settlement agreement and Board Resolution on June 18, 2020.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

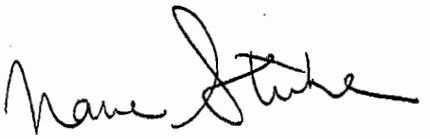
1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or the signatures of their representatives.

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

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

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

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



June 22, 2020

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: June 22, 2020

Date Mailed to Parties: June 22, 2020

ljb

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

MARK A. WENCZEL, Counsel

mwenczel@cgajlaw.com

Reply to: Oakland Office

June 18, 2020

Via email (latoyabryant@oal.nj.gov)
Hon. Nanci G. Stokes, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, N.J. 07102

Re: D.P. and G.P. o/b/o P.P. v. Demarest Board of Education
OAL Docket No.: EDU 04600-2020N
Agency Reference No.: 53-2/20

Dear Judge Stokes:

Enclosed please find a fully executed copy of the Settlement Agreement and Consent Judgment executed by the parties in the above-referenced matter. Also enclosed is a certified copy of the Board Resolution, evidencing the Demarest Board of Education's approval of the Settlement Agreement and Consent Judgment. On behalf of the parties, I am respectfully requesting your Honor to approve and forward the Settlement Agreement for Commissioner of Education approval.

Thank you for the courtesies extended by your Honor in this matter.

Respectfully,

Mark A. Wenczel

cc: Mr. Michael Fox, Superintendent
David & Galit Paz (via email pazgalit@yahoo.com)

Mark A. Wenczel, Esq., (ID No. 017841992)
Cleary Giacobbe Alfieri Jacobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, New Jersey 07436
(973) 845-6700
(201) 644-7601 (Fax)
Attorneys for Respondent, Demarest Board of Education

D.P. and G.P. o/b/o P.P., Petitioner, v. DEMAREST BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO.: EDU 04600-2020N AGENCY NO.: 53-2/20 **SETTLEMENT AGREEMENT**

This Agreement is entered into by and between the Petitioners, David and Galit Paz, with an address of 218 Truman Drive, Cresskill, New Jersey 07626 (hereinafter referred to as the "Petitioners"), and the Respondent, the Demarest Board of Education, with an office located at 568 Piermont Road, Demarest, New Jersey 07627 (hereinafter referred to as the "Board") (collectively referred to as the "parties" and individually as the "party,"), and supersedes and replaces any and all prior agreements between the Board and the Petitioners.

WHEREAS, David and Galit Paz are the parents of a seventh-grade student, Peleg Paz ("P.P.") (hereinafter referred to as "P.P.").

WHEREAS, P.P. attended the Demarest Public School District for the entirety of the 2019-2020 school year

WHEREAS, the Demarest Board of Education ("Board") determined that P.P. was not domiciled in the Borough of Demarest during the 2019-2020 school year and therefore was not eligible to receive a free public education from the Board.

WHEREAS, the Petitioners filed a Petition with the Commissioner of Education to appeal the Board's determination to disenroll P.P. from the Demarest Public School District; and

WHEREAS, the Board filed an Answer and a Counterclaim, seeking an award of tuition from the Petitioners for P.P.'s attendance in the Demarest Public Schools during the 2019-2020 school year while not domiciled in the Borough of Demarest.

WHEREAS, the Board and the Petitioners have negotiated an amicable resolution of the issues in dispute and wish to set forth the terms of their agreement in this settlement agreement ("Agreement"), which has been determined to be in the best interest of the parties;

NOW, THEREFORE, in consideration of the foregoing, the Board and the Petitioners agree as follows:

1. **Terms.** The Board agrees to accept the Petitioners' payment of the sum of Sixteen Thousand Twenty-Three Dollars and Fifteen Cents ($16,023.15) ("Settlement Sum") in satisfaction of the Board's claim for the payment of the total amount of tuition due of $21,364.20 for P.P.'s attendance in the Demarest Public Schools for the 2019-2020 school year, in accordance with the terms and conditions set forth herein.

a. Petitioners are to pay the Board the Settlement Sum on or before June 26, 2020;

b. Payment of the Settlement Sum shall be in the form of a bank certified check, made payable to the Demarest Board of Education, and delivered to Mr. Thomas Perez, Business Administrator, Demarest Public School District, 568 Piermont Road, Demarest, N.J. 07627;

c. The Pro Se Residency Appeal filed by the Petitioners on February 27, 2020, is dismissed, with prejudice.

2. In the event Petitioners should fail to deliver the Settlement Sum in accordance with the terms set forth in this Agreement, the Board may submit an *ex parte* certification to the Superior Court of New Jersey with notice to the Petitioners setting forth Petitioners' failure to pay in accordance with the terms set forth herein, with a consent judgment for entry by the court, in the Demarest Board of Education's favor, and in the form annexed hereto, (the "Consent Judgment"). The Demarest Board of Education shall be the "Plaintiff" in any action concerning the Consent Judgment. The Consent Judgment shall be for the full assessed tuition amount for the 2019-2020 school year of $21,364.20, less any payments made by the Petitioners to the Board pursuant to paragraph 1 (above);

a. The Petitioners waive any and all rights to contest entry of the Consent Judgment, an unexecuted copy of which is attached as Exhibit "A" to this Agreement. The Consent Judgment may be docketed with the Clerk of the Superior Court of New Jersey;

b. If the Board is required to take any legal action to enforce the terms of this Agreement, the Petitioners shall pay all of the Board's reasonable attorney's fees and legal costs incurred in the taking of such action.

3. No delay or omission on the part of the Board in exercising any right under this Agreement will operate as a waiver of that right or of any other right under this Agreement.

4. Petitioners represent and acknowledge that they and P.P. will not be residing in the residence located at 18 Hardenburgh Avenue, Demarest, New Jersey during the 2020-2021 school year.

5. **Binding Effect.** All parties to this Agreement, as well as their heirs, successors, and assigns, are bound by it. The other party and/or parties may rely upon his/her actual authority in connection with the signing of this Agreement. Additionally, each party to this Agreement is

an intended beneficiary hereof.

6. **Mutual Release and Hold Harmless.** Petitioners, on behalf of themselves and on behalf of P.P., and the Board mutually release and forever discharge each other, its/their officers, employees, administrators, agents and servants from any and all past, present or future claims, whether known or unknown to Petitioners or P.P., arising out of events that have occurred prior to the date on which this Agreement is signed, including, but not limited to the provision of a public education to P.P. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

7. **Integration Clause.** This Agreement shall constitute the entire agreement among the parties and supersedes all prior or contemporaneous agreements, oral or written. This Agreement cannot be altered, amended, modified, terminated, or discharged except in a writing signed by the party against whom enforcement of such alteration, amendment, modification, termination or discharge is sought.

8. The terms of this Agreement represent the compromise of disputed claims between the parties. Except as otherwise expressly admitted, represented, and/or acknowledged herein, this Agreement shall not be treated as an admission on the part of either party.

9. The parties recognize that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties, obligations, requirements and limitations enumerated herein. The drafting and negotiation of this Agreement have been participated in by each of the parties and/or their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

10. The Board hereby acknowledges that it has been represented by counsel throughout the above-referenced matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and has read and consulted with counsel regarding this Agreement. The Board acknowledges and agrees that it is satisfied with its legal representation in this matter.

11. The Petitioners hereby acknowledge and agree that they have had an opportunity to consult with legal counsel regarding the negotiations and execution of this Agreement and have determined, on their own accord and volition, to proceed *pro se*. The Petitioners agree that they have been actively involved in the negotiation and execution of this Agreement. The Petitioners further acknowledge that they have read the entire Agreement and understand the purpose and effect of each of its terms and are satisfied with the Agreement.

12. **Governing Law & Venue.** This Agreement shall be governed by the laws of the State of New Jersey. Any controversies or disagreements arising out of, or relating to this Agreement or the breach thereof, shall be resolved in the Bergen County Superior Court of New Jersey.

13. **Severability.** If all or any portion of any provision of this Agreement shall be held to be invalid, illegal, or unenforceable in any respect, then such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and such provision shall be limited and construed as if such invalid, illegal, or unenforceable provision, or portion thereof, were not contained herein.

14. **Confidentiality.** As further consideration for the Agreement, the parties agree that they will keep all terms of this Agreement completely confidential. Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that neither party nor any representative of the parties will take any action to disclose the terms or nature of this

Agreement except that disclosure is permitted: (i) as necessary with regard to any proceeding for the enforcement of this Agreement; (ii) to the student's immediate family, accountants and attorneys for the parties, who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (iii) as may be required, through subpoena or otherwise, by any court or agency of competent jurisdiction; (iv) as may be required pursuant to the Open Public Records Act; and (iv) as may be required by law.

15. **Entire Agreement.** This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party. This Agreement may be signed by the parties in counterparts on separate copies of the Agreement, and all signature pages shall be incorporated into the Agreement as if all the signatures are affixed on one (1) page.

16. **Board Approval.** This Agreement is expressly conditioned upon and subject to the review and approval of the Demarest Board of Education.

[INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THE TERMS OF THIS AGREEMENT, UNDERSTANDS THE TERMS OF THIS AGREEMENT AND INTENDS TO BE LEGALLY BOUND BY THIS AGREEMENT AND ITS PROVISIONS. ADDITIONALLY, THE PARTIES ARE SIGNING BELOW VOLUNTARILY AND WITHOUT THREAT OR COERCION OF ANY KIND.

PETITIONERS

_____ Date: 06-05-2020
DAVID PAZ

_____ Date: 06-05-2020
GALIT PAZ

DEMAREST BOARD OF EDUCATION

_____ Date: 6/14/2020
DIANE HOLZBERG
Board President

CLEARY GIACOBBE ALFIERI & JACOBS, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436
Telephone: 973-845-6700
Facsimile: 201-644-7601
Mark A. Wenczel, Esq., Attorney ID 017841992
Attorneys for Plaintiff, Demarest Board of Education

DEMAREST BOARD OF EDUCATION, Plaintiff, vs. DAVID PAZ and GALIT PAZ Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO: BER- **CONSENT JUDGMENT**

THIS MATTER having been opened to the Court by Cleary Giacobbe Alfieri Jacobs LLC, attorneys for the Plaintiff, Demarest Board of Education ("Plaintiff"), with the consent of the defendants, David Paz and Galit Paz, husband and wife ("Defendants"), and it appearing that the parties entered into a Settlement Agreement on _____, 2020, and for good consideration acknowledged by the parties, the Plaintiff and the Defendants willingly executed this Consent Judgment, the entry of which is governed by the terms and conditions of the Settlement Agreement and good cause appearing;

IT IS on this _____ day of _____;

ORDERED AND ADJUDGED:

Judgment be and is hereby entered in favor of Plaintiff, Demarest Board of Education and against Defendants, David Paz and Galit Paz, jointly and severally, in the amount of $21,364.20, in addition to interest, attorneys' fees, and legal costs, as of _____, 2020, as follows:

a. Within _____ days of the execution of this Consent Judgment,

David Paz and Galit Paz shall pay the Demarest Board of Education $21, 364.20, less any monies already paid to the Plaintiff under the Settlement Agreement; and

b. David Paz and Galit Paz shall pay Plaintiff's attorneys fees and legal costs incurred in enforcing this Consent Judgment.

_____
J.S.C.

We hereby consent to the form and entry of this Consent Judgment:

_____
DAVID PAZ
Defendant

_____
GALIT PAZ
Defendant

Date: 06-05-2020

_____
MARK A. WENCZEL, ESQ.
Cleary Giacobbe Alfieri Jacobs, LLC
Attorney for the Plaintiff,
Demarest Board of Education

Dated: 6-18-20

DEMAREST BOARD OF EDUCATION

568 Piermont Road - Demarest, New Jersey 07627

CERTIFICATION

I hereby certify that the following is a true, full and correct copy of Resolution Number XIV, D85, adopted by the Demarest Board of Education, County of Bergen, State of New Jersey, at its meeting on June 16, 2020.

It was moved by Governale , seconded by Lee and approved by unanimous roll call vote of those present to approve the following resolution:

Move to approve the Settlement Agreement and Consent Judgement in the student residency matter referenced below, as recommended by the Chief School Administrator:
OAL DOCKET NO: EDU 04600-2020N

AYES: Cantatore, Choi, Governale, Lee, Schliem, Holzberg
NAYS: None
Abstains: None
Absences: Verna

BY: _____
Thomas J. Perez, Board Secretary

DATE: 6/18/2020

156-20

OAL Dkt. No. EDU 17303-19
Agency Dkt. No. 309-11/19

New Jersey Commissioner of Education

Final Decision

O.C. and C.C., on behalf of minor children, P.A. and J.A.,

Petitioners,

v.

Board of Education of the Township of Saddle Brook, Bergen County,

Respondent.

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

Upon such review, the Commissioner agrees with the Administrative Law Judge's conclusion that this matter is no longer a contested case before the Commissioner. The petitioners withdrew their appeal and the Board withdrew its request for tuition. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: 7/27/2020
Date of Mailing: 7/28/2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 17303-19
AGENCY DKT. NO. 309-11/19

O.C.&C.C. ON BEHALF OF MINOR CHILDREN, P.A. & J.A.,

Petitioners,

v.

TOWNSHIP OF SADDLEBROOK BOARD OF EDUCATION,

Respondent.

O.C. and **C.C.**, petitioners appearing pro se

Jessika Kleen, Esq. for respondent (Machado Law Group)

Record Closed: June 22, 2020 Decided: June 22, 2020

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioners, O.C. and C.C. filed an appeal of the residency determination by the Board of Education of the Township of Saddle Brook. (Board) The Board filed a counter

claim for tuition reimbursement. On December 10, 2019, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I conducted several telephone conferences in this case and directed the parties to exchange discovery. Before the June 16, 2020, conference, respondent advised that it wanted to withdraw its due process petition [counterclaim] contesting residency for the 2019-2020 school year. On June 22, 2020, petitioners sent an email stating they "would not like a hearing of this case ..." The email correspondence is attached for reference.

Accordingly, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law, and I, therefore, **ORDER** that this case is **DISMISSED**.

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

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

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

June 22, 2020

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: June 22, 2020

Date Mailed to Parties: June 22, 2020

ljb

157-20

New Jersey Commissioner of Education

Decision

Antoine Gayles,

Petitioner,

v.

Board of Education of the Township of Hillside, Union County,

Respondent.

Synopsis

Petitioner began working as Superintendent of Schools in July 2016 under a four-year contract expiring in June 2020. Following an election in 2018, which significantly altered the composition of the Board of Education, the "lame duck" board rescinded petitioner's original contract and approved a successor contract that increased petitioner's salary and expired in June 2023. When the newly-elected Board took office in January 2019, petitioner was suspended with pay pending the resolution of questions regarding the validity of the successor contract. Petitioner sought reinstatement under the terms of the successor contract, while the Board sought to have the successor contract declared void.

The ALJ found, *inter alia*, that: petitioner still had 18 months left in his term as Superintendent when the "lame duck" board voted on the successor contract; there was no compelling reason to modify the original contract other than what amounted to unilateral action by the outgoing board president; the "lame duck" board failed to comply with the public notice and comment requirements of *N.J.S.A.* 18A:11-11 and *N.J.A.C.* 6A23A-3.1; the Board's suspension of petitioner was invalid; the petitioner's suspension was, in essence, a termination; and the Board failed to comply with any of the requirements of *N.J.S.A.* 18A:17-20 and *N.J.A.C.* 6A23A-3.2. The ALJ ordered that petitioner be reinstated to his position as superintendent from the date of the suspension through the expiration of the original contract on June 30, 2020, together with all salary, benefits, and seniority credit for that period of time.

Upon review, the Commissioner concurred with the ALJ that both the successor contract and the rescission of the original contract are void. In so deciding, the Commissioner found, *inter alia*, that the rescission of an existing contract well in advance of its expiration in order to increase the salary and extend the term is exactly the type of situation contemplated in *N.J.S.A.* 18A:11-11. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is entitled to his salary and benefits under the terms of the original contract, through its expiration on June 30, 2020.

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

157-20

OAL Dkt. No. EDU 06502-19 and EDU 05548-19
Agency Dkt. No. 45-2/19

New Jersey Commissioner of Education

Final Decision

Antoine Gayles,

Petitioner,

v.

Board of Education of the Township of Hillside, Union County,

Respondent.

Board of Education of the Township of Hillside, Union County,

Petitioner,

v.

Antoine Gayles,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by Antoine Gayles (Gayles) pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Hillside Board of Education (Board) have been reviewed.

This matter concerns the validity of two contracts between Gayles and the Board. Gayles began working as the superintendent in Hillside on July 1, 2016, under a four-

year contract expiring June 30, 2020 (original contract). In late 2018, following an election that significantly changed the membership of the district's board of education, the "lame duck" board rescinded the original contract and approved a new contract (successor contract) that increased Gayles' salary and expired in June 2023. In January 2019, the newly-elected board of education (Board) suspended Gayles until questions regarding the validity of the successor contract were resolved. The Board stipulated that the suspension was not based on performance, impropriety, or any allegations of wrongdoing.

The ALJ concluded that the successor contract was void and, consequently, the rescission of the original contract – done solely to allow for the parties to enter into the successor contract – was also void. The ALJ reasoned that Gayles still had 18 months left in his term at the time the "lame duck" board voted on the successor contract, and there was no compelling reason to modify it other than what amounted to unilateral action by the outgoing board president. Moreover, the "lame duck" board failed to comply with the public notice and comment requirements of *N.J.S.A.* 18A:11-11 and *N.J.A.C.* 6A:23A-3.1. The ALJ also concluded that the Board's suspension of Gayles was invalid. The resolution regarding the suspension was not part of the agenda for the meeting in which it occurred, again circumventing the public notice and comment requirements, and Gayles did not receive a *Rice* notice sufficiently in advance of the meeting. The ALJ found that the suspension was, in essence, a termination, and that the Board failed to comply with any of the requirements of *N.J.S.A.* 18A:17-20 and *N.J.A.C.* 6A:23A-3.2. The ALJ ordered that Gayles be reinstated to his position as superintendent from the date of the suspension through the expiration of the original contract on June 30, 2020, together with all salary, benefits, and seniority credit for that time.

In his exceptions, Gayles argues that the successor contract was valid and binding because it was reviewed by the "lame duck" board's attorney, approved by the Executive County Superintendent (ECS), and voted on by the "lame duck" board during a meeting in which it was placed on the agenda and discussed during the public comment period. Gayles notes that the ECS testified that he was aware that the successor contract was entered into by the "lame duck" board and contends that if the ECS had required a resolution of this issue, he could have requested more information. According to Gayles, *N.J.S.A.* 18A:11-11 gives the "lame duck" board the authority to perform all acts and do all things necessary for the lawful and proper conduct of the schools, including modifying the terms of his contract by entering into the successor contract. Gayles argues that the Board's reliance on *Wall Twp. Educ. Ass'n v. Bd. of Educ. of Wall Township*, 2019 *N.J. Super. Unpub. LEXIS* 575 (App. Div. Mar. 14, 2019) is misplaced because the decision postdates the acts at issue in this case and does not specifically state that its requirements are retroactive.

In reply, the Board argues that the ALJ appropriately found that the "lame duck" board's decision to bind the Board to the successor contract violated well-established principles regarding board authority. Moreover, the Board argues that the record demonstrates that the outgoing president acted unilaterally and without the knowledge of the full "lame duck" board. The Board notes that the ECS was not aware of the procedural shortcomings related to the successor contract and that his approval cannot, therefore, render the successor contract enforceable. The Board also argues that the *Wall Twp.* decision does not create new requirements, but rather confirmed existing requirements, and that the holding in that matter should be applied to this case.

Upon review, the Commissioner concurs with the ALJ that both the successor contract and the rescission of the original contract are void. Initially, the Commissioner notes that the Board did not take exception to the ALJ's conclusion that the rescission of the original contract was void, and the Commissioner finds no reason to disturb that conclusion. Accordingly, Gayles is entitled to his salary and benefits under the terms of the original contract, through its expiration on June 30, 2020.

As to the successor contract, the Commissioner does not find Gayles' exceptions, which largely reiterate arguments made before the ALJ, to be persuasive. First, the Commissioner agrees with the ALJ that extending Gayles' contract term by two years and increasing his salary exceeds the authority of the "lame duck" board. The position of superintendent was not vacant at the time the "lame duck" board took action, and it would not be vacant for more than 18 months. The "lame duck" board "had no statutory authority to bind its successor Board by issuing individual contracts to [its continuing employees]." *Nowak v. Bd. of Educ. of the Borough of Manville, Somerset Cty.*, 1976 *S.L.D.* 43. *See also Gonzalez v. Bd. of Educ. of Elizabeth School Dist., Union Cty.*, 325 *N.J. Super.* 244 (App. Div. 1999) (concluding that "[s]uch an appointment usurps the will and power of a future board to fill a vacancy based on the future board's consideration of prevailing policy, personnel and general welfare concerns.")

Furthermore, the "lame duck" board failed to provide the required public notice prior to voting on the successor contract. "The Legislature's clear mandate in [*N.J.S.A.* 18A:11-11] was the dual purpose of public notice and a public hearing when a board of education renegotiates, extends, amends, or alters an existing contract with its superintendent." *Wall Twp. Educ. Ass'n v. Bd. Of Educ. of Wall Township, supra, at 12.* The rescission of an existing

contract well in advance of its expiration in order to increase the salary and extend the term is "exactly" the type of situation contemplated by the statute that requires public notice. *Ibid.* The Appellate Division made clear in the *Wall Twp.* decision that it was an interpretation of the statute as written – the same version of the statute that was in effect at the time of the events at issue in this case. Therefore, that decision represents a confirmation of existing statutory requirements, rather than a new requirement being applied retroactively, as Gayles argues, and it is appropriate to apply the *Wall Twp.* holding here. The "lame duck" board's failure to comply with the notice requirements renders the successor contract void.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner shall be reinstated to his position as superintendent from the date of the suspension through the expiration of the original contract on June 30, 2020, together with all salary and benefits owed for that time.

IT IS SO ORDERED.[1]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: 8/3/2020
Date of Mailing: 8/5/2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISON

ANTOINE GAYLES,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,
Respondent.

OAL DKT. NO. EDU 06502-19
AGENCY DKT. NO. 45-2/19

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,
Petitioner,
v.
ANTOINE GAYLES,
Respondent.

OAL DKT. NO. EDU 05548-19
AGENCY DKT. NO. 45-2/19

William F. Koy, Esq., for petitioner

Allan C. Roth, Esq., for respondent (Ruderman & Roth, attorneys)

Record Closed: December 19, 2019 Decided: June 17, 2020

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Antoine Gayles, currently suspended/placed on leave from his position as superintendent of schools in Hillside, New Jersey, with pay, brings an action before this tribunal as a result of a unilateral action by respondent Hillside Board of Education suspending him from his position effective January 24, 2019. Also pending is an application for declaratory relief brought by the Board, seeking to have the new contract which was approved by the "lame duck" Board on November 29, 2018, declared void ab initio, with no further obligation to Dr. Gayles. The dispute between these parties was the subject of two prior emergent applications set forth below in the procedural history. With decisions rendered on both emergent applications, what is left to determine is the Board's position that with the old contract rescinded, Dr. Gayles' new contract is void ab initio. Dr. Gayles seeks reinstatement as superintendent under the terms of the new contract, which would allow him to serve through June 2023.

PROCEDURAL HISTORY

Petitioner filed a second motion for emergent relief directly with the undersigned due to its connection to a pending related case, seeking reinstatement of salary and benefits. The matter had been the subject of a prior application for emergent relief before the Hon. Thomas Betancourt on March 6, 2019. Based on certain representations that were made on the record at the time by the Board counsel, and the respective position of the Board itself, Judge Betancourt denied the application by petitioner on the basis that, among other things, the Board was still paying petitioner and continuing to provide benefits, and his determination that he did not believe petitioner could succeed on the merits and meet the other criteria required for this type of application.

Although Judge Betancourt ruled at the time that the rest of petitioner's case was moot, the Commissioner disagreed and remanded the matter for additional proceedings. Subsequently, Judge Betancourt recused himself from handling the rest of the case, as well as the related declaratory action filed by the Board.

On May 9, 2019, the Board changed its position on the continued payments to petitioner based in part on the recently decided case of Wall Township Education Association v. Wall Township Board of Education, No. A-4885-17 (App. Div. March 14, 2019), http://njlaw.rutgers.edu/collections/courts/. The decision to do so, while the case on the merits was still pending before the Office of Administrative Law, was made with only three days' notice to petitioner, with the notice omitting what action was going to be taken against Dr. Gayles.

Having learned that the salary and benefits would now be terminated, petitioner brought a second emergent application on May 23, 2019, to compel the Board to return him to the status quo and continue the payments, at least until both cases on the merits could be heard.

Each party filed briefs, and oral argument was held on June 17, 2019 on the second emergent application. The current superintendent, Dr. Sheard, was notified of her right to file to intervene in this proceeding and be heard but declined to do so.

An Order was issued compelling the District to continue Dr. Gayles' salary and benefits pending the outcome of the full proceeding. The plenary hearing went forward on July 8, 9, and 31, August 12, and October 8, 2019. Briefs were submitted and oral argument was held on December 19, 2019. An extension was granted for the issuance of the Initial Decision, and, shortly thereafter, State offices were closed due to Covid-19. The Governor subsequently issued an Executive Order allowing for additional time for the filing of decisions in pending matters.

TESTIMONY AND DISCUSSION

The Hillside Public School District is located in Union County. The first witness who testified was Darryl Palmieri, the acting Union County superintendent of schools. Mr. Palmieri, a former teacher, had only held the position for a few months when he was presented with a new contract to review between Dr. Gayles and the Hillside Board of Education.

Mr. Palmieri explained that his role is to serve as an extension of the New Jersey Department of Education, essentially to oversee all of the school districts in Union County. His office conducts evaluations of districts every three years, to review and approve administrator contracts and transportation contracts, and do budget reviews.

By law, county superintendents are required to review all superintendent contracts. In late October 2018, during his mid-year budget review of the district, Mr. Palmieri learned that there were discussions concerning changes to Dr. Gayles' contract. In early November 2018, the outcome of the local school Board election drastically changed the makeup of the majority of the Board which would take office on January 3, 2019, thus rendering the current Board into "lame duck" status. The Board president at the time, Ms. Thompson-Epps, was defeated, although she would later be appointed by the County superintendent to serve a one-year vacancy on the incoming Board.

On November 21, 2019, Mr. Palmieri received correspondence from the Board counsel at the time, Ms. Gonzalez, concerning a proposed new contract for Dr. Gayles, which included increased salary and benefits, and instead of his term expiring in eighteen months, under his existing contract, the proposed contract would expire in June 2023. He did not know at the time that the full Board was unaware that this proposed contract had been sent to him for review, nor did it go through the usual channels of being considered by the Board's labor or negotiations committees. According to Mr. Palmieri, he received it from the assistant business administrator, Annette Giordano.

Although Mr. Palmieri did not question the substance or term of the new contract, or how a decision was made to offer it, there were some salary credits and other miscellaneous items that needed revisions. Not having dealt with this situation before, Mr. Palmieri consulted with his predecessor, Roger Jenks, who had assumed a position in another part of the state. It was recommended to Mr. Palmieri that he tell the district that in order to implement a new contract, the old one would have to be rescinded first. He said normally a contract termination requires notice and a hearing.

The district inquired if the position had to be posted, and he responded that if the initial contract were rescinded, there was no requirement to post the job. A public hearing

on a new contract was required, and the public should have the ability, according to Mr. Palmieri, to review it and comment on it before it was voted upon. When asked whether the original contract was enforceable after it was rescinded, he responded no, but he also viewed the rescission as a predicate to the passing of a successor contract, and that you couldn't have one without the other.

Mr. Palmieri did not question the timing of the new contract, and/or the implications for the incoming Board. He was a steady, credible witness.

The next witness called by the district was assistant business administrator Annette Giordano. Mrs. Giordano has served in this position for seventeen years. She confirmed that she was asked to convey the new contract to Mr. Palmieri by Dr. Gayles and was involved in a meeting with him, as was the Board's interim administrator and Board secretary, Dr. David Eichenholz. She did not recall any discussion about the propriety of entering into such a contract and its potential impact on the incoming Board.

Angela Menza was the next witness who appeared. Mrs. Menza had served on the Board for fourteen years. She explained her understanding of Board policy as it relates to negotiations and new contracts. As a member of the prior and new Board of Education, she indicated that the normal process would be to have such a document reviewed by the negotiations committee. In fact, she knew nothing about a new contract until she received it three days before the meeting to be held on November 29, 2018. Prior to the vote, there were no questions she recalled from the public, but the minutes of the meeting seem to suggest that there were about fifteen comments, some favorable, some unfavorable.

Mrs. Menza objected to the contract, as, in her view, it would be a burden on the new Board. She further stated that at no time did the old Board authorize the submission of the new contract to Mr. Palmieri.

Mrs. Menza, who continued to serve on the Board, then went on to discuss the decision to suspend Dr. Gayles in order to determine the validity of the new contract. She

confirmed that the resolution to suspend was not on the agenda for the meeting on January 24, and for some reason it came as a "walk-on" resolution, with little discussion.

She confirmed there was no discussion by the former Board as to whether to offer a new contract and send it for review to the County superintendent. The only discussion she recalled was during the executive session prior to the vote on November 29.

When a question was asked by a fellow Board member of the former president, Ms. Thompson-Epps, for the reasons why Dr Gayles was being offered a new contract, she responded "why not?" At least one member of the public questioned why the "lame duck" Board was taking such an action. Two other members of the public, Althea Mitchell and Arthur Kobitz, asked the same question. When asked if one Board member can instruct the superintendent to take action, Mrs. Menza indicated that the president can make such a request if the rest of the Board knows about it, and if it's discussed either in committee or with the Board as a whole.

Mrs. Menza also stated that prior to the vote, she warned the Board, which would be leaving office in a month, that they couldn't do a new contract in this manner. Towards the end of her testimony, Mrs. Menza indicated that she voted no because she believed it was an illegal contract. She also emphasized that at no time did the Board authorize sending the new contract to Mr. Palmieri, and she did not believe Board policy was properly followed.

Continuing her service with the swearing in of the new Board she confirmed that Dr. Gayles had no prior notice of the pending vote to suspend, and, again, as far as she knew, none of the Board committees were asked to review the action prior to the vote.

At the end of her testimony, the district put a stipulation on the record that the suspension was not performance or discipline related, nor were there any allegations of impropriety on the part of Dr. Gayles. Although she voted for the resolution to suspend, which was consistent with her vote on the former Board against the contract, she did not vote to approve the appointment of an acting superintendent.

The next witness was Board member Joel Chapman. Mr. Chapman said that at the time of the events surrounding the new contract, he had been a Board member for about a year and a half. More importantly, Mr. Chapman had been the chair of the Board's labor committee in November 2018.

Mr. Chapman first learned about the new contract three days before the November 29 meeting in an email from staff member Marlena Batts. When he reviewed the email, he was surprised to learn that the subject was not about Dr. Gayles' existing contract, but about a new contract. As chair of the labor committee, he indicated that the usual protocol was to have something of this nature be reviewed first. Neither Dr. Gayles nor any other members of the Board discussed this item with Mr. Chapman prior to its introduction on November 29. Even the draft agenda did not include this item, according to Mr. Chapman.

Other Board members he reached out to prior to the meeting had no knowledge of the new contract, so the next day, November 27, he sent an email to Mr. Palmieri to inquire further. In response, Mr. Palmieri simply told Mr. Chapman that the concerns he expressed are up to Board counsel. In a further attempt to find out what was going on, Mr. Chapman wrote to Ms. Betts and asked "how could this be going on with a lame duck Board?"

Mr. Chapman further indicated that he was never asked as a member of the Board for permission to send the contract for review to Mr. Palmieri, and that he learned that the new contract process was initiated by Board president Thompson-Epps.

The method of enacting the new contract, as directed by Mr. Palmieri in conjunction with the former Board counsel, was to rescind the existing contract, and then vote on a new contract. This presumes that the entire Board knew about it and authorized it.

Mr. Chapman also continued his service on the Board into the next year. He confirmed that the resolution to suspend Dr. Gayles was not listed on the agenda for the first full public meeting on January 24. A motion to move the public portion of the meeting to earlier in the evening was approved. As a result, there would be only one part of the

agenda for the public to speak, even if other resolutions, such as the motion to suspend Dr. Gayles, would be voted on later in the meeting.

Mr. Chapman further expressed that he voted for the suspension of Dr. Gayles due to a lack of trust, even though the Board was seeking a decision concerning the validity of the contract.

It was again noted during Mr. Chapman's testimony that the Board stipulated that the suspension of Dr. Gayles was not related to performance, impropriety, and there were no allegations of wrongdoing. He indicated that he was satisfied with the decision to suspend, since Dr. Gayles was being asked to "step away" with full pay until the matter was resolved.

When asked why the motion to suspend Dr. Gayles was not reflected on the agenda for January 24, he had no explanation. He also confirmed that prior to the vote to suspend, the meeting was not re-opened to the public for comments on what was being done.

Prior to the meeting, there was also no communication about who would become the acting superintendent, though eventually the Board approved the appointment of the director of curriculum, Debra Sheard, to serve in this capacity. I **FIND** the testimony of Mr. Chapman to be credible.

Juan Allende, who took over as Board president in January 2019, and who also served on both Boards, also testified. He too expressed surprise upon learning shortly before the November 29 meeting about the new contract. He confirmed that neither he, nor Mrs. Menza, nor Mr. Chapman knew about it, and were not consulted on the submission to Mr. Palmieri.

Upon going into executive session prior to the vote, Board president Thompson-Epps confirmed only she had spoken about it with two other members. When questioned about the new contract, Ms. Thompson-Epps simply stated, "well, why not?"

As the new Board president, Mr. Allende indicated that the Board has an ethical responsibility to work as a whole, and that one person, in this case, Ms. Thompson-Epps, can't speak on behalf of the Board without consensus. He said the Board president does not have the unilateral right to contact the County superintendent about this or any other type of significant matter.

Mr. Allende then confirmed the "walk-on" nature of the resolution to send the Rice notice to Dr. Gayles after the new Board was sworn in. He also confirmed that neither he as the new president nor any other new Board members spoke with Dr. Gayles about their concerns regarding the new contract prior to the adoption of the resolution to suspend him with pay to investigate the validity of the contract. That too was done as a non-agenda "walk-on" resolution, which was not really explained. He too confirmed that Dr. Gayles was not removed for performance reasons. The purpose of the Rice notice, which is required under law, was to inform Dr. Gayles that his contract would be discussed at the next public Board meeting. Despite the law that requires a consensus to send a Rice notice to an employee there was testimony that the minutes of the reorganization meeting are not clear as to whether the Board as a whole discussed it first in executive session, or even what prompted the sending of such a notice. Even more unclear is why, having voted to send the notice to Dr. Gayles on January 3, 2019, the Board took almost three weeks to send the notice out, and it was not received via email until January 22, 2019. Certainly, the possibility exists that had it gone out earlier, the parties could have at least started meaningful communication about why the new Board had concerns about the new contract. For reasons unknown, the Rice notice itself was not turned over in the discovery process before the hearing commenced, although Dr. Gayles did acknowledge that he eventually received it.

Mr. Allende stated that in his new capacity as Board president, he believed there was consensus, and the notice preparation was done in conjunction with Mr. Roth, who had just been appointed as new counsel to the Board. He was later replaced, although he remained as counsel of record to litigate this case.

Mr. Allende confirmed that after the reorganization meeting, Dr. Gayles asked him what was going on. His response, which seems somewhat incredible, was that he didn't know.

Mr. Allende's testimony then turned to the events surrounding the suspension of Dr. Gayles at the first full public meeting on January 24, 2019. He confirmed that prior to the meeting, Dr. Gayles was not informed by him as Board president that the Board was considering the possibility of a suspension. (Dr. Gayles, in his testimony, said that Mr. Allende told him it was only a rumor.) Again here, the credibility of the testimony of Mr. Allende, who was the presiding officer of the Board, is somewhat suspect.

Ultimately, the motion to suspend, which was not on the agenda for the January 24 meeting, came before the Board as a "walk-on" resolution. Mr. Allende confirmed that the possibility of suspension was not brought before the Board's labor, personnel, or negotiations committees between January 3 and January 24, and also unexplained is why since a Rice notice had been authorized, a resolution was not prepared in advance for review by other Board members and the public prior to the meeting.

Mr. Allende confirmed that midway through the executive session on January 24, Dr. Gayles, who did not even receive the formal Rice notice three days in advance of the meeting, was asked to leave the executive session. Thus, even if he wanted to exercise his rights under Rice to address the Board in public or private, he was apparently denied the opportunity to do so. At best, the transparency of how the Board went about this process of suspending Dr. Gayles is questionable.

In addition to the prior stipulation that the suspension was unrelated to performance or impropriety by Dr. Gayles, the Board also stipulated during Mr. Allende's testimony that there was no discussion about Dr. Sheard's ability or willingness to serve in the position on an interim basis. When asked if the Board could have determined the validity of Dr. Gayles' contract while he was still serving in the position, he simply said he did not know. Mr. Allende also confirmed that since the Board had moved up the public portion of the meeting, and the resolution to suspend was not on the agenda, the public would not have known about the suspension, nor would it have been possible to comment

or ask questions of the Board. Mr. Allende testified that he did not ask for a resolution to re-open the public portion of the meeting before the vote to suspend Dr. Gayles.

Former Board president Hawaiian Thompson-Epps was the next witness who testified. Prior to her taking the stand, there was some back-and-forth colloquy about whether she could testify due to cross ethics complaints between herself and Mr. Allende. After consulting with personal counsel, who accompanied her to the hearing, her testimony went forward.

Ms. Thompson-Epps indicated that she had been elected to an initial three-year term, starting January 2015. In 2018 she became the Board president, which was the year in which the contract that is the subject of the within case was enacted. Although she was defeated in the November 2018 election, she was appointed in January 2019 by the County superintendent to serve a one-year vacancy on the new Board.

During her testimony, she acknowledged that Board presidents cannot act unilaterally, and that in order for a Board to take action, a majority is needed. Usually, according to Ms. Thompson-Epps, matters are discussed in committee before they get to the full Board. However, as Board president, she said she has the right to set the agenda, and she was responsible for Dr. Gayles' evaluations.

Ms. Thompson-Epps said that her motivation, with a year and a half left on Dr. Gayles' contract, was she wanted to lock him in for an extended period, as she felt that under his leadership the district was moving forward. While the testimony of Ms. Thompson-Epps was for the most part credible, just as there were some aspects of Mr. Allende's testimony that were not credible, the same applies to her testimony about the reasons and motivations for moving a matter of such magnitude, specifically, a longer contract on an expedited basis. It was never admitted or stated during the testimony, but it seems clear that at least part of her motivation was that she knew that the composition and majority of the Board was about to change in early January. At the time Ms. Thompson-Epps moved the new contract, she also knew she was leaving the Board, having been defeated in the recent election.

In fact, other than Board counsel, the only other person Ms. Thompson-Epps consulted with was her liaison with the New Jersey School Boards Association, Ms. Thornton. Both the liaison and the Board attorney at the time, as well as the assistant business administrator, gave her approval in her capacity as Board president to move on the new contract. However, none of these officials were aware that Ms. Thompson-Epps had not consulted with the entire Board. She further testified that she wanted to make the process easier, so she left it to Dr. Gayles, the Board attorney, and the assistant business administrator to prepare the document. Again here, while she may have believed this to be true, her credibility on this issue raises more questions than answers. She also says she was advised by the Board counsel at the time, who was replaced in one of the first acts by the new Board, to have the document sent to the County superintendent. That statement is believable. Also credible and consistent with Mr. Palmieri's testimony is that the district was told by the County superintendent, whether it was correct or not, to rescind the old contract before a new contract could be acted upon.

Responding to questions from Mr. Roth, Ms. Thompson-Epps indicated that the contract wasn't rescinded due to Dr. Gayles' failure to obtain certificates. She said the normal 120-day notice requirement involving a superintendent's contract was waived by the old Board, also on the advice of former counsel. But Ms. Thompson-Epps did admit that she was told by the School Boards Association liaison that all of the members of the Board needed to be informed of her intentions so there were no surprises, which, according to the testimony of others, did not occur. She did say she spoke with two or three other members, even though this was not consistent with the advice she had received.

Turning to the circumstances of the suspension, Ms. Thompson-Epps said she believed such an action was detrimental to the school system. She cited several achievements the district enjoyed under Dr. Gayles' leadership, including but not limited to the installation of a new football field, a new lab at the high school, a rebuilt gym, the addition of six computer classrooms, more parent involvement, and the development of partnerships with the New Jersey Institute of Technology and Kean University.

In essence, according to Ms. Thompson-Epps, Dr. Gayles exceeded expectations. Rather than risk losing him to another district that might offer Dr. Gayles more money and benefits, she decided that a new contract should be offered, although, as discussed earlier, the timing seemed questionable after the outcome of the election.

Dr. David Eichenholtz, who served as interim business administrator and Board secretary, was the next witness who testified. He confirmed that prior to having a draft contract sent to the County superintendent, the Board as a whole was not informed or asked for approval. His involvement in the new contract process occurred during November 2018 when he was asked by Dr. Gayles to work with Ms. Giordano, the assistant administrator, on answering questions raised by the County superintendent about certain financial terms.

The only other involvement by Dr. Eichenholtz was keeping minutes of public meetings and executive sessions; he said that for both the November 29, 2018, meeting, and the January 24, 2019, meeting, the minutes of the executive sessions were limited. He also confirmed that the procedure involving rescinding the existing contract before enacting the new contract was the advice that was received from Mr. Palmieri.

Dr. Antoine Gayles was the last witness to take the stand. He indicated that he started his position as superintendent of the Hillside Public Schools on July 1, 2016. The initial contract was for a four-year term, ending June 30, 2020. Prior to coming to Hillside, he served as a principal in two districts, worked for the State Department of Education, and received his superintendent certificate in 2000.

At the beginning of Dr. Gayles' testimony, his counsel attempted to elicit testimony that suggested that a local political leader was involved in interfering with Dr. Gayles. That line of questioning was not allowed, as his counsel did not offer any discovery on this issue to the counsel for the district before the hearing started, and no foundation was laid with other witnesses concerning this subject.

On direct examination, Dr. Gayles stated that the idea about a new contract was initiated by Ms. Thompson-Epps. She texted him that she had allegedly spoken with two other members before asking if he was interested in pursuing an extension.

Dr. Gayles confirmed that without his own counsel, he negotiated the terms of the new contract with the individual who was serving as Board counsel at the time. He also communicated on this issue with Ms. Giordano. Dr. Gayles acknowledged that he didn't believe that any of the Board committees had reviewed the proposed contract before it was sent to the County superintendent, or before it went to a vote by the full Board. On cross-examination, it was not clear why there were some minutes of a meeting by the labor committee on November 14, which turned out to be an evening of heavy snow, and other minutes of a meeting of November 19, prior to the full Board meeting on November 29. Regardless, it did not seem from these documents that the new contract was fully vetted by this committee prior to the meeting of the full Board.

Dr. Gayles expressed surprise that virtually the first development at the Board's reorganization meeting on January 3, 2019, was to fire the Board attorney, as it was not an agenda item. Also, not on the agenda was a resolution to send a Rice notice to Dr. Gayles advising him that his status with the district would be discussed at the Board's first full public meeting on January 24, 2019. Also unexplained is why it took almost three weeks for the new Board counsel to send the formal notice to him. Dr. Gayles testified that in that period, he asked the new Board president, Mr. Allende, about rumors he had heard, and Mr. Allende's response was, "it's just a rumor."

Just as the vote on just suspension was not on the agenda for January 24, he learned of the Board's action after being asked to leave the executive session and the public meeting that night. He was informed of the action by Board counsel and the local newspaper. He felt that the actions of the new Board were of a harassing nature, damaging to his reputation and career, and were not transparent, as neither he nor the public was given a fair opportunity to speak before or after the vote on the "walk-on" resolution at the meeting on January 24.

Two months into his suspension, which the Board stipulated throughout the proceeding was not performance related, the Board demanded his resignation on short notice. That month, he filed an emergent application seeking reinstatement, which was denied since the Board was still paying him. The Board's Declaratory Judgment action, filed the same month, was not acted on by the Commissioner, and was transmitted to the OAL for the proceedings addressed herein. The Board sought relief declaring the new contract void ab initio, while also seeking to uphold the rescission of the first contract.

Dr. Gayles said that in early May 2019 he received a second Rice notice without explanation. Were it not for a text message he said he received from a member of the public, he would not have known that the Board decided to renege on its commitment to continue paying him during the suspension. That resulted in a second emergent application, the outcome of which was to order the district to resume full payments and benefits until the underlying matter could be heard.

Dr. Gayles also stated that he felt dehumanized when called to Board headquarters in early May to pick up the rest of his belongings, where he was met by three police officers and denied entry to his office.

Towards the end of his testimony, Dr. Gayles confirmed that the rescission of the old contract and the enactment of the new contract were part of the same resolution on November 29, 2018. He expressed no concern at the time of the vote on the old and new contracts whether, if for some reason the new contract were set aside, his employment status would be jeopardized.

FINDINGS OF FACT

1. Antoine Gayles began his position as superintendent of the Hillside Public Schools under a contract with a term from July 1, 2016, through June 30, 2020.

2. On November 6, 2018, an election for five seats on the District Board of Education was held. Four new members were elected, together with one

remaining incumbent member, which significantly changed the majority composition of the Board.

3. On her own initiative, the Board president at the time, Hawaiian Thompson-Epps, started a conversation with Dr. Gayles to determine if he would like to consider a contract extension.

4. Without consulting with the full Board, the Board counsel at the time was enlisted to draft a new contract, which was forwarded to the County superintendent by the assistant business administrator. The Board secretary also was involved to the extent that figures and numbers in the new contract had to be revised.

5. Three days prior to the former Board's next-to-last meeting, on November 26, 2018, the full Board, for the first time, received the proposed new contract for its review.

6. At one of its last public meetings prior to the new Board assuming office, on November 29, 2018, the prior Board took action to rescind petitioner's existing contract and replace it with the new contract, which, among other things, extended petitioner's term for three additional years through June 2023 and raised his salary. This was done after review and direction from the County superintendent, who was not aware that the entire Board was not informed of the existence of a new proposed contract. The parties involved were limited to the former Board counsel, the Board secretary, the assistant business administrator, the Board president at the time who was not re-elected, and Dr. Gayles.

7. By a vote of 5-3 with one abstention, the old contract, which was supposed to end June 30, 2020, was rescinded and was replaced with a new contract with a higher salary and a term ending in June 2023.

8. At its first meeting, which took place on January 3, 2019, the new Board, after it was sworn in and a new counsel was hired, authorized sending a Rice Notice to petitioner. No explanation was offered as to why it was only sent to

Dr. Gayles via email within thirty-six hours of the next meeting when the Board might act.

9. Three weeks elapsed with no one, including the new Board president, Juan Allende, communicating with Dr. Gayles that his employment status might be in jeopardy. When Dr. Gayles asked Mr. Allende about rumors he had heard, Mr. Allende declined any knowledge about what was being said.

10. At its next meeting on January 24, 2019, the Board suspended petitioner with pay and benefits continuing. No date was memorialized for this change of status to end, and no facts were presented that the superintendent was suspended for cause or any allegations of improper acts. In fact, the Board stipulated during the proceeding that the suspension was not performance related. The Board contended that the suspension was to allow them to "investigate" the legality or illegality of the new contract. Having heard all of the testimony, I **FIND** that whether or not the suspension was the appropriate method for the Board's inquiry, the suspension was not in any way related to Dr. Gayles' performance as superintendent of schools.

11. The resolution that the Board voted on to suspend Dr. Gayles did not appear on the agenda for the January 24 meeting. For reasons unknown, it was done as a "walk-on" resolution that night, with no ability for the public to comment, since the Board had previously voted to move the public portion of the meeting to an earlier spot on the agenda. At the time the suspension resolution was considered, the public portion of the meeting was not re-opened.

12. The parties, with counsel, appeared before Judge Betancourt on March 6, 2019, at which time the district, through counsel, represented that the relief requested should be denied because petitioner would still be paid. In fact, it was represented to Judge Betancourt that would continue to pay Dr. Gayles while it was researching the issues involving the new contract.

13. Two days before the hearing before Judge Betancourt, on March 4, 2019, the district filed its request for a declaratory ruling seeking to have the new contract deemed void ab initio.

14. Both matters were remanded to the OAL, and with Judge Betancourt's recusal, the matters were assigned to the undersigned ALJ.

15. Following a status phone conference, the parties were directed to appear for settlement conferences, one of which was held on April 29, 2019, and the second on May 14, 2019.

16. Five days prior to the second settlement conference, and with Dr. Gayles' request for reinstatement and the declaratory-relief application still pending, the Board on less than three days' notice to petitioner unilaterally took action to stop the payments it had previously agreed to make, resulting in no further payments to petitioner as of May 15, 2019. A second emergent application was then instituted by Dr. Gayles, seeking immediate reinstatement of his salary and benefits while he remained suspended.

17. On the return date of the second request for emergent relief, no testimony was taken, and the parties relied on their submissions and oral argument. Hearing dates were scheduled on the merits of both matters for July 8 and July 9, 2019. Further hearings were conducted on July 31, August 12, and October 8, 2019. The district also filed a motion to strike petitioner's answer and disqualify petitioner's counsel, which was denied. Prior to the start of testimony, counsel for Dr. Gayles withdrew the affidavits, which cured the unintentional impropriety the district complained about.

18. The Board does not dispute, and in fact stipulates, that the suspension was in no way related to Dr. Gayles' performance in the position. I **FIND** that the suspension was not performance related, nor was it based on any improprieties or acts committed by Dr. Gayles. For reasons unknown, the Board elected to remove Dr. Gayles from his position while it investigated the legality of the new contract.

No other options were explored, nor does it appear that the new Board president or members of any of the Board committees attempted to engage in a dialogue with Dr. Gayles prior to suspending him.

LEGAL DISCUSSION AND CONCLUSIONS

The parties agree on most of the applicable law that governs this dispute. Not surprisingly, they disagree on the application and interpretation of the legal principles that determine the outcome.

N.J.S.A. 18A:6-8.3 states: "any employee or officer of a Board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, **shall** receive his full pay or salary during such period of suspension except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement." Emphasis added.

N.J.A.C. 6A:23A-3.1 governs the review of employment contracts for superintendents, and N.J.A.C. 6A:23A-3.2 addresses the required actions for early terminations of such contracts. Among other things, notice is required, and at least thirty days' notice of a hearing is required before any such action is taken. Simply put, both sides ignored these provisions and circumvented the appropriate legal process for changing a superintendent's contract.

The following sequence of events lead to the conclusion that the rescission of the first contract is void, as is the rescission of the second contract. The suspension of Dr. Gayles without an acceptable basis such as performance related, or the existence of improprieties was really intended to be a termination, without following any of the recognized statutory, regulatory or policy procedures for notice, discussion and public input.

It is undisputed that the question of which contract or either contract had not been decided, yet the Board on May 9, 2019, unilaterally voted to stop the payments it had been making to petitioner, which it represented it would do to the ALJ previously assigned to this case. During argument, the district advocated that the provisions of N.J.A.C. 6A:23A do not apply since there was a prior mutual rescission, yet at the same time they also argue that the actions of the prior Board in providing a new and extended-term contract to petitioner were invalid. This argument is not convincing, since if the new contract is void, the act of rescission of the old contract is also void, regardless of whether it was part of the same resolution, or if it had been reflected in a separate resolution. I **CONCLUDE**, that the rescission of the old contract is also void. Based on that conclusion and the applicable law, Dr. Gayles is entitled to reinstatement to the position of superintendent of Hillside Public Schools under the terms of the old contract through June 30, 2020.

Dr. Gayles argues that the former Board had the authority to modify the existing contract under N.J S.A. 18A:11-1, which allows a Board to do all things necessary for the lawful and proper conduct of its schools. He further cites N.J.S.A. 18A:17-20.1, which is the renewal statute for superintendents providing that at the conclusion of the initial contract or any subsequent contract the superintendent holding the position shall be deemed reappointed for another contract of the same duration, unless the board reappoints him for a different term.

One of the problems with advancing this argument is that under the underlying facts indicate that Dr. Gayles still had more than eighteen months left at the time the new contract was proposed, so this was not a renewal at the end of an expiring term.

Further, there is nothing in the record to suggest that under the lawful-and-proper-conduct standard, there was a compelling reason to essentially tear up his old contract and replace it with a new one that had a longer term with higher salary and benefits. The Board president's justification for what amounted to unilateral actions, while perhaps well-intentioned, was misguided, and did not follow well-established law.

Dr. Gayles also argues that the enactment of the new contract also had the blessing of the County superintendent and was properly presented to Mr. Palmieri under N.J.S.A. 18A:7-8 and N.J.A.C. 6A:23A et seq., which establish the duties and responsibilities of this official as an agent of the Department of Education, including but not limited to review of superintendents' contracts.

But that presumes that Mr. Palmieri was aware that the Board was asked for a consensus to send the new contract for review, and that Mr. Palmieri knew or should have known that a new Board would be seated in a few short weeks which might not want to be bound by the new agreement. The unilateral actions taken by Ms. Thompson-Epps had the potential to compromise both Boards under the ruling in Cheng v. Rodas, West New York Board of Education, Dkt. No. C58-14, Comm'r (January 20, 2017), https://www.nj.gov/education/legal/, a school ethics case wherein the board president initiated private action to negotiate a new employment agreement for a business administrator without including all the other board members.

Once Mr. Palmieri returned the contract after some revisions, the full Board only had forty-eight hours to review the entire contract, and the members of the public had even less time to review it and comment upon it. What seems clear, although it was not specifically stated by the witnesses, is that the Board president at the time, Ms. Thompson-Epps, recognized that the outcome of the election would not be favorable for Dr. Gayles, and so she acted in an expedited and somewhat surreptitious manner to make sure he would have some additional protection with a longer contract term. It is certainly understandable that most individuals offered the same opportunity would agree to accept a new contract. Dr. Gayles, negotiating directly with the Board counsel at the time, may have unintentionally caused himself harm instead of waiting to see if the new Board would concur with the actions of the Board that was about to leave office. See Nowak v. Bd. of Educ. of Manville, 1976 S.L.D. 47, wherein a lame-duck board is not allowed to bind a future board in non-administrative matters; see also Gonzalez v. Bd. of Educ. of Elizabeth Sch. Dist., 325 N.J. Super. 244, 252 (App. Div. 1999), cited by both sides and setting forth the principle that "[a] board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute." Thus, the rescission

of Dr. Gayles' existing contract and replacement with a new contract when there was no vacancy in the position and no compelling reason to make such a change was significantly more than a ministerial act as described in Nowak.

Moreover, when a board of education is contemplating a significant action such as a superintendent's contract, reasonable notice to the public is required under N.J.S.A. 18A:11-11 and N.J.A.C. 6A:23A-3.1, which requires thirty days' notice to the public in advance of taking action, and at least ten days for the public to comment. The forty-eight hours provided here in late November 2018 is woefully short of both requirements.

The pattern of failing to follow well-established statutes, rules, and protocol was exacerbated once the new Board took office. Barely sworn in at its reorganization meeting, the new Board, under leadership from a new president, voted on a "walk-on" resolution pursuant to Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), certif. denied, 76 N.J. 238 (1978), which requires that a formal written notice be sent to school employees at least seventy-two hours in advance of the time a board may take action involving the person's employment with the district. The rationale behind this provision was to give that individual an opportunity to appear before the board in public or private before any decisions are made. In this case, for reasons unknown, almost three weeks went by after the initial vote before the notice was sent, thereby allowing little or no time for Dr. Gayles to act or respond prior to the suspension.

Even more curious are the circumstances surrounding the ultimate action the new Board took regarding the suspension of Dr. Gayles. Both sides agree that the rules and provisions for public comment at school-board meetings, as well as for other public entities, are governed by the Open Public Meetings Act, which can be found at N.J.S.A. 10:4-6 et seq. This statute, also commonly known as "the Sunshine Law," encourages boards to conduct most of their business before the public, and to allow a reasonable period of time for the public to comment, and participate in question-and-answer sessions before the board takes action on matters that will impact the public, the students, and individuals employed by the board. In this case, the new Board took at least two actions

that contravene this important standard in a manner that was detrimental to Dr. Gayles and the public.

Prior to its first full public meeting, no resolution appeared on the agenda regarding the suspension of Dr. Gayles. Surely, having previously authorized a Rice notice three weeks earlier, the Board knew or should have known that it might be considering some sort of action against Dr. Gayles that would impact his employment with the district. Not only was Dr. Gayles deprived of the ability to have a meaningful opportunity to address the Board's concerns, but the Board failed to give the public, the taxpayers, and parents whose children were about to be impacted an opportunity to address the Board.

This denial of public comment was further compounded by the Board's decision to confine public comment to a one-time period much earlier in the meeting, prior to the vote on the suspension. Presented in the form of a "walk-on" resolution, there was no thirty-day period for the public or members of the Board to review the resolution, nor was there a ten-day period for public comment.

At least three times during this proceeding, the Board stipulated that the suspension was not performance related, nor was any impropriety involved. The new president Mr. Allende, and Mr. Chapman identified the sole reason for the suspension as an opportunity for the Board to investigate its rights under the new contract. No other justification was offered.

Compounding the deleterious nature of the new Board's actions, after initially agreeing on the record before another administrative law judge to continue Dr. Gayles' salary and benefits, not more than two months later, and while the matter was still active before the Office of Administrative Law, the Board approved a new resolution, brought as a "walk-on" without proper notice to Dr. Gayles and the public, which immediately stripped Dr. Gayles of his salary and benefits. As justification for this arbitrary and capricious action, the Board cited the recently decided case of Wall Township Education Association v. Wall Township Board of Education, No. A-4885-17 (App. Div. March 14, 2019), http://njlaw.rutgers.edu/collections/courts/, wherein the Appellate Division ruled that the requirements of N.J.S.A. 18A:11-11 are still necessary in order for a successor contract

to be valid. Thus, the new Board advances the argument that if a board wants to change a superintendent's contract, public notice and a hearing are mandated in accordance with N.J.A.C. 6A:23A-3.1 (thirty and ten days, respectively), and, as such, the new agreement is void.

Conveniently though, Hillside does not argue that the same ruling applies to the rescission of the contract, which occurred at the time the new contract was enacted. They further disingenuously suggest that the undersigned does not have the authority to overturn the rescission, unless a finding is made that the Board actions violated a statute.

Given the actions of both sides, I **CONCLUDE** that each side violated the spirit and intent of the relevant statutes, regulations, and caselaw regarding superintendents' contracts, and I further **CONCLUDE** that the initial "walk-on" resolution suspending Dr. Gayles in January 2019, followed by another "walk-on" resolution to stop his salary and benefits wherein he was directed to pick up his boxed belongings and barred from his office, amounted to a termination, disguised as a suspension, without the right to be properly heard under the involuntary-termination section of N.J.S.A. 18A:17-20 and N.J.A.C. 6A:23A-3.2, which involves notice of charges and evidence to a superintendent, with a right to reply. Thus, the same argument Hillside advances, that the new contract was the result of improper and illegal procedures, also applies to its action of suspending Dr. Gayles, and ultimately in early May 2019 of stripping him of salary and benefits and the use of his office, without formally saying he had been terminated.

In support of its actions and position, the district relies on the recently decided Wall case, as well as its belief that this is a contract case only and argues that since the first contract was mutually rescinded, the Board has the authority to cease payments. For the reasons set forth herein, I **CONCLUDE** that the acts leading to second contract were inappropriate, making the contract itself void, the same **CONCLUSION** applies as well to the rescission of the contract in existence at the time, as the County superintendent was not aware that the new contract was sent for his review without the consensus of the Board. Moreover, the action could be detrimental to the new Board that would take office within a few weeks that there was no compelling reason to offer Dr. Gayles a new contract with eighteen months left on the contract in effect at the time.

I further **CONCLUDE** that starting with the Rice notice, together with the "walk-on" resolution to suspend, the lack of public input constitutes bad faith on the part of the new Board, which in essence masked an intent to terminate Dr. Gayles under a suspension that had no legitimate basis or rationale.

While I **HAVE CONCLUDED** that the circumstances surrounding the suspension were suspect, the same **CONCLUSION** applies to the circumstances surrounding the preparation of a new contract sent without full Board authority to the County superintendent. The vote on the new contract by a "lame duck" Board seems as if it was done to circumvent the normal process of a full public hearing. The former Board president, Ms. Thompson-Epps, without the knowledge of the full Board, took unilateral actions to expedite the process of enacting a new contract that a new Board was about to take over. There was no consensus to send the proposed contract to the County superintendent. The members of the "lame duck" Board only had forty-eight hours to review the proposed contract. There was insufficient time for members of the public to review the document. I therefore **CONCLUDE** that it was appropriate for Dr. Gayles to receive his full salary and benefits due to the questionable circumstances surrounding his suspension while this matter was pending. The application for declaratory relief is granted in part as to the new contract being deemed void ab initio. I **further CONCLUDE** that the rescission of the contract ending June 30, 2020, is also deemed void ab initio, as it was part of the same act and resolution approving the new contract. I **further CONCLUDE** that the Board's argument that the new contract should be deemed void, but the rescission of the old contract should be upheld, is misguided, and fails as a matter of fact and law. Therefore, I **CONCLUDE**, under a totality of the facts and circumstances, Dr. Gayles is entitled to all the salary and benefits he collected during the pendency of the litigation and retroactive to January 1, 2019 through June 30, 2020.

The parties are left to their remedies in other forums concerning any remaining disputes about payments, should they try to pursue them.

ORDER

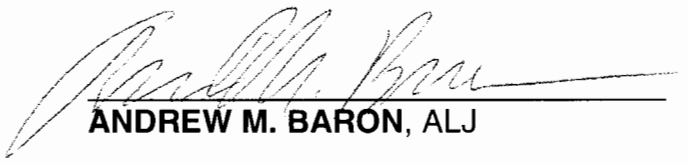
I hereby **ORDER** that the rescission of the original contract as part of a resolution on November 29, 2018 is hereby deemed **VOID** as is the new contract enacted as part of the same resolution is also deemed **VOID**. Board compensate petitioner for any salary and benefits lost and credit petitioner any seniority credit lost retroactive to January 24, 2019 and is reinstated to the position of superintendent through June 30, 2020. I further **ORDER** that the suspension enacted on January 24, 2019 is deemed **VOID** and **VACATED** and a copy of this initial decision confirming the suspension was not based on performance or inappropriate conduct by Dr. Gayles becomes a permanent part of his personnel file.

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

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

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

June 17, 2020
DATE



ANDREW M. BARON, ALJ

Date Received at Agency: June 17, 2020

Date Mailed to Parties:
mm

APPENDIX

Witnesses

For Petitioner:

Dr. Antoine Gayles

For Respondent:

Darryl Palmieri
Anette Giordano
Angela Menza
Joel Chapman
Juan Allende
Hawaiian Thompson-Epps
Dr. David Eichenholtz

Exhibits

Joint:

J-1 2016 contract
J-2 2018 new contract

For Petitioner:

P-1 Contract, (also J-1) dated 2016
P-2 Not in Evidence
P-3 Labor draft, dated November 14, 2018
P-4 Letter to Mr. Palmieri, dated November 21, 2018
P-5 Letter to former Board counsel Gutierrez
P-6 Meeting Minutes, dated January 24, 2019
P-7 Detailed statement Dr. Eichenholtz
P-8 Transmittal to Board Attorney,

P-9 Minutes, dated November 29, 2018

P-10 Board Policy 01711 Duties of Officers

P-11 Labor Committee policy

P-12 Rice Notice

P-13 Performance Appraisal

P-14 Not in Evidence

P-15 Meeting Minutes, dated January 3, 2019

P-16 Rice Notice

For Respondent:

R-1 Meeting Minutes, dated September 20, 2018

R-2 Agenda, dated October 18, 2018

R-3 Exec. Session, dated October 18, 2018

R-4 Minutes, dated November 29, 2018

R-5 Closed Session Minutes, dated November 29, 2018

R-6 Meeting Minutes, dated January 24, 2019

R-7 Exec. Session Minutes, dated January 24, 2019

R-8 Palmieri/Giordano emails

R-9 Palmieri to Giordano email

R-10 Emails

R-11 Palmieri/Eichenholtz emails

R-12 Miscellaneous documents

R-13 Labor Agenda, dated November 27, 2018

R-14 Labor Committee, dated November 14, 2018

R-15 and R-16 Eichenholtz tapes referenced, not played

163-20E

OAL Dkt. No. EDU 05439-20
Agency Dkt. No. 129-6/20

New Jersey Commissioner of Education

Order on Emergent Relief

Township of Wantage, Sussex County,
Borough of Sussex, Sussex County,
Borough of Branchville, Sussex County,
Township of Lafayette, Sussex County,
Ronald Bassani, Edward Meyer,
Anthony Frato, Sr., and Richard Hughes,

Petitioners,

v.

New Jersey Department of Education,
Board of Education of the High Point
Regional High School District, Sussex
County, and Board of Education of the
Township of Montague, Sussex County

Respondents.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner[1] concurs with the ALJ that petitioners have failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

[1] This matter was delegated to the undersigned by *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 1:1-14.5(a) pursuant to *N.J.S.A.* 18A:4-34.

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

8 7 2020

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: August 7, 2020
Date of Mailing: August 10, 2020

164-20

Agency Dkt. No. 141-6/20

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of
Kenia Penalva, School District of the
Town of West New York, Hudson County.

For the Petitioner, Nashali A. Rose, Esq.

No appearance by or on behalf of Respondent, Kenia Penalva

This matter was opened before the Commissioner of Education on June 22, 2020, through tenure charges of incapacity, unbecoming conduct and other just cause certified by Clara Brito Herrera, Superintendent of the West New York School District ("District"), together with supporting evidence against respondent, Kenia Penalva, a tenured custodian in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address on June 22, 2020.

On June 24, 2020, the Commissioner directed the respondent, via regular mail to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner."* The notice also states that the failure to answer within the prescribed period, absent granting of an extension for good cause shown, would result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that throughout 2019 and up until February 27, 2020 the respondent has been out on medical leave because she has been unable to perform her custodial duties. The respondent is no longer on approved leave and she has not returned to work. Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her, the Commissioner finds that the District's charges of incapacity and other just cause have been proven and warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2020
Date of Mailing: August 12, 2020

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

165-20

OAL Dkt. No. EDU 01134-16
Agency Dkt. No. 329-12/15

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Upper Township, Cape May County,

Petitioner,

v.

Board of Education of the City of Ocean City, Cape May County; Kathleen Taylor, Superintendent; Joseph Clark, President of the Ocean City Board of Education; and Jacqueline McAllister, Member of the Ocean City Board of Education,

Respondents.

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

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

IT IS SO ORDERED.



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2020
Date of Mailing: August 12, 2020

165-20

OAL Dkt. No. EDU 01134-16
Agency Dkt. No. 329-12/15

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Upper Township, Cape May County,

Petitioner,

v.

Board of Education of the City of Ocean City, Cape May County; Kathleen Taylor, Superintendent; Joseph Clark, President of the Ocean City Board of Education; and Jacqueline McAllister, Member of the Ocean City Board of Education,

Respondents.

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

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

IT IS SO ORDERED.



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2020
Date of Mailing: August 12, 2020

166-20SEC

SEC Dkt. No. T15-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T15-19.pdf)
Agency Dkt. No. 149-6/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Zakaria Kandiel,
Board of Education of the
Carlstadt-East Rutherford Regional
School District, Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's May 19, 2020 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, respondent is suspended, as of the date of this decision, from his position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2020
Date of Mailing: August 12, 2020

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

167-20SEC

SEC Dkt. No. T26-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T26-19.pdf)
Agency Dkt. No. 150-6/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Patricia Gerris,
Board of Education of the Borough of
Lake Como, Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the date of this decision, respondent is removed from her position as a school official for violating the School Ethics Act.

IT IS SO ORDERED.[1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2020
Date of Mailing: August 12, 2020

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

168-20SEC

SEC Dkt. No. T17-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T17-19.pdf)
Agency Dkt. No. 146-6/20

New Jersey Commissioner of Education

Final Decision

In the Matter of James Donovan,
Board of Education of the Township of
Lyndhurst, Bergen County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2020
Date of Mailing: August 12, 2020

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

169-20SEC

SEC Dkt. No. T19-19 (https://www.state.nj.us/education/legal/ethics/training/2020/T19-19.pdf)
Agency Dkt. No. 147-6/20

New Jersey Commissioner of Education

Final Decision

In the Matter of Lisa Asare,
Board of Education of the Borough of
Berlin, Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 21, 2020 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2020
Date of Mailing: August 20, 2020

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

173-20E

OAL Dkt. No. EDU 05938-20
Agency Dkt. No. 143-6/20

New Jersey Commissioner of Education

Order on Emergent Relief

A.R. and E.R., on behalf of minor child, S.R.,

Petitioners,

v.

Board of Education of the Monmouth County Vocational School District, Monmouth County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioners have failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia,* 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 20, 2020
Date of Mailing: August 24, 2020

[1] Exceptions to the ALJ's Order submitted by the petitioner were not considered; *N.J.A.C.* 1:1-18.4 permits the filing of exceptions to an initial decision, but no provision of the Uniform Administrative Procedure Rules allows for exceptions to an Order Denying Emergent Relief.

174-20

New Jersey Commissioner of Education

Final Decision

J.C. and C.C. on behalf of minor child, J.C.,

Petitioners,

v.

Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County,

Respondent.

Synopsis

Petitioners appealed the respondent Board's determination that J.C. committed an act of harassment, intimidation and bullying (HIB) in violation of New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, when he removed the pants and exposed the buttocks of another boy, J.K., while G.E. held him down. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the core facts in this case are not in dispute, and the matter is ripe for summary decision; the Act defines HIB as any gesture, written, verbal or physical act, or electronic communication that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, and must also substantially disrupt or interfere with the orderly operation of the school; an action by a board of education is entitled to a presumption of correctness and will not be overturned unless it can be shown that the Board's action was arbitrary, capricious or unreasonable; here, there is no dispute that J.C. pulled down the pants of J.K., exposing him, while G.E. held J.K. down; the Board further determined that J.C. also exposed himself during the incident and that J.K. suffered emotional harm that required him to undergo counseling; moreover, the Board determined that the episode disrupted the orderly operation of the school because a photograph of the incident circulated among students, leading to harassment of both J.C. and J.K. by others; and the Board's determination that J.C.'s conduct was motivated by J.K.'s gender was reasonable given that the act of removing another person's pants while that person is restrained, then removing your own pants, is inherently sexual and based on the gender of the victim. The ALJ concluded that the petitioners failed to sustain their burden of proving that the Board acted in an arbitrary, capricious or unreasonable manner in finding that HIB occurred in this matter. Accordingly, the petition was dismissed.

Upon review, the Commissioner concurred that, based on the evidence in the record, petitioners did not establish that the Board acted in an arbitrary, capricious or unreasonable manner in finding that J.C. committed an act of HIB. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner noted, *inter alia*, that while *N.J.A.C.* 6A:16-7.5(a) requires a nexus to a student's physical or emotional safety, security, and well-being and a material and substantial interference with the operation of the school in order to impose a consequence for student conduct away from school, the Commissioner does not need to decide whether J.C.'s conduct met this definition as the Board did not impose discipline on J.C. since he is no longer a student in the district.

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

174-20

OAL Dkt. No. EDU 12064-19
Agency Dkt. No. 179-7/19

New Jersey Commissioner of Education

Final Decision

J.C. and C.C., on behalf of minor child, J.C.,

Petitioners,

v.

Board of Education of the Ramapo Indian Hills 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, as have the exceptions filed by the petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.[1]

In this matter, petitioners challenge the Board's determination that their son committed an act of harassment, intimidation and bullying (HIB). This case stems from an incident that occurred at a student's home in December 2017 or January 2018, in which the Board found J.C. removed the pants and exposed the buttocks of another boy, J.K., while G.E. held him down. The Board also found that J.C. removed his own pants while on top of J.K. A photograph of the incident spread to other students at school in September 2018, when the students were beginning their freshman year.[2] As a result, the

[1] The Board argues that petitioners' exceptions should not be considered because they were filed electronically eight minutes after the Department's close of business at 4:15 p.m. The Commissioner will exercise his discretion pursuant to *N.J.A.C.* 6A:3-1.16 and *N.J.A.C.* 1:1-1.3 to consider petitioners' exceptions, especially given the closure of the Department's offices during the COVID-19 pandemic.

[2] Petitioners alerted school officials that J.C. was being threatened and called names after the photograph was distributed; they subsequently filed a HIB complaint against several students. Although a finding of HIB was substantiated against two students, petitioners transferred J.C. to an out-of-state school because of the harassment.

victim's parents filed a HIB complaint against J.C. Following an investigation, the Board found that J.C. committed an act of HIB, specifically finding: (1) the events substantially interfered with the victim's rights and the operation of the school given the number of students involved and the effect on the victim, who subsequently required therapy; (2) a reasonable person would perceive that J.C.'s actions in removing the pants of a person who is held down and exposing his buttocks is motivated by gender; and (3) a reasonable person would know that the actions would have the effect of causing the victim emotional or physical harm. Following motions for summary decision, the Administrative Law Judge (ALJ) found that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

In their exceptions, petitioners argue that the ALJ improperly applied the summary decision standard by failing to recognize numerous disputed issues of material fact. Specifically, petitioners deny that a sexual assault took place. Additionally, petitioners point out that it was J.K. – and not J.C. – who spread the rumors about the incident around the school and set any harassment in motion. Furthermore, according to petitioners, the Board was arbitrary, capricious, and unreasonable in ignoring that G.E. submitted conflicting statements during the HIB investigation. G.E. first said that J.C. "never did anything inappropriate that I saw or remember," but several days later changed his story and said that he saw J.C. "half-naked with his thing out." (Petitioner's certification, Exhibits L and M). Petitioner's maintain that these material facts cannot be reconciled on a motion for summary decision.

Petitioners dispute the Board's conclusion that the incident was motivated by gender. Petitioners assert that since the two other students who participated in the same incident were not deemed to be motivated by a distinguishing characteristic, the Board's determination that J.C.'s actions were motivated by gender must be based on the unfounded assumption that J.C. is gay without any evidence of such. While petitioners acknowledge that the conduct may have been inappropriate, the HIB investigation materials do not provide a basis for the conclusion that his actions were motivated by gender.

Petitioners also argue that J.K.'s statement in his interview that he had suffered no emotional distress undermines the Board's finding of HIB. Specifically, J.K. was asked how much the

incident bothered him "in terms of distraction, emotional stress, etc. (10 being extremely, 1 being not at all)" and J.K. answered "1." (Petitioner's certification, Exhibit J). Petitioners maintain that J.K.'s statement contradicts his parents' assertion that he was in therapy, and an essential element of HIB cannot be met.

Finally, petitioners claim that the Board did not have the authority to regulate conduct that occurred in a private home. According to petitioners, in order to regulate off campus conduct, the Board would have to show that there is a nexus to student health or safety and that the behavior materially and substantially interferes with the orderly operation of school. Here, petitioners maintain that the Board exceeded its authority because the conduct did not threaten J.K.'s physical or emotional safety or well-being, as the two remained friends and J.K. filed his HIB complaint nine months later, after J.C. initiated his own complaint. Petitioners further argue that the ALJ erred in finding a substantial disruption to the school because any disruption was the harassment that J.C. suffered – not J.K. – and he should not be blamed for coming forward about being harassed. Accordingly, petitioners urge the Commissioner to reject the Initial Decision.

In reply, the Board contends that there are no genuine disputes of material fact because the only facts necessary to decide this matter are the HIB record and the conclusions the Board drew from it. The Board argues that petitioners cannot relitigate the facts of the incident; instead, the only issue here is whether the Board was arbitrary, capricious, and unreasonable in determining that J.C. committed an act of HIB based on the record before it at the time. Specifically, in response to petitioners' disputed material facts, the Board maintains that: it did not determine that a sexual assault occurred; regardless of who started the rumor around school, it was J.C.'s conduct that started the chain of events; and the Board was not arbitrary in crediting G.E.'s second statement, which was consistent with J.K.'s statement.

The Board argues that J.C.'s conduct was inherently of a sexual nature, and a reasonable person could conclude that it was motivated by gender. Additionally, the Board reasonably relied on J.K.'s need for therapy for its conclusion that he suffered emotional harm. Finally, the Board maintains that pursuant to *N.J.A.C.* 6A:15-7.5(b), it is required to investigate HIB complaints regardless of whether

they occurred off school grounds. The Board explains that *N.J.A.C.* 6A:15-7.5(a) does not apply because it did not impose any discipline in this matter, so it does not need to demonstrate a nexus to student health or safety. Accordingly, the Board requests that the Commissioner adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that, based on the evidence in the record, petitioners did not establish that the Board acted in an arbitrary, capricious, or unreasonable manner in finding that J.C. committed an act of HIB. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974). The record contains sufficient credible evidence to support the Board's determination that J.C. removed the pants and exposed the buttocks of J.K. while he was held down, and that J.C. removed his own pants while on top of J.K. – specifically, the victim's statement recounting the incident and G.E.'s statement that he saw J.C. "half-naked with his thing out." While petitioners deny that J.C. removed his own pants and point to G.E.'s first statement, where he said that J.C. "never did anything inappropriate," this does not erase the evidence in the record that the Board relied upon which indicated the opposite. While the evidence may leave room for two opinions, it is not sufficient to overturn the Board's decision, as it does not demonstrate that the decision was arbitrary, capricious, or unreasonable. To overturn the Board's decision would require the Commissioner to substitute his judgment for the Board's, which is impermissible.

The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national

> origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements. First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020). The statute also requires that the conduct take place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3.

Regarding the first element, in defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra.* Here, it was not arbitrary, capricious, or unreasonable for the Board to conclude that a reasonable person would consider J.C.'s actions to be of an inherently sexual nature and thus motivated by the gender of the victim.

Regarding the second element, the Board relied upon the number of students involved in the incident and the disturbance that resulted when the photograph was shared among students. The Commissioner finds that – given the incident set in motion a string of events that led to a photograph being circulated around school – the Board was certainly not arbitrary, capricious or unreasonable in finding a substantial interruption of the ordinary operation of the school.

Regarding the third element, an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . .". *N.J.S.A.* 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that his actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know. *Wehbeh, supra.* As such, a board of education can find that an individual committed an act of HIB even if the individual did not intend to cause harm. Here, the Board found that J.C.'s actions in removing his own pants and J.K.'s pants while J.K. was held down resulted in emotional harm to the victim, as demonstrated by his need to undergo school-sponsored and private therapy. While petitioners point to the victim's statement that he was not bothered by the events, evidence in the record supports the Board's determination. There is no doubt that a reasonable person would know that J.C.'s actions would result in emotional harm, satisfying *N.J.S.A.* 18A:37-14 of the Act, so the Board was not arbitrary, capricious, or unreasonable in reaching that conclusion.

Finally, regarding where the conduct occurred, the Act sets forth that conduct may be considered HIB when it takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3, and otherwise satisfies the remaining elements of HIB. *N.J.S.A.* 18A:37-15.3 indicates that HIB policies adopted by boards of education shall include provisions for responses to HIB that occurs off school grounds when a school employee is made

aware of such actions. Additionally, *N.J.A.C.* 6A:16-7.5(b) requires that school authorities respond to HIB that occurs off school grounds. Accordingly, the Board is required to investigate HIB complaints even if they occur outside of school. Here, the Board received a HIB complaint involving conduct that occurred at a private residence, and the Board investigated the allegations as it is required to do. Although *N.J.A.C.* 6A:16-7.5(a) requires a nexus to a student's physical or emotional safety, security, and well-being and a material and substantial interference with the operation of the school in order to impose a consequence to student conduct away from school, the Commissioner does not need to decide whether J.C.'s conduct met this definition because the Board did not impose discipline on J.C., as he is no longer a student in the district. As such, the Board was not arbitrary, capricious, or unreasonable in investigating conduct that occurred off school grounds and finding that it met the definition of HIB.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 20, 2020
Date of Mailing: August 24, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12064-19
AGENCY DKT. NO. 179-7/19

J.C. AND C.C. ON BEHALF OF J.C.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Arla D. Cahill, Esq., for Petitioners (Mandelbaum Salsburg, attorneys)

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

Record Closed: May 15, 2020 Decided: May 20, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner parents challenges the respondent District's HIB determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on August 29, 2019, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on September 17, 2019, and a prehearing Order was entered on September 18, 2019.

Respondent filed a motion for summary decision on December 23, 2019. Petitioners filed a cross motion for summary decision, and their response to respondent's motion, on February 10, 2019. Respondent filed its reply brief on March 6, 2020. Petitioner, with permission from the undersigned, submitted a sur-reply brief on May 15, 2020.

ISSUE

Did Respondent err in determining that J.C. committed an act of HIB within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.

FACTUAL DISCUSSION

I find the following **FACTS**:

1. In or around September 2018, J.C. was a high school freshman in the District.

2. In or around September 2018, Petitioner's met with Assistant Principal L. Michael Mancino to discuss an incident involving their son, J.C., and other boys, that occurred sometime in December 2017 or January 2018.

3. During that incident J.C. removed the pants of J.K. while another boy, G.E., held down J.K.

4. Petitioners advised Mr. Mancino that due to this incident other students at the High School were threatening J.C. and calling him names.

5. J.C. supplied a written statement regarding the incident.

6. G.E. and J.K. also supplied written statements. G.E. supplied a second written statement as well.

7. A photograph purportedly showing J.C. removing J.K.'s pants was taken during the incident and was distributed to some members of the student body.

8. During the incident J.C. also removed his own pants.

9. The parents of J.K. filed a HIB complaint against J.C. and his sister on or about October 4, 2018.

10. A HIB investigation ensued, conducted by Anti Bullying Specialist Rachel Calabrese.

11. The conclusion of the HIB investigation was that J.C.'s action during the incident constitute HIB because he committed a physical act that was reasonably perceived to be motivated by J.K.'s gender that substantially disrupted or interfered with the orderly operation of the school and a reasonable person should have known, under the circumstances, would have the effect of physically or emotionally harming a student.

12. As a result of the incident J.K. underwent counselling.

13. The incident substantially disrupted and interfered with J.K.'s rights based upon his need to attend counseling, and the harassment he faced from other students.

14. The orderly operation of the school was substantially disrupted due to the incident in that it caused J.C. and J.K. to receive significant harassment from other students, which included substantiated allegations of HIB by other students against J.C.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application,

show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter both parties are requesting relief via summary decision. Petitioners contend that the Board lacked jurisdiction to conduct an HIB investigation as the act occurred off school property. Petitioners further contend that if there is jurisdiction that there are sufficient facts in dispute to deny Respondent's motion for summary decision.

In support of their position Petitioners submitted Petitioners' Response to Respondent's Statement of Undisputed Material Facts and Counter Statement of Material Facts. A careful review of the same reveals much of what is set forth as fact is merely the opinion of the Petitioners. Much of what is fact is not material to the HIB investigation. By way of example, Petitioners focus on a C.P., who they maintain "de-pantsed" J.C. while in 6th grade. Petitioners further maintain that C.P. spread rumors about the incident. While the above may be facts, they are not material to the finding of HIB. What is material to the finding of HIB are the facts pertaing to the incident itself.

Respondent submitted their Response to petitioners' Counter Statement of Undisputed Material Facts. I found the same extremely persuasive and concur with the same.

Respondent contends that the "core" facts are not in dispute and that those facts lead to a finding of HIB, and that such a finding is not arbitrary, capricious or unreasonable.

I concur with Respondent in this regard. The facts alleged to be disputed by Petitioners are not material to the Board's determination that J.C. committed an act of HIB.

Accordingly, I find that the matter is ripe for summary decision.

The Anti-Bullying Bill of Rights Act ("Act"), N.J.S.A. 18A:37-13 et seq., is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises."[3] N.J.S.A. 18A:37-13.1.(f). Under the Act, "harassment, intimidation or bullying" (HIB) is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 ofP.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or

> pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, and shall take no longer than ten school days to be completed. The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial actions. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

Pursuant to the Act, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Any hearing shall be held in executive session to protect the identity of any students involved. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. The board must issue a decision at the first meeting after its receipt of the investigation report. The board may affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education.

Petitioners raise two issues which need be addressed.

The first issue is regarding a HIB investigation regarding C.P. In their reply brief Petitioners challenge Respondent's failure to conduct a proper HIB investigation against C.P. As Petitioners did not address the HIB findings regarding C.P. in their Petition, I shall not consider this issue as it is not before me.

The second issue is that the Board did not have jurisdiction to investigate the HIB allegation against J.C. as the incident occurred off campus.

N.J.A.C. 6A:16-7.5 states:

> **(a)** School authorities have the right to impose a consequence on a student for conduct away from school grounds that is consistent with the district board of education's code of student conduct, pursuant to N.J.A.C. 6A:16-7.1.
>
> **1.** This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2.
>
> **2.** This authority shall be exercised only when the conduct that is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.
>
> **3.** The consequence pursuant to (a) above shall be handled in accordance with the district board of education's approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, and as appropriate, in accordance with N.J.A.C. 6A:16-7.2, 7.3, or 7.4.
>
> **(b)** School authorities shall respond to harassment, intimidation, or bullying that occurs off school grounds, pursuant to N.J.S.A. 18A:37-14 and 15.3 and N.J.A.C. 6A:16-1.3, 7.1, and 7.7.

Clearly the Board had jurisdiction to conduct the HIB investigation in this matter. See W.D. ex rel. G.D. v. Board of Education of Jefferson, 2018 WL 3609529 (initial decision Jul 13, 2018), adopted, No. 375-18 (Comm'r Nov. 26, 2018) where the undersigned determined that a HIB investigation regarding an off campus incident, which was adopted by the Commissioner, was not arbitrary, capricious or unreasonable.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted) <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556 (1963), 562 (1963)), adopted, Comm'r (April 25, 2013) <http://njlaw.rutgers.edu/collections/oal/>.

There are reported cases in which HIB determinations by boards of education have been both affirmed and overturned. In R.G.B. v. Vill. of Ridgewood Bd. of Educ., EDU 14213-12, Initial Decision (May 15, 2013) <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (June 24, 2013), the ALJ found that the Board did not act in an arbitrary, capricious, or unreasonable manner in determining that a student engaged in HIB when he repeatedly called a female student "fat," "fat ass," and "horse." According to the ALJ, such verbal statements satisfied all of the necessary elements under N.J.S.A. 18A:37-14. And, in G.H., supra, the ALJ also upheld a Board's finding that a white student who repeatedly called a black student "Kool-Aid" engaged in HIB. The ALJ found that the "use of the word 'kool-aid' was directed at [the other student] because of his race; insulted and demeaned [the other student]; and . . . interfered with [the other student's] education" because "[u]pset and embarrassed children are not fully available for learning." However, in J.A.H., supra, the Board's finding that an incident in which one student stuffed a crumbled piece of paper down the shirt of another student constituted an act of bullying was overturned as arbitrary, capricious, and unreasonable because the incident was merely a prank that was part of an ongoing, mutual conflict between the two boys and did not "contain the more serious and aggravating elements either 'expressed or implied' under [N.J.S.A. 18A:37-14.]" The ALJ found that the incident was not improperly motivated by

a distinguishing characteristic and that the facts "only support[ed] a finding of ordinary student conflicts rather than the more serious behavior of bullying."

Given the facts in the instant matter, I cannot conclude that the Board acted in an arbitrary, capricious, or unreasonable manner in determining that an HIB incident did occur. It is not disputed that J.C. pulled down the pants of J.K. exposing him. It is not disputed that this was done while G.E. held down J.K. The Board further determined that J.C. also exposed himself during this incident based upon the statement of J.K. and the second statement of G.E. The Board then determined that J.K. suffered emotional harm as he was required to undergo counseling due to the incident. The Board further determined that the incident disrupted the orderly operation of the school due to the harassment of J.C. and J.K., and that substantiated acts of HIB occurred against J.C. To argue to the contrary does not ring true.

Lastly, the Board determined in its HIB determination that J.C.'s conduct was motivated by J.K.'s gender. Petitioners argue there is no basis for this determination. It is certainly a reasonable conclusion that the act removing another person's pants while that person is restrained, then removing your pants, is inherently sexual and based upon the gender of the victim. It certainly is not an arbitrary, capricious or unreasonable determination.

While clearly Petitioners disagree with the Board's HIB decision in this matter, nothing the Board did, either while conducting the HIB investigation or the conclusions reached during that investigation to conclude J.C. committed an act of HIB, were arbitrary, capricious or unreasonably.

Accordingly, I **CONCLUDE** that petitioner has failed to sustain the burden of establishing that the Board acted arbitrarily, capriciously, or unreasonably in finding that HIB did occur.

Based upon the foregoing, I **CONCLUDE** that the Petition must be **DISMISSED**.

ORDER

It is hereby **ORDERED** that Petitioner's Petition be **DISMISSED** with prejudice.

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

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

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

5/20/2020
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

List of Moving Papers

For Petitioner:

Cross motion for summary decision

Brief in in support of cross motion and in opposition to motion for summary decision

Response to respondent's Statement of Undisputed Material and Counter Statement of Material Fact

Certification of Joseph Corella, Petitioner, with Exhibits A – O

Certification of Arla D. Cahill, Esq., with Exhibits A & B

Sur-reply letter brief

For Respondent:

Motion for summary decision

Brief in support of motion for summary decision

Certification of L. Michael Mancino, Asst. Prin., with Exhibits A - C

Statement of Undisputed Facts

Certification of Beverly Mackay, Superintendent of Schools with Exhibits A - E

Reply brief

Reply certification of L. Michael Mancino

Response to petitioners' Counter Statement of Undisputed Material Facts

Other Pleadings and Filings:

Petition of Appeal

Answer to Petition of Appeal and Separate Defenses

175-20

New Jersey Department of Education
Bureau of Controversies and Disputes

In the Matter of:	:	
Watchung Borough Board of Education	:	Opinion and Order Re: Motion to Dismiss
Tenure Charges Against	:	Agency Docket No. 112-520
Christopher Riley	:	

Before: Robert H. Barron, Esq.
Arbitrator

Appearances

For the Watchung Borough Board of Education
By: Kerri A. Wright, Esq.
David L. Disler, Esq.
Porzio, Bromberg & Newman P.C.

For Christopher Riley
By: Keith Waldman, Esq.
Hop Wechsler, Esq.
Selikoff & Cohen, P.A.

* * * *

Pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), P. L. 2012, c. 26, N.J.S.A. 18A:6-115 *et seq.* and regulations adopted thereunder by the New Jersey Department of Education ("DOE"), this Arbitrator was appointed by letter dated June 11, 2020 from Jennifer Killough-Herrera, Director, Office of Controversies and Disputes, to hear and determine arguments regarding Tenure Charges ("the Charges") filed by the Watchung Borough Board of Education ("the Board) against Christopher Riley ("Respondent").

On May 26, 2020, by letter to Lamont Repollet, the DOE's Commissioner of Education, the Board filed Tenure Charges against Respondent requesting his termination for unbecoming conduct, along with supporting documentation. On June 9, 2020, in lieu of filing an Answer, Respondent filed a Motion to Dismiss the Charges along with supporting documentation (the "Respondent's Initial Brief). On June 26, 2020, the Board filed a letter brief (the "Board's Brief") in opposition to the Motion, along with a Certification from the School District's Superintendent, George P. Alexis. On July 7, 2020, Respondent filed a letter Reply Brief (the "Respondent's Reply Brief"). At that point, briefing was closed.

Facts

The Charges allege the following:

(1) Respondent was a tenured teacher at the Valley View Middle School. On March 8, 2019, Linda MacLeod, a school guidance counselor, came upon Respondent in the school's hallway. Respondent told her he "just want[ed] to kill these sixth graders", that the students were "driving him crazy"[1], and he "just want[ed] to kill these kids". (Charges at paragraphs 5 and 6). He mentioned two students by name. Neither student was identified in the Charges (although both appear to be identified in the Investigation Notes attached to the Charges). During that conversation, Respondent banged his head against the wall and put his head in his classroom door and closed the door on his head. A hallway security camera recorded the conversation, without audio.

(2) Respondent then entered his classroom and "appeared visibly sad". (Charges at paragraph 9) The Charges did not identify who made that observation. An unidentified student subsequently reported to the paraprofessional in the room that Respondent said he "wanted to kill

[1] The Charges are unclear whether Respondent allegedly made this statement to Macleod (Charges at paragraph 5), in front of the students (Charges at paragraph 25), or in front of both MacLeod and the students.

himself". (Charges at paragraph 10) The Charges did not identify who reported that the student talked to the paraprofessional or who reported what the student said. Other unidentified students went to the school Nurse "because they were deeply upset by what they heard and witnessed". (Charges at paragraph 11) The Charges did not identify who reported that students went to the Nurse or who provided the explanation for why they went to the Nurse.

(3) MacLeod reported Respondent's behavior to the Principal, Mary Nunn. The Nurse also reported to Principal Nunn that unidentified students came to her because they were upset by Respondent's behavior. The Charges did not identify who reported the Nurse's conversation with Principal Nunn. Principal Nunn went to Respondent's classroom where she observed him "'clenching his hand' in front of the students". (Charges at paragraph 14) She told Respondent he needed to leave his classroom, which he did.

(4) Immediately after the incident, Respondent was placed on paid Administrative leave, and directed to undergo a psychiatric evaluation by a doctor selected by the Board. In the Doctor's March 8, 2019 report, he found that, Respondent engaged in "aggressive acting out", and "fear inducing self-destructive behavior". (Charges at paragraph 19) The Doctor also concluded that the behavior was not likely to repeat itself but recommended that Respondent remain out on leave until a follow up examination was administered. In the Doctor's September 19, 2020 report of that follow up examination, he concluded that Respondent was not suffering from severe affection disorder or severe depression.

(5) On April 20, 2020, Superintendent Alexis filed tenure charges with the Board against Respondent, including supporting documentation. The Charges alleged conduct unbecoming a teaching staff member. On May 7, 2020, Respondent filed his statement of position in opposition to the Charges. On May 11, 2020, the Board held a virtual meeting and voted to uphold the

Charges. The Board concluded that, based on the Charges and supporting evidence, Respondent had engaged in conduct unbecoming a teaching staff member in violation of N.J.S.A. 18A:6-10, and he failed to create a classroom environment that was conducive to learning as required under his job description.

In support of the Charges, the School District presented 21 pieces of evidence. These included, unsigned, handwritten notes that were identified in the Superintendent's Exhibit List as "Written Investigation Notes", a typed statement with MacLeod's name typed at the end, various correspondence related to Respondent's administrative leave, the examining Psychiatrist's two examination reports, School policies covering "inappropriate Staff Conduct" and the "Code of Ethics", and the video of the hallway meeting between Respondent and MacLeod, without sound.

The exhibits did not include any signed or unsigned statements or certifications from the individual(s) who investigated the incident or from any witness, including the Paraprofessional, Nurse, or Principal, all of whom are referenced in the Charges as having been involved in a portion of Respondent's alleged unbecoming behavior. The typed MacLeod notes includes only one of the specific statements the Charges allege Respondent made to her in the hallway, and it is not signed or certified. The handwritten Investigation Notes are difficult to read, do not identify who wrote them and do not identify who was reporting what the note taker was writing. Finally, the Charges and exhibits do not identify how Superintendent Alexis determined the facts set forth in the Charges.

The Respondent's Initial Position

Respondent argues that the evidence filed by the Board in support of its claim that he engaged in conduct unbecoming in fact supports his position that he did not engage in conduct unbecoming. He maintains that the evidence shows that his actions were the result of his diagnosed

disability as defined under the New Jersey Law Against Discrimination. He concludes that the Board failed to make any showing that his conduct harmed the school's morale, efficiency or public perception.

Respondent asserts that the Board's Psychiatrist, in two separate examinations, found that Respondent's recovery was satisfactory, and that he was fit to return to work. Based on the Psychiatrist's findings, Respondent concludes that the Board was required to return him to work. Instead, the Board improperly substituted its unfounded fears and prejudices for the evidence-based conclusions of its chosen Psychiatrist and failed to meet its obligation to return him to his position.

Respondent maintains that the Charges are also procedurally defective, as they contain no competent, credible documentary evidence to support the allegation that Respondent engaged in conduct unbecoming. Respondent rejects the Investigation Notes, arguing they are hearsay, and points out that the Board did not identify who took the notes, any circumstance surrounding their taking, or any information regarding whether or how an investigation was conducted. Respondent also maintains that there are inconsistencies between the notes and MacLeod's typed statement.

Respondent also raises a procedural defect regarding Superintendent Alexis' presentation of the Charges, arguing that he had no firsthand knowledge regarding the facts set forth in the Charges. Respondent notes that Superintendent Alexis was the Principal at a neighboring district's High School at the time of the incident and did not fill his Superintendent roll until October 2019. As a result, he had no basis to certify that any of the facts in the charges were true.

Respondent cites and quotes two cases in support of his position that the procedural deficiencies support dismissal of the Charges:

> *Matter of Bd. of Educ. of Tp. of Barnegat, Ocean Cty. and Kevin Karp* , Agency Dkt. No. 102-4/16 (May 26, 2016) (Gerber, Edmund, Arb.) (dismissing tenure

> charges in relevant part because "[t]he Superintendent...swore to a statement of evidence and signed under oath the tenure charges but ***nothing in the record indicated she directly participated in the investigation*** of the student's complaints or talked to any of the students and/or their parents...***[N]o signed written statement by someone with direct knowledge of the alleged events was ever presented to the Board. The tenure charges were certified on the basis of double hearsay")***; *Matter of Tara Trongone, Bd. of Educ. of the City of Gloucester City, Camden Cty.*, Agency Dkt. No. 173-6/16 (Sept. 12, 2016) (De Treux, Walt, Arb.) (dismissing tenure charges in relevant part because "the sworn Statement of Evidence by [the] Superintendent...is inadequate as ***he had no direct knowledge [of] or participation in the investigation")***.

(Respondent's Initial Brief at 9, emphasis in Brief)

Finally, Respondent argues that the Charges omit and mischaracterize many key facts, documents, and other information. In particular, he asserts that the Charges fail to state that he denies threatening to kill, injure or harm any students, and omits the portions of the Psychiatrist's report that support his ability to safely return to work. He also argues that given his disability, even if he had made the alleged statements, they should not have been taken seriously as threats to act, but rather as venting frustration.

The Board's Position

The Board argues that the Charges are sufficient and should not be dismissed. It maintains that the Commissioner of Education resolved this issue in the June 11, 2020 transmittal of the matter to this Arbitrator. That transmittal stated in part:

> [F]ollowing receipt of respondent's motion to dismiss on June 9, 2020, **the above captioned tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction of salary**, subject to the arbitrator's decision on the motion.

(Board's Brief at 2, emphasis in Brief)

It concludes that, pursuant to N.J.A.C. 6A:3-5.5, the Commissioner's conclusion and transmittal resolves any question regarding the sufficiency of the Charges.

The Board rejects the argument that the Charges should be dismissed because the Superintendent had no direct knowledge of the facts underlying them. In support, it offers into

evidence Superintendent Alexis' June 26, 2020 Certification, which outlined the steps he took to investigate the incident after he became Superintendent. These included talking to witnesses with first-hand knowledge and reviewing the hallway video.

The Board distinguishes this case from the *Karp* and *Trongone* cases cited by Respondent. It argues that in *Karp,* the Charges provided no information regarding when the alleged conduct occurred, while the Charges and supporting documentation in this case, including the video, provide the specific information necessary to put Respondent on notice of the incidents that gave rise to the Charges. The Board distinguishes *Trongone*, arguing that, unlike the Superintendent in *Trongone*, Superintendent Alexis interviewed the witnesses and reviewed the exhibits prior to sending the Charges to the Board. It further asserts that the New Jersey Code does not require that the administrator who conducted the investigation sign the Certification or that the Superintendent signing the Certification have firsthand knowledge of the facts.

The Board also rejects Respondent's argument that because the Investigation notes are alleged to contain hearsay, the Charges must be dismissed. It argues that hearsay is admissible, and that it is up to the fact finder to determine the weight it should be given. It also maintains that Respondent's hearsay objection applies only to the Investigation Notes, and that the proper forum to contest the value of those notes is the hearing.

In support, the Board quotes *I/M/O Tenure Hearing of Michelle Gates*, Agency Dkt. No. 144-5/16 (Gerber, 2016) (*quoting N.J.A.C.* 1:1-15.5(b)):

> Hearsay evidence shall be admissible in a trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate, taking into account the nature, character and scope of the evidence, the circumstances of its creation and production and generally its reliability. While generally, in order to accord hearsay evidence its full weight, there must be a residuum of legally competent evidence to support each ultimate finding of fact, known as residuum rule.

The Board challenges Respondents numerous examples of alleged contrary facts that were not included in the Charges. It argues that Respondent's factual allegations should not be considered in deciding this Motion. Rather, they are arguments that Respondent must make at a hearing. Moreover, it points out that Respondent had the opportunity to provide his version of the facts to the Board before it made the decision, and that he exercised that right.

Finally, the Board maintains that the Charges clearly state a cause of action against Respondent for conduct unbecoming. It asserts that:

> Numerous arbitrators and the Commissioner of Education have previously held that indirectly making inflammatory remarks about students to a colleague does not insulate a teacher from discipline for "completely unprofessional" behavior. For example in *Geiger*, the Arbitrator held that:
>
> Notwithstanding [the teachers'] assertion **that there was no deliberate exposure to the students or the public at large, the reality is that students did in fact hear** [them] using the inflammatory term. As a result there was a direct impact to the school environment ... [and] the Commissioner finds that the [teachers] are unfit to discharge the duties and functions of their positions as teachers.*I/M/O Tenure Hearing of Geiger*, OAL Dkt. No. EDU 5974-12, Comm'r (Oct. 7, 2013), *affirmed in part, reversed and remanded on degree of penalty*, 2015 N.J. Super. Unpub. LEXIS 2649 (App.Div. Nov. 18, 2015).

(Board's Brief at 8, emphasis in Brief)

The Board cites numerous additional arbitration decisions in support of its position that the Charges state a cause of action. Finally, the Board argues and cites cases in support of its position that, while there is no explicit legal standard for what constitutes a "sufficiently flagrant" incident, tenure charges have been upheld for a single event.

The Respondent's Reply

Respondent rejects the Board's argument that, because of the Commissioner's language transmitting the Charges, the question of the Charges' sufficiency has already been resolved. In

support of his position, Respondent notes that the transmittal language states that sufficiency is "subject to the arbitrator's decision on the motion".

Respondent also disputes the Board's arguments that the Charges are not procedurally defective. He asserts that Superintendent Alexis' July 26, 2020 Certification, describing the steps he took to review the evidence in this case, does not cure the procedural defect, as the Board was obligated to submit all of its supporting evidence with the Charges, and the July 26 Certification was submitted after the fact. In support, Respondent cites and quotes:

> *Matter of the Tenure Arbitration Between Sch. Dist. of Camden Cty. Tech. Schs. and Brett Fetty, Agency Dkt. 173- 7 /19 at 11-12* (Sept. 3, 2019) (Zudick, Arnold H., Arb.) ("[A] board's obligation to submit all evidence it intends to rely upon when filing tenure charges is a statutory requirement... There is no provision I am aware of in the TEACHNJ statutory scheme that provides that a board can amend or supplement its original statement of evidence after filing charges in order to subsequently comply with N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.l(b)(3) after having originally failed to comply with those statutes").

(Respondent's Reply Brief at 2)

Respondent also maintains that even if the Superintendent's Certification is considered in deciding this Motion, his lack of firsthand knowledge of the facts and the investigation nonetheless renders the Charges procedurally flawed and insufficient under N.J.S.A. 18A:6-11.

Respondent asserts that while his hearsay objections are focused on the Investigation Notes, those notes are central to the Boards' case, and that the video and the other submitted evidence either fails to support those notes or refutes them. He concludes that since the Investigation Notes are critical to the Charges, their abundant hearsay renders the Charges procedurally defective.

Finally, Respondent challenges the Board's claim that it was inappropriate for him to include facts in his briefs that conflict with and were not addressed by the Charges. He maintains that the inclusion of those facts illustrates the procedural defects in the Charges, as the Board was

obligated to consider all of the facts relating to this incident, and its failure to do so was itself a procedural defect. Moreover, Respondent claims that the additional facts provided in his Initial Brief forcefully illustrate that the Board did not have probable cause to pursue the tenure charges against him.

Opinion

The Board initially argues that the Commissioner of Education resolved any issue regarding the Charges' sufficiency in the June 11, 2020 transmittal of the matter to this Arbitrator.[2] That transmittal stated in part:

> [F]ollowing receipt of respondent's motion to dismiss on June 9, 2020, the above captioned tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction of salary, subject to the arbitrator's decision on the motion.

However, as Respondent points out, the transmittal specifically states that the determination regarding the Charges' sufficiency is "subject to the arbitrator's decision on the motion." That final phrase clearly specifies that final determination on the Motion is left to this Arbitrator. The transmittal letter does not resolve the Motion to Dismiss.

Arbitrators have repeatedly recognized that the New Jersey statute and code set forth the minimum requirements that must be included in tenure charges and supporting evidence, and arbitrators have repeatedly granted motions to dismiss charges that failed to meet those requirements. See, *Karp, Trongone,* and *Fetty*, cited above. See also, *Matter of the Tenure Hearing of Nikki Vogel, Sch. Dist. of the Tp. of Deptford, Gloucester Cty.*, Agency Dkt. No. 14-1/19 (May 13, 2019) (Denenberg, Tia Schneider, Arb.); *Matter of the Tenure Charges Against Dawn*

[2] The letter was not from the Commissioner of Education, it was from Jennifer Killough-Herrera, Director, Office of Controversies and Disputes.

Karpinski by Sch. Dist. City of Pleasantville, Atl. Cty., Agency Dkt. No. 185-8/18 (Sept. 25, 2018) (Colflesh, Ralph H., Jr., Arb.)

Those requirements are:

> N.J.S.A. 18A:6-11 - Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board.
>
> N.J.S.A. 18A:6-17.1(b)(3) - Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.
>
> 6A:3-5.1(b) In all instances of the filing and certification of tenure charges, except charges filed against a teacher, principal, assistant principal, or vice principal for reasons of inefficiency pursuant to N.J.S.A. 18A:6-17.3, the following procedures and timelines shall be observed:
>
> > 1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement.

Those three provisions help ensure that due process is provided to an employee subject to tenure charges. The provisions require, at a minimum, that the tenure charges are (1) stated with specificity as to the action or behavior underlying the charges and are accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges, and (2) include all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony. The requirement placed on the necessary detail and completeness of a tenure charge submission is

emphasized by the prohibition in N.J.S.A. 18A:6-17.1(b)(3), which states "[t]he employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses."

To meet those requirements, it is incumbent on a school district to conduct a thorough investigation, provide a signed statement by the individual or individuals conducting the investigation detailing the investigation steps taken, provide signed witness statements from individuals who may be called to testify in support of the tenure charges, provide copies of all evidence in support of the charges, and provide a statement signed under oath by the person(s) instituting such charges detailing the action or behavior underlying the charges and the supporting statement of evidence.

The Board argues that the Charges against Respondent meet those procedural requirements. For the reasons set forth below, this Arbitrator concludes that the Charges do not meet those requirements.

The Charges and supporting evidence suffer from multiple shortcomings. First, the conclusion that Respondent's behavior constituted conduct unbecoming relies in part on the negative impact Respondent's behavior had on the students who witnessed it. However, the Charges fail to identify the person or persons who reported that Respondent's statements and conduct were heard and observed by students and had a negative impact on those students. The Charges do not identify:

> (1) who reported that when Respondent returned to the classroom, Respondent "appeared visibly sad" in front of the students,
>
> (2) who reported that an unidentified student[3] told the paraprofessional that Respondent said he "wanted to kill himself", and

[3] The fact that the students' identity and privacy was protected in the Charges is not fatal to the Charges. See, *Karp.*

(3) who reported that unidentified students went to the school Nurse "because they were deeply upset by what they heard and witnessed"?[4]

Because the Charges do not identify the source of those allegations, the Respondent is left to guess about who may be testifying regarding them.

Those shortcomings are exacerbated by the inadequate support provided by the evidence attached to the Charges. There are only three pieces of substantive evidence covering Respondent's conduct on March 8, 2019. The first is the unsigned Investigation Notes. The notes do not identify who wrote them, the writer's role in the investigation, or the source of the statements being recorded.[5] While the notes appear to contain one or more layers of hearsay, calling into question any evidentiary value they might arguably have, the inability to identify who took the notes or made the statements recorded in the notes are fatal flaws. Similarly, the lack of signed statements from any witnesses is also a fatal flaw. See, *Karp* and *Trongone.*

This leaves only MacLeod's typed statement and the video in support of what allegedly occurred on March 8, 2019. While the video speaks for itself regarding what physically occurred in the hallway, it has no audio. MacLeod's statement is unsigned with her name typed at the bottom. However, even if the typed notes were signed, they only corroborate a single statement that Respondent is alleged to have made to MacLeod – that he "just wanted to kill these kids". The typed notes do not address any of the other statements Respondent is alleged to have made to her.[6] Taken together those three pieces of evidence fail to provide sufficient support for the

[4] While the Charges can be read as implying that the Nurse reported that the students were visibly upset by what they heard and witnessed, that attribution is unclear. The Charges leave open the possibility that the Nurse, Principal Nunn or some other individual was the source and support for that allegation.

[5] The notes can be interpreted as being statements MacLeod and the paraprofessional gave directly to the note taker. However, it is also possible that the notes are an account by some other person to the note taker of what MacLeod and the paraprofessional told that other person.

[6] While MacLeod's notes say that "some students witnessed some or all of what was happening" in the hallway, the notes do not address any of the Charges' specific allegations regarding what students allegedly saw or heard, or how the students reacted.

allegations made in the Charges and do not meet the due process requirements set forth in N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.1(b)(3), and 6A:3-5.1(b).

Finally, the fact that Superintendent Alexis did not have firsthand knowledge of the investigation is not in itself fatal to the Charges. However, in this case, the fact that he presented the Charges nonetheless created a procedural deficiency for two reasons. First, while the Superintendent did not necessarily need firsthand knowledge of the facts and evidence to submit the Charges, he needed to state the basis for his knowledge of the facts and evidence. The Charges are silent on that point. Superintendent Alexis' June 26, 2020 Certification cannot correct that deficiency, due to the prohibition in N.J.S.A. 18A:6-17.1(b)(3) against presenting additional evidence after the submission of the Charges. See, *Fetty*.

Second, even if the June 26 Certification corrected that deficiency, Superintendent Alexis, had no direct knowledge, and therefore could not properly certify the Charges without basing his certification on the certified statements of the investigator(s) and witnesses who had direct knowledge. The Charges lack certified statement from anyone, and for that reason as well, Superintendent Alexis' presentation of the Charges is procedurally defective. See, *Karp* and *Trongone*.

For all the reasons set forth above, this Arbitrator finds that the Charges filed with the Board of Education and the Commissioner of Education are procedurally deficient and must be dismissed without prejudice. Respondent must be returned to his former position.

In deciding that Respondent must be returned to his former position, this Arbitrator is aware that Respondent's alleged statements and behaviors on March 8, 2019, if true, raise potential concerns regarding Respondent's future actions. However, the Board's selected Psychiatrist

addressed those concerns in his second examination report dated September 19, 2019, stating:

> As of this writing, Mr. Riley, to my knowledge has had a calm and stable time since the incident in question on March [8], 2019; has remained in treatment with Mr. Woods and Dr. Park, and told me that he intends to continue indefinitely; has arranged for those two providers to comply with my recommendations for written records and feedback about Mr. Riley's treatment; and has taken two internet courses (above) to address some of his prior problems with his teaching: He has complied with my recommendations, and in my view, used his time away from teaching to good advantage.
>
> Putting all of these points together, (1) I reiterate a point made in my June 18, 2019 report that Mr. Christopher Riley is not likely -- for the reasons expressed in pages 11 and 12 of that report -- to repeat the March [8], 2019 episode, or one like it, in at least the reasonably foreseeable future; (2) I note that Mr. Riley has complied with my previous recommendations and continues to engage in the protective benefits of counseling/psychotherapy and psychiatric treatment....

(Statement of Evidence #14)

In reliance on the Doctor's reports, returning Respondent to his former position is the appropriate remedy in this case.

Award

> Respondent's Motion to Dismiss Tenure Charges is granted. The tenure charges are dismissed without prejudice. As the remedy, the School District is ordered to immediately reinstate Respondent Christopher Riley to his former position with full backpay, benefits, and all emoluments associated therewith, as required by law and consistent with the operative collective bargaining agreement.

August 7, 2020

Robert H. Barron

Robert H. Barron
Arbitrator

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of the TENURE Arbitration between

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY, NEW JERSEY,
Petitioner,

and

GUSTAVO RIOS,
Respondent.

Docket No.: 218-8/19

OPINION AND AWARD

Before **MELISSA H. BIREN**, Impartial Arbitrator

OPINION

Petitioner Board of Education of the City of Newark, Essex County, New Jersey (the "District") brought tenure charges against the Respondent Gustavo Rios ("Rios") pursuant to *N.J.S.A.* 18A:6-17.3 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ") alleging inefficiency and seeking Rios' termination of employment. Respondent was served with the Notice of Tenure Charges signed by Superintendent Roger Leon on July 29, 2019. The District, by its counsel Christina M. Abreu, Esq. (Weber Gallagher Simpson Stapleton Fires & Newby LLP) then filed the tenure charges with the New Jersey Department of Education ("Department") Commissioner of Education on August 26, 2019. Respondent, by his counsel Raymond M. Baldino, Esq. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman PC), filed an Answer to the tenure charges on September 6, 2020. On September 13, 2019, the Department, Office of Controversies and Disputes, appointed me to serve as arbitrator pursuant to *N.J.S.A.* 18A:6-16 to hear and decide this tenure matter.

Hearings were held at the New Jersey State Board of Mediation office hearing rooms in Newark, New Jersey on December 10, 2019, January 16, 2020, February 12, 2020, February 20, 2020 and February 21, 2020. Both parties were represented by their attorneys at the hearing. At the start of the hearing, the parties stipulated that the issue before me in this proceeding is whether the Petitioner Board of Education of the City of Newark has proven the charges of inefficiency against the Respondent, Gustavo Rios, consistent with TEACHNJ.

Both parties had full opportunity to adduce evidence, to call and cross-examine witnesses and to make argument in support of their respective positions. Over the course of

the five hearing dates, the District presented six witnesses and Respondent presented three witnesses. In addition, 66 exhibits were admitted into evidence. Post hearing briefs were filed on May 18, 2020. Both parties requested, and were granted, permission to file limited responses to the other party's post-hearing brief; the responses were filed on May 26, 2020.[1] Neither party has raised any objection to the fairness of this proceeding. Whether or not expressly referred to herein, all of the evidence adduced, arguments set forth and authorities cited by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Background:

Respondent, Gustavo Rios, is a tenured teacher for the Newark Public Schools. He began his employment with the District in 2003. He received a standard certificate to teach mathematics in 2002 and a standard certificate as a teacher of bilingual bicultural education in 2007. (Respondent Exhibit 3.) His first assignment for the Newark Schools was as a bilingual math teacher at Barringtion High School from 2003 to 2013, at which time Rios became an Educator Without Placement Site ("EWPS").

As the name implies, an EWPS is a tenured teacher without a permanent position. As an EWPS, the District assigns the teacher to schools at the start of each school year to provide additional support or assistance, often co-teaching with two licensed teachers in the classroom. The teacher remains on the District's budget rather than the school budget. After becoming an EWPS, Rios was assigned to several different schools and grades. He taught sixth and eighth grade bilingual math classes and health at Park Elementary School for the 2013-2014 school year. In the following school year, 2014-2015, Rios was assigned to William Horton Elementary School, teaching seventh and eighth grade mathematics and science.[2] In the 2016-2017 school year Rios was assigned to George Washington Carver Elementary School as a bilingual math teacher in the first grade, working with another first grade teacher. In 2017-2018, still working as an EWPS, Rios was assigned to the Abington Avenue Elementary School ("Abington School") and in 2018-2019, Rios was assigned to the Oliver II School ("Oliver II"). These tenure charges arise from Rios' ratings of partially

[1] Requests for extensions of time were made and granted by the Department.

[2] Tenure charges were brought against Rios after the 2014-2015 school year; those charges were withdrawn.

effective and ineffective in his annual summative evaluations for the 2017-2018 school year at Abington School and the 2018-2019 school year at Oliver H, respectively.[1] Details regarding Rios' assignment at each of these schools are set forth in the discussion of each school year below.

Evaluation Framework:

The goal of TEACHNJ is to "raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions." N.J.S.A. 18A:6-118. Teachers in the District are evaluated based on the Framework for Effective Teaching (the "Framework"). Dr. Yolanda Mendez ("Mendez"), Executive Director for Human Resources for the District, testified that the Framework was approved by the Department pursuant to the requirements of TEACHNJ to be used by the District for evaluating teacher performance.

The Framework sets forth five categories of teacher performance, called Competencies. These include the following: a) Competency 1 – Lesson Design and Focus; b) Competency 2 – Rigor and Inclusiveness; c) Competency 3 – Culture of Achievement; d) Competency 4 – Student Progress towards Mastery; and e) Competency 5 – Commitment to Personal and Collective Excellence. Each competency then includes several indicators related to the evaluation of the competency.

As set forth in the Guidebook for Teachers and Administrators for both 2016-2017 and 2018-2019 (the "Guide"), the Framework allows administrators "to assess a wide variety of evidence in determining whether or not a teacher is meeting expectations and if his or her students have met the student learning goals SGOs." (District Exhibits 70 and 71 at page 15.) The Guide provides that observations are not the only mechanism to collect evidence of teacher performance as related to each of the indicators. Other evidence can include such items as "student learning data, student work, and other artifacts of the teacher's practice" to allow for "a more complete picture of the teacher's effectiveness across all five

[1] The instant tenure charges initially included the 2016-2017 school year, at the start of the hearing, the District withdrew those charges, except to the extent that the rating for that year established the basis for the CAP in 2017-2018.

Competencies." *Id.* The evidence for the teacher evaluation is informed by four basic components, including:

- **Goal-Setting Conference** to develop student learning goals SGOs and professional development goals which are captured on the Individual Professional Development Plan (IPDP) or Corrective Action Plan (CAP);
- **Classroom observations**, including pre-observations (as appropriate) and post observation conferences;
- **Mid-year conferences** to examine evidence and data to assess progress towards student learning and professional development goals; and
- **Annual conferences** to examine all evidence and assign final ratings.

(District Exhibits 70 and 71 at page 15.)

The Guide provides that observers are "encouraged to observe teachers in the classroom as often as they think is helpful for the purposes of both providing feedback for the teacher's development and collecting evidence to assign ratings at the mid-year review and annual evaluation." (District Exhibits 70 and 71 at p. 17.) Administrators make observations through informal observations of the teacher and his/her classroom, or walk-throughs conducted "over time", i.e., throughout the school year, as well as through formal observations. Tenured teachers must receive at least two formal classroom observations, i.e., observations of at least 20 minutes in length, up to the entire duration of the lesson. Tenured teachers on a CAP[3] must receive three formal observations. Observations can be announced or unannounced. An announced observation is scheduled in advance and includes a pre-observation conference with the teacher where the lesson elements can be discussed with the teacher. An unannounced observation is not scheduled in advance and does not include a pre-observation conference. Teachers are required to have at least one announced and one unannounced observation each year. A post observation conference is required for all formal observations, whether or not announced. Teachers on a CAP must be observed by at least two different observers over the course of the school year.

Depending on the length of the observation, it is considered a "short" or a "long" formal observation. During a short formal observation, the evaluator is not required to rate all of the competencies and indicators; rather, the teacher is rated on the indicators for which evidence was observed during the lesson. For a long formal observation, Competencies 1 to 4

[3] A CAP is required for all teachers who receive a partially effective or ineffective rating in their prior year's annual summative evaluation.

are generally rated.[1] The indicators are rated as either highly effective, effective, partially effective or ineffective. If an indicator is rated, the corresponding competency must also be rated. Points are assessed based on the ratings provided for each competency. Formal observation ratings are entered into EdReflect and are shared and discussed with the teacher at the post observation conference. Teachers may submit rebuttals to the observation ratings.

The mid-year evaluation, required for a teacher on a CAP, provides an opportunity to discuss the teacher's progress towards meeting student and professional goals set at the start of the year, and to modify those goals if appropriate. In completing the mid-year evaluation the administrator considers all evidence gathered for the school year prior to the evaluation, including formal observations as well as over time indicators, providing a rating on all competencies including all indicators of Competency 4 as well as Competency 5. Competency 5 is rated differently than the other four competencies. The ratings for Competency 5 are: Exceeds Expectations; Meeting Expectations; Slightly Below Expectations; and Significantly Below Expectations.

The annual summative evaluation, required for all teachers, is a "final assessment of progress towards both the teacher's professional goals and the student learning goals SGOs that were set at the start of the year." (District Exhibits 70 and 71 at p. 21.) The annual summative evaluation also rates the teacher on all competencies based on all evidence gathered throughout the year, including formal observations and over time indicators. The District received approval from the Department to include the required assessment relative to SGOs (Student Growth Outcomes) as part of Competency 4 in the annual summative evaluation. The overall rating is based on the total number of points received for all of the competencies as follows: Highly Effective (17-19 points); Effective (13-16 points); Partially Effective (8-12 points); or Ineffective (0-7 points).

Mendez testified that administrators are trained each August on the Framework. Teachers are also provided information on the Framework's rubric at the start of each year and through the Professional Learning Committees ("PLC") and the School Improvement Panel ("SIP") at each school. Both administrators and teachers are provided a copy of the Guide, which is also on the District website. Administrator training includes "norming"

[1] Certain indicators in Competency 4 and all of Competency 5, Commitment to Personal and Collective Excellence, are rated only in the mid-year evaluation and the annual summative evaluation.

sessions to be sure that all administrators in all District schools evaluate teachers in a consistent manner. As Mendez testified, the goal is to assure that throughout the District, regardless of school, grade, subject matter, individual administrator or teacher, "our lens of effective or partially effective or ineffective, the definition in the rubric is consistent, normed, and calibrated." (2.12.20 Tr. at 15.) The training regarding the Framework continues throughout the school year. Indeed, each of the administrators testifying on the District's behalf confirmed that he/she received training on the Framework each year and that he/she is familiar with the Framework used to evaluate teachers in the District.

2017-2018 School Year – The Abington Avenue School:

Rios was assigned to Abington School in September 2017. Nelson Ruiz ("Ruiz"), the principal of Abington School, testified that when Rios arrived, he assigned Rios to a seventh and eighth grade bilingual classroom. He was assigned to teach math; another teacher in the classroom, Vidian Velez ("Velez"), taught the students English Language Arts ("ELA") as well as System 44, a program designed to support students in vocabulary and reading. Rios' direct supervisor was Alex Echevarria ("Echevarria"), a Vice-Principal.

At the start of the year, there were 19 students; the roster grew to approximately 23 students during the course of the school year. Rios and Velez taught the same students and shared a classroom. Accordingly, when Rios was teaching math to the seventh graders, Velez was teaching ELA to the eighth grade students in the same room. A classroom schedule introduced into evidence for this class was the student schedule, not the teacher schedule (District Exhibit 27.) Ruiz explained that Rios was not responsible for Homeroom or the "special" classes (art, gym, Spanish, Music); when students attended these classes, Rios had a preparation period or a PLC meeting. He was also not responsible for ELA or System 44. Rios testified, however, that he was not told he could leave the classroom when ELA was taught (but not math) and that he assisted Velez in teaching the System 44 class, working with small groups. Rios and Velez shared the display space in the classroom, with half of it devoted to math and the other half to ELA.

Rios' 2017-2018 CAP

Because Rios received an overall rating of ineffective in the annual summative evaluation for the 2016-2017 school year, he was required to have a corrective action plan or

CAP for the 2017-2018 school year. Ruiz and Echevarria both explained that completion of the CAP is a collaborative process, although it is controlled by the teacher. The teacher completes the CAP, identifying his/her professional goals and goals for student achievement. The teacher selects indicators to work on during the school year and the goals for student growth outcomes or SGOs. When the teacher is ready to share the CAP with the administrator, the administrator reviews the CAP with the teacher, discusses it and, if appropriate, makes recommendations for modification. The administrator does not, however, make any modifications or additions to the CAP. When the teacher finalizes the CAP, it is sent to the administrator for final sign-off. The CAP can be modified at mid-year to adjust for any changes that may be deemed appropriate.

Rios was already on a CAP prior to arriving at Abington School. That CAP had to be modified for the new assignment. Rios made the changes to the CAP that he deemed appropriate. He selected two indicators to work on during the year, these included indicator (d) under Competency 1, Clarity, and indicator (e) under Competency 2, Responsiveness. With respect to the SGO, Rios indicated that "[b]y June 2018, 15 over 19 students will prove mastery in Standard 7NSA1C" and that "[b]y June 2018, 15 over 19 students will prove mastery in Standard 7NSA1B." (District Exhibit 9.) In setting the SGOs, Rios indicated that based on testing done early in the school year in these areas, at the start of the school year:

> 2/19 are well prepared to perform well in this level. 10/19 need to work harder than the first two in order to understand and meet the requires for this level. Finally 7/19 are not ready and need to work more harder than the others but if they came to class every day, participate, do the HWS, and ask for tutoring they will improve the percentage to pass this class significantly.

(District Exhibit 9.) Echevarria reviewed the data with Rios and approved the CAP, testifying that the SGO would be reviewed again at the mid-year evaluation to determine whether students were making progress towards the goal and if necessary, adjust the goal at that time. This was the CAP that Rios signed in the EdReflect system. The CAP was not modified at the mid-year evaluation.

Echevarria testified that Rios received professional development and support during the course of the school year. Professional development was provided at the District and the school level. There are Staff Development Days for professional development. In addition, the School Improvement Panel met with teachers. PLCs were held once a week at the school

level. Some involved more general training, such as use of rich tasks, silent signals and other best practices. Others were directly connected to content areas, including literacy, math, science and bilingual education. (District Exhibit 28.)

Several other training opportunities were offered to Rios, as well as other teachers in the school, including a webinar on rich tasks that the math coach provided to the teachers, including Rios, and that Echevarria separately provided by email to Rios. (District Exhibits 21 and 22.) The math coach in the school facilitated training and was available to meet with teachers, including Rios, during the course of the year. Echevarria did not know if Rios took advantage of all of the learning opportunities that were offered to him. Other professional development, however, was provided to Rios individually. Arrangements were made for Rios to observe another math teacher on multiple occasions and to meet with Echevarria to discuss the lesson modeling he observed. In addition, an instructional specialist from the District math department and Echevarria met with Rios to provide coaching on at least one occasion. Echevarria met with Rios to discuss the coaching session and provide guidance based on his observations. (District Exhibit 23, 24 and 25.)

Rios' Evaluations - 2017-2018 School Year:

In the 2017-2018 school year, Rios received three formal observations, all unannounced. In addition, Ruiz and Echevarria conducted informal observations, or over time indicators. Rios also received a mid-year evaluation and an annual summative evaluation reflecting all of the evidence gathered in the course of the school year.

a. Informal Observations:

Ruiz testified that while he did not perform any of the formal observations of Rios' teaching, he conducted informal rounds, once per quarter. The rounds were done in collaboration with a cohort administrator for Rios. Echevarria accompanied Ruiz during these informal observations. The informal rounds look at "classroom instruction, classroom environment, classroom organization, student work, and student data, performance data; how they're doing throughout the year." (12/10/19 Tr. at 40.) Feedback was provided to Rios verbally.

Ruiz testified that Rios generally had a small group of students, teaching one-half of the 7th 8th grade class at a time. He made the following observations during his informal rounds: (a) Rios knew the math content well; (b) Rios' instruction was not always aligned to

the yearlong pacing guide; (c) the lesson objective was not always met; (d) Rios called on students who raised their hands, but other students did not participate; (e) for students who were not participating, Rios did not check for understanding; (f) Rios did not use silent signals, notwithstanding that teachers received training on use of silent signals; and (g) Rios did not properly implement the use of rich tasks, a central core piece of a lesson intended to allow the students to think independently and to use their prior knowledge. (12-10-19 Tr. at 40-42, 107.)

In addition, Ruiz testified that in the bilingual class, students were at different levels of English proficiency, as determined by the ACCESS assessment taken annually. Students were placed in tiers, ranging from those with little or no English proficiency to those who had greater proficiency; the goal of bilingual education is to prepare students to learn in English, particularly as these students would soon be attending high school where they would be immersed in the English language. Accordingly, the expectation in teaching a bilingual class is not to teach primarily in one language, but rather, to balance the use of English and Spanish based on these groupings. Ruiz noted that there are times a bilingual teacher would teach mainly in English and less in Spanish, particularly because these students would be moving to high school. Ruiz observed that "Rios was more comfortable teaching in Spanish. He did know the content, and he taught in Spanish, and he did answer or translate when asked or if needed be, but it was not to the standard." (12-10-19 Tr. at 44.) The standard, with a group at this grade level, is generally teaching approximately "70% in English and 30% in Spanish, translations into Spanish would be made as appropriate. Rios taught 80-90% in Spanish. According to Ruiz, Rios was advised to achieve more balance, but his performance in this regard did not change." Rios testified that no one ever discussed differentiating instruction based on English proficiency and noted that it was not set forth in his CAP. Ruiz testified, however, that it was not in his CAP because it was not one of his goals.

Echevarria testified that he usually stopped into the classrooms two to three times per week for just a minute or two. During those brief interactions, he made observations as to

---

[7] Ruiz testified on cross-examination that the instructional goal of teaching 70% in English and 30% in Spanish was not one of the goals Rios set for his professional growth. Nonetheless, it could impact his evaluations because it impacted such items as clarity under Competency 1(c), and tailored (or differentiated) instruction under Competency 2(a). Ruiz could not speak to whether this issue was raised in the formal observations but reiterated that it was discussed verbally with Rios.

what was happening in the classroom, such as whether students were doing their work and were following instructions. He jotted down notes from these informal observations over time which were then part of the evidence used in completing the mid-year and annual summative evaluations.

b. Formal Observation – November 8, 2017:

Echevarria conducted an unannounced formal observation on November 8, 2017. He observed Rios teach a seventh grade bilingual math lesson for 25 minutes and rated Rios on Competency 2, indicators 2(b) (Questions and Tasks) and 2(c) (Responsiveness), as well as Competency 4, indicators 4(a) (Checks for Understanding), 4(b) (Feedback) and 4(c) Demonstration of Learning. Each of these indicators was rated effective, with an overall effective rating for the observation. He also noted that students were completing a Do Now when Echevarria entered the room and that they were all engaged in the tasks planned for them. (District Exhibit 10.) Echevarria met with Rios for a post observation conference. Rios signed the evaluation form.

c. Formal Observation – February 6, 2018:

Echevarria conducted an unannounced formal observation on February 6, 2018. Rios was teaching an eighth grade bilingual math class with 12 students. Because he observed for a full period, he was able to rate Rios on four competencies. The overall rating was partially effective. Detailed comments were provided as to each indicator rated based on the evidence observed in the lesson.

Echevarria testified that he rated Rios effective for Competency 1(d), Clarity, which was one of his CAP goals. This rating, therefore, was directly aligned to his CAP. His instructions were clear, given largely in English with Spanish translation. Rios did not perform as well in the other indicators for Competency 1, spending too much time on one component of the lesson, and not allowing students opportunities to elaborate or explain their thinking. He received a partially effective rating for 1(a) (Lesson Sequence), 1(b) (Lesson Components) and 1(c) (Pacing and Momentum). He testified that he did not see students given an opportunity to really struggle and to explain their thinking. Unlike the first time he was formally observed, students were not engaged in a Do Now. Nor did Rios use a rich task. The lesson did not allow all students to move closer to mastery.

For Competency 2, Echevarria rated Rios effective for indicator 2(b), Questions and Tasks. He received a partially effective rating on indicators 2(a) (Tailored Instruction), 2(c) (Responsiveness) and 2(d) (Precision & Evidence). Responsiveness was the second area connected to Rios' CAP. Echevarria noted that Rios should cold call students that were not raising their hands to respond to non-participating students and hold them accountable for the learning. Echevarria also noted that Rios did not group students in a strategic manner; even though he was teaching math, he should group students based on English language proficiency as a way to better respond to them. He also noted that Rios should post the objective in Spanish and English so that students could master math content easier. This would also allow students who are more proficient in English to move on and continuing progressing through the tasks without having to stop instruction for one group to start instruction for another. As to tailored instruction, he noted that some students did not participate when the teacher asked for student responses and that Rios goes from Spanish to English when addressing the whole class when he could group students according to language proficiency.

For Competency 3, Rios was rated as effective for indicators 3(a) (Enthusiasm for Learning), 3(c) (Community) and 3(d) (Attention). Echevarria testified that the students were happy to be there and felt satisfied at completing tasks. He received a partially effective rating for indicator 3(b) (Persistence) because students did not all show persistence in confronting the tasks and did not all meet the objective. Rios did not allow the students to struggle through the tasks to hold them accountable to work through difficult skills and concepts and to be able to accurately assess where they were and how to move them forward.

For Competency 4, no strengths were noted. He received a partially effective rating for indicator 4(a) (Checks for Understanding) and 4(b) (Feedback). Echevarria noted that Rios only sometimes checked for understanding. His checks for understanding were incomplete, asking if there were questions and when none were raised, he moved on even though there were students observed who did not understand. In providing assistance, he restated what he said previously, a little slower and louder, but did not provide the student the opportunity to restate the explanation. As to feedback, Echevarria indicated that feedback is "academically focused and appropriate" but was not tailored to the needs of individual students and was teacher directed. Echevarria testified that it is the expectation that teachers

will check for understanding for the majority of students in the class and that use of exit tickets or a simple clipboard as the teacher walks around are methods to assess and check for understanding. (District Exhibit 11.)

Rios received an overall rating of partially effective for this observation. A post observation conference was held where Echevarria reviewed his findings with Rios. Rios refused to sign the observation; another vice-principal was called in to provide a witness signature.

d. Mid-Year Evaluation:

Echevarria prepared Rios' mid-year evaluation and met with Rios on February 15, 2018 to discuss the evaluation. The mid-year evaluation incorporated the two formal observations as well as informal observations over time. Using this evidence, he created an average rating for each indicator in the framework, including those rated only in the mid-year and annual summative evaluations. Based on the evidence over the first five months of school, Rios received a partially effective rating for a total of 10 points. The evaluation contained detailed observations as to the strengths and areas of growth in the five competencies. (District Exhibit 12.)

Echevarria testified that Competency 1(d) (Clarity) was noted as a strength, which was directly tied to Rios' CAP. He wanted to see growth through the remainder of the year on lesson sequence, lesson components and pacing and momentum. In Competency 2, his strength was in Questions and Tasks; growth was needed on Tailoring Instruction, Responsiveness and Depth of Knowledge. For Competency 3, Echevarria noted that Rios' strengths were in Enthusiasm for Learning, Community and Attention; Persistence remained a growth area. In Competency 4, no strengths were noted; growth areas included Checks for Understanding and Feedback.

The mid-year evaluation also addressed student progress on the SGO set forth in the CAP in Competency 4(f). According to Echevarria, there were now 21 students in the class. Rios provided the information to update student progress. As set forth in the evaluation, that data indicated that at this point in the year: "7 21 are well prepared to perform well in this level. 8 21 need to work harder than the first two in order to understand and meet the requires for this level. Finally, 6 21 are not ready and need to work more harder than the others but if they came to class every day, participate, do the HW and ask for tutoring they will improve

the percentage to pass this class significantly." (District Exhibit 12.) The evaluation concluded that per these three results, the teacher and the class were making progress and on track to meeting the year end goal set in the CAP in September.

For Competency 5, which is also rated only in the mid-year and annual summative evaluation, Echevarria noted as follows:

> Commitment to continuous improvement: The teacher is struggling to implement the recommendations that were made in his CAP at the end of last year. This year he has struggled implementing some of the recommendations that have been provided by me at our post observation conferences. The teacher should be aware of different resources he can utilize for his professional growth as well as incorporate feedback given and use resources available to him here at the school. (Partially Effective.)

(District Exhibit 12.) Echevarria testified that he wanted to see Rios get better and that he told Rios to continue to work on improving the areas where he was rated partially effective.

Echevarria met with Rios regarding the mid-year evaluation on February 15, 2018. They reviewed the evaluation and again discussed Rios' CAP; no changes were made to his CAP as a result of the mid-year evaluation. Rios expressed concern about the ratings but did not express disagreement. He did not sign the evaluation.

e. Formal Observation – March 23, 2018:

On March 23, 2018, Rios was observed by another administrator at Abington School, Sandra Heintz ("Heintz"), a Vice-Principal. She undertook this observation as a second observer; she was not Rios' supervisor. She did not review his records in advance nor did Echevarria share his prior findings with Heintz because he did not want to influence her views in any way. She assumed, however, that Rios was on a CAP due to the need for a second observer. The observation was a formal one, but again unannounced. Heintz observed the eighth grade bilingual math class for 30 minutes and provided ratings in Competencies 1 and 3. Rios was rated partially effective in this observation. (District Exhibit 13.)

Heintz testified, and the observation report reflected, that Rios used both English and Spanish in this lesson; while most of the lesson was in English, he translated into Spanish throughout the lesson. Heintz, who in not fluent in Spanish, testified that having grown up in south Texas in a Spanish speaking area, she understands "enough Spanish to usually get the gist of what's being said." (1/16/20 Tr. at 80.) Indeed, in listing Rios' strengths for Competency 1(d), Clarity, she wrote, in part, that "[t]he teacher explained everything well to

student in both English and Spanish ensuring that all the students had access to the information and that they understood it clearly." (District Exhibit 13.) His rating for Clarity, as well as for Lesson Sequence was effective.

Nonetheless, other indicators for Competency 1, along with the rating for Competency 3 were rated partially effective. According to Heintz, Rios' biggest issue was student engagement. He did not use student engagement strategies for academic discourse. He did not use silent signals, something that the entire school had been trained to use. Most of the lesson involved Rios speaking. There was one student who was actively involved, and Rios spoke mostly with that student; other students were not engaged, were not paying attention and appeared disinterested or bored. The climate in the classroom, the way the lesson was actually designed and facilitated, prohibited the children from accessing the learning objective. Classroom norms were inconsistently enforced and students were not redirected to pay attention. In addition, opportunities were not provided for students to turn and talk or otherwise grapple with the math problems on their own.

A post observation conference was held where Heintz reviewed her findings and asked if Rios had any questions. He responded that he did not have questions. He did not sign the observation; Echevarria signed as a witness. At no time did Rios tell Heintz that he did not use Spanish because she was observing and that this caused his students not to understand and be engaged. Heintz also testified that she did not tell Rios to change his teaching approach – to use only English – when she arrived in the classroom to observe.

Rios submitted a rebuttal to the evaluation on May 1, 2018. (Respondent Exhibit 16.) In the rebuttal, Rios expressed disagreement with the conclusions Heintz reached and the ratings he received. In particular, he did not understand why his rating for Community was partially effective, when it was rated effective in a prior observation. He also disagreed that he provided only minimal explanation of the lesson objectives and that he did not include rich tasks. While claiming he received no training on rich tasks, he stated that he routinely included rich tasks from the District's website. Rios' rebuttal did not state that he did not use Spanish in the lesson.

f. Annual Summative Evaluation:

Echevarria provided Rios' annual summative evaluation on April 6, 2018, meeting with him on April 20, 2018. Echevarria explained that it is District policy for the evaluation to be completed in April rather than in June for tenured teachers on a CAP in order to be able to make early determinations for the following year. Echevarria testified that the rating is based on all of the evaluations, including formal and informal observations and the teacher's progress over the course of the year. In completing the evaluation, Echevarria testified that he considers the trajectory of the teacher's ratings over the year and whether there was an upward or downward slope.

Echevarria testified that in Rios' case, it was not an upward trajectory. Indeed, even in areas where he was rated effective at the start of the year, the rating went down as the year progressed. For example, his rating for Community was effective at the start of the school year, but was only partially effective at the end because the community started to break down; by the mid-year evaluation, Rios was becoming concerned about his ratings because he was on a CAP and there was a shift in attitude impacting community in the classroom.

The annual summative evaluation rated all competencies. Rios was rated effective for Clarity, Coherent Planning and Progression of Instruction under Competency 1, but only partially effective for Lesson Sequence, Lesson Components and Pacing and Momentum. No strengths (or effective ratings) were given for Competency 2; Rios received a partially effective rating for all indicators under Competency 2. He received an effective rating for Enthusiasm for Learning under Competency 3, but all other indicators were rated partially effective. All indicators for Competency 4 were rated partially effective. The evaluation included a rating for all indicators in that competency, including 4(f) which addresses the SGOs that Rios set for the year; he received a partially effective. While students were making progress, only 8 of the original 19 student in the class had mastered the concepts.[1] For Competency 5, Rios was rated effective for Collaboration and Attendance and Promptness, but only partially effective for Commitment to Continuous Improvement and Communication of Student Progress. Details were provided to support the ratings.

[1] Greater detail regarding the calculation of mastery under the SGO will be addressed in the Discussion section below.

Rios' overall rating was partially effective, with a total of eight points. Rios disagreed with the rating and did not sign the evaluation.

Rios' Testimony – Abington School:

Rios testified that as an EWPS, he was not treated well at Abington School (or at the other schools where he worked as an EWPS). He had many complaints about his assignment and treatment. At Abington School (as well as at Washington Carver and Oliver II), Rios claimed that he was not provided a desk or a chair and, therefore, that he was unable to sit the entire day or have a place to put his personal belongings. On cross-examination, however, he admitted that he was never told that he could not sit during the day nor was he prohibited from putting his personal belongings in the closet. He also did not request a locker in the teachers' room. Rios further testified that in his position as a teacher, he did not believe it appropriate to sit. Rios testified that he was not provided a computer. He acknowledged, however, that he was permitted to use the computer in the room for things other than using PowerTeacher. With respect to PowerTeacher, a District computer system for tracking attendance and grading, Rios testified that he was not given his own access code; he had to use Velez's code to input grades. According to Rios, Velez would allow him to enter grades while she was with him in the classroom. Echevarria explained, and Rios confirmed in his testimony, that access to PowerTeacher is only provided to the homeroom teacher. Because Velez, not Rios, was the homeroom teacher, she was the teacher with the access code for that class.[7]

Rios testified that he taught three math classes each day and stayed in the classroom when Velez taught a combined 7/8/11A class; he was not told it was a prep period. He also assisted with small groups in the System 44 class, a computer program designed to improve English language skills. During System 44, the students were working individually at stations; he and Velez would monitor and assist students as needed. Rios testified, however, that he was not provided with the System 44 materials to review in order to prepare. He acknowledged, however, that he never asked to be able to take the materials home. According to Rios, assisting in System 44 was stressful because he did not feel prepared and was embarrassed if a student asked a question he could not answer.

[7] As will be discussed, Rios was provided with the access code for PowerTeacher when he taught middle school grades at Oliver II because he was the homeroom teacher for that semester.

Rios also testified that he was required to cover other classes repeatedly in several circumstances. First, Rios testified that he, rather than Velez, would escort the class to specials, including art, gym, music and Spanish, and that frequently, the specials teacher would be absent when he arrived and he had to take the class back and remain with the class the entire time; he was not qualified to teach any of these classes. As a result, he missed numerous prep periods. Rios confirmed that this also happened to the other teachers at the school and he admitted that at no time was he told that he was required to teach the class that the students were missing. He did not file any grievance regarding the missed preparation periods.

Second, Rios testified that he was repeatedly asked to cover classes for teachers who were absent, either for a whole day or a partial day. According to Rios, he covered other classes three to four days per week, missing teaching math on 20 to 25 occasions as a result. In fact, he testified that there were times that he was called out to cover a class while in the middle of teaching a lesson and while Velez was teaching the other group ELA. He kept track of the coverages for the period of October 4, 2017 through February 13, 2018. During that over four-month period, Rios' records show that he was called to cover a class on 18 occasions. Only three were full days; most of the remainder were for one period, with a few for two periods. Rios testified that he stopped keeping track because after complaining to Echevarria and telling him that his students were worried that he was not there to teach them math, Echevarria told him that he appreciated Rios' willingness to cover and that Rios was doing good for the school. He testified, however, that once he stopped keeping track in February, he covered even more classes. Both Ruiz and Echevarria acknowledged that on occasion, Rios was asked to cover for absent teachers when they needed coverage; a licensed teacher had to be with students at all times and there were two teachers in his classroom. Both denied that this occurred regularly or often.

Third, Rios claimed that he missed many classes because he was required to assist with testing. He was required to proctor PARCC tests and ACCESS tests over a month or so. Echevarria testified that Rios was required to assist with testing; all teachers are required to do so. It would not have been for a full month. Heintz, who is responsible for coordinating testing at Abington School, testified that many teachers are selected to proctor the PARCC exams which went on for three weeks. She stated that it is the reality of testing in New

Jersey. The school must use all licensed teachers who can be made available, including the ESL teacher, the teachers of special classes (art, music, etc.) and teachers like Rios who was the second licensed teacher in the classroom. During the two weeks that his class was not testing, Velez would have been responsible for covering his math, notwithstanding that he was the primary math teacher for the class. With respect to the Access tests, they were done mostly by ESL teachers, not by Rios.

Rios also testified that he was not provided with bilingual materials to use in the classroom. Indeed, other than at Barrington High School, the District did not provide bilingual materials for his use. Such materials were only available at the high school level. Accordingly, he testified that he spent hours and hours and weekends translating materials to prepare for class.[7] He testified that he had to translate all materials into Spanish and print the materials for his students and that the time involved was extensive.

As to the CAP, as will be discussed more fully in the Discussion section, Rios claimed that "mastery" as set forth in the CAP meant achieving a passing grade of 65 or higher. He acknowledged that he met with Echevarria to discuss the CAP, including growth areas and the SGOs. Rios testified that the CAP did not mention rich tasks nor did the CAP mention differentiated instruction based on English proficiency.

With respect to his formal observations, Rios testified that rich tasks were not mentioned to him until after the February 6, 2018 observation by Echevarria. He implemented the two recommendations that were made in that evaluation. As to the March 23, 2018 observation by Heintz, Rios claimed that because he knew Heintz did not understand Spanish, he spoke to his students only in English. Because no Spanish was used in the lesson, the students did not understand and for that reason, they were not engaged. As to his annual summative evaluation, he disputed that the SGOs were not met based on using a grade of 65 percent or higher as the measure for mastery. He also testified that Echevarria was not as friendly to him after he refused to grade Spanish papers, believing that this could be the reason for Echevarria's lower ratings in the annual summative evaluation.

Towards the end of the school year, Rios wrote a letter to Ruiz in response to Ruiz's request that he advise as to what he would like to do in the following school year. He

[7] Rios did not provide any examples of the types of translations he provided to his students as a result of these efforts.

indicated that he should be given the same training and support given to other math teachers in the building and would want to work with a math coach; he stated that he did not work with a math coach during the 2017-2018 school year. He also claimed he did not receive any training on rich tasks and would need such training to know how to do it in the same way that the other teachers were trained. He asked for guidance in other areas as well, including teaching in a multi-grade classroom and differentiating instruction based on English proficiency claiming that he received no guidance on these issues. He also took issue with the lower rating for community in the annual summative evaluation, noting that he needed to understand why the sudden shift in the rating from effective at the start of the year to partially effective. (Respondent Exhibit 9.)

2018-2019 School Year – Oliver II School:

Rios was assigned to the Oliver II for the 2018-2019 school year. He did not receive this assignment until a few days after the school year started for teaching staff. Oliver II is an elementary school that opened in September 2018 with grades pre-kindergarten, 1, 6, 7 and 8; the students in the middle school grades were newcomers. Oliver II was part of Oliver I Elementary School, although it was located in a separate building; the two buildings were about four doors away from each other. The principal of Oliver I and Oliver II was Dr. Douglas Petty ("Petty"). His office was at Oliver I but he was at Oliver II at least once per day. Day-to-day supervision at Oliver II was the responsibility of Viviana Rodriguez ("Rodriguez") who was the Vice Principal.[1] Rodriguez was Rios' direct supervisor.

When Rios arrived at the school, he advised that his focus was teaching math. He was assigned to teach math and science to the sixth, seventh and eighth grade bilingual class. While the initial plan for the middle school students was to split the students by grade, Petty decided to split the class by content area in order to allow Rios to work where his strengths were; therefore, he was assigned math and science, rather than ELA and social studies. Another teacher was assigned to teach ELA and social studies, although for a short time at the start of the year, they did not have a teacher for the ELA social studies content. Rodriguez testified that for that short time, Rios had the students all day, but was not required to teach

[1] At the time of the hearing, Rodriguez was the Vice Principal of the Peshine Avenue School. Petty is no longer with the District

ELA or social studies; he could teach in the content areas assigned. After two weeks, another teacher was assigned to teach the students ELA and social studies. At that point, Rios taught two periods of math, two of science and one small group math instruction.[1]

At the start of the winter holiday break in December, the decision was made to dismantle the newcomers' program and to transfer all of the middle school students from Oliver II to other schools throughout the District, leaving only pre-kindergarten and first grade at Oliver II. While Rios testified that he was advised he would likely be transferred when this change occurred, he was not transferred. Rather, at the start of January, he was assigned as a co-teacher in Maria Kadus' ("Kadus") first grade classroom. Petty checked with Human Resources at the District to confirm that Rios could teach in first grade and was advised that Rios held a standard license in math and bilingual bicultural education and that "he is able to teach grades P-12." (District Exhibit 65.)

Although this first grade class was not formally designated a bilingual class, many of the students spoke Portuguese or Spanish. Kadus, who spoke both languages, was able to translate into Portuguese as necessary and Rios was able to translate into Spanish as needed. Rios indicated that it was not clear to either Kadus or to him what his assignment was in the classroom, but upon learning that Rios' strength was math, the two decided that Rios would teach the students math, with Kadus assisting. When Kadus taught the other subjects, Rios assisted. Kadus, as the homeroom teacher, continued to do all the planning for all of the subjects. Kadus testified that Rios could modify the math lesson plans or deliver the lessons differently if he felt it appropriate; he had access to the materials, chapter tests and artifacts.

Rodriguez testified that in addition to her meetings with Rios throughout the year (see Informal Observations below), Rios received professional development and coaching from various sources, including a teacher coach, grade level colleagues, PLCs, SIP meetings and from the administration. Isel Stavrou ("Stavrou") was the coach at Oliver II for ELA and math; there was also a math coach at Oliver I who met with Rios when he was teaching math to the middle school students in the fall. Stavrou provided coaching and guidance to Rios regarding assessment tests for the middle school students. (District Exhibit 30.) She visited Rios' class and provided recommendations for teaching math and for the classroom

[1] Cheryl Avraamides, Vice Principal of Oliver II, testified that teachers in the District are assigned to teach math and science or ELA and social studies, that is how the content areas are paired off. None of these teachers has a special science certification. If they do, it is a different type of class that is strictly science. (2/12/20 Tr. at 170.)

environment. (District Exhibits 31, 32, 33, 35, 37, 44, 45, 54.) Rodriguez also took steps to assure that Rios received support from the Oliver I math coach, Sheila Bruce ("Bruce"), including assuring that Rios had access to various relevant on-line resources. (See, e.g., District Exhibits 34 and 41.) Rodriguez provided resources to Rios for the science curriculum. (District Exhibit 33.) Rodriguez also provided information on a math online resource in Spanish. (District Exhibit 41.) Arrangements were made to provide Rios opportunities to visit another math class (at Oliver I) that was similar to the class he was teaching. (District Exhibit 46.) Guidance was provided regarding bulletin boards, including Rodriguez reviewing other teachers' bulletin boards with Rios and having another teacher speak to him about bulletin boards. (District Exhibit 42.) Rodriguez also communicated with the SIP to obtain additional support for Rios. (District Exhibit 60.) Rodriguez testified that Rios received training on the PowerTeacher system to support him in this area and the opportunity to attend all of the PLC meetings. (District Exhibit 59.) Kadus testified that she also provided coaching to Rios as to how to better deliver instruction to the first grade students. She would intercect to assist and she modeled lessons over and over again. According to Kadus, Rios understood that she was modeling lessons when in the class.

Rios' CAP:

Rodriguez testified that Rios had a CAP when he arrived at the school. The CAP continued because he was still not rated effective in the prior school year. As Echevarria had indicated, Rodriguez testified that the teacher is responsible for creating the CAP in the first instance; the teacher selects the indicators that he wants to work on during the school year based on the Framework, as well as his goals for student achievement. After creating the CAP, the teacher shares it with the administrator. Rios prepared and signed the CAP when he initially shared it with Rodriguez. One indicator was missing so Rodriguez directed Rios to add an indicator. The CAP was then finalized in October, after all of the revisions they discussed were included. The final CAP included Competency 1c(d) (Clarity), Competency 2c(c) (Responsiveness), Competency 3c(d) (Attention), Competency 4c(d)(Using Data) and Competency 5c(d) (Attendance and Promptness). Student goals were set for grade 6 students in two math content areas and grade 7 in one math content area. The student goals were as follows:

6th grade:

2-6 are well prepared to perform well in this level. 2-6 need to work harder than the first two in order to understand and meet the requires for this level. Finally 2-6 are not ready and need to work more harder than the others but if they came to class every day, participate, do the HWS and ask for tutoring they will improve the percentage to pass this class significantly.

By June 2019, at least 75% of students will score 75% or higher or growth at least a percentage point (sic).

7th grade:

3-4 are well prepared to perform well in this level. 1-4 need to work harder than the first two in order to understand and meet the requires for this level.

By June 2019, all students will have at least 75% as a grade or growth at least a percentage point (sic).

(District Exhibit 15.)

Rodriguez testified that because Rios' teaching assignment was changed at the beginning of January, the CAP was modified at the mid-year evaluation to adjust for the change in assignment. The indicators that Rios selected for professional growth remained the same. As Rodriguez testified, regardless of the grade or class a teacher is assigned to teach, the teacher is still being rated under the same indicators. The student goals, however, were changed. Rodriguez gave Rios time to confer with Kadus regarding the student goals. The revised goal provided for three content math areas was: "By June 2019, at least 65 percent of the students will score 65 percent or grow 20 points." (District Exhibit 18.)

Rios' Evaluations – 2018-2019 School Year:

In the 2018-2019 school year, Rios received three formal observations. Two were announced and one was unannounced. In addition, Rodriguez conducted informal observations, or over time indicators. Rios also received a mid-year evaluation and an annual summative evaluation reflecting all of the evidence gathered in the course of the school year.

a. Informal Observations:

Rodriguez testified that the mid-year and annual summative evaluations were based on Rios' entire performance based on her walk throughs on a day-to-day basis, formal observations and attendance. Rodriguez stated that she met with Rios throughout the school

year to discuss what she found during her informal observations and to make recommendations. Some of the guidance provided was set forth in emails she wrote directly to Rios and, in some cases, to all of the teachers at Oliver II.

The record includes evidence that Rodriguez discussed the Diagnostic District Math testing with Rios, confirming her directives and noting that "I met with you on October 9, 2018 and asked you to continue to take your classes to the computer lab to see if they can log on. You must be proactive on this matter." (District Exhibit 30.) Additional support was provided to Rios in connection with this matter. *Id.* She provided guidance on use of the AMOR Tracker during his lessons and the MIF Data Tracker to track student growth; this information was provided both verbally and by email. (District Exhibit 40.) Based on her walk-throughs, she made recommendations for updating his bulletin board, after looking at other teachers' bulletin boards with him. (District Exhibit 42.) Rodriguez testified that even after providing recommendations regarding updating his bulletin boards, verbally and in writing, and after getting others to make recommendations, Rios still did not update his bulletin boards.

On several occasions, Rodriguez had to write to Rios to request that he comply with prior requests made to all teachers or to him individually. For example, an email was sent to Rios regarding inputting student council rep information in the Google sheet provided (District Exhibit 36), providing grades in writing for the middle school students (District Exhibit 51), submitting his mid-year reflection form (District Exhibit 53) and annual reflection (District Exhibit 57). In addition, Rodriguez sent email reminders to Rios noting that he had provided lesson plans for math but not science, and asking that he provide his lesson plans for science (for his middle school class) (District Exhibit 43) and to provide a winter break math packet for the middle school students (District Exhibit 48).[4]

b. Formal Evaluation – October 10, 2018

Rodriguez conducted an announced formal observation of Rios teaching math to his sixth grade class on October 10, 2018. A pre-observation conference was held on October 5, 2018. Rodriguez observed the class of six students for 57 minutes. The observation was

[4] Rodriguez also sent Rios a request for disciplinary action for his neglect to properly monitor and supervise students on Friday, December 21, 2018. (District Exhibit 49.) This disciplinary action, however, is not part of the present charges.

rated partially effective. Evidence based observations and recommendations were made for each of the indicators. (District Exhibit 16.)

No strengths were noted for Competency 1. Competencies 1(a) (Lesson Sequence) and 1(d) (Clarity) were rated ineffective and Competencies 1(b) (Lesson Components) and 1(c) (Pacing and Momentum) were rated partially effective. For Clarity, which was also one of his CAP goals, Rodriguez testified, and the observation evaluation reflected, that the content and instructions were unclear; "students were unable to complete the task on their own or with a partner during guided practice and independent practice." (District Exhibit 16.) Rodriguez recommended use of anchor charts.

For Competency 2, Rodriguez testified she was looking to see how Rios worked with students independently, tailored his instruction and used small group instruction after he presented the lesson. She did not see him do this; all students remained together and although one or two students needed extra help, he did not pull them aside to provide that assistance. While it was already a small group, smaller groups would have been beneficial. Competencies 2(a) (Tailored Instruction) was rated ineffective; Competencies 2 (b) (Questions and Tasks), and 2(d) (Precision & Evidence) were rated partially effective.

Rios was rated effective in Competencies 3(a) (Enthusiasm for Learning) and 3(c) (Community); he had good students and they worked well together. Competencies 3(b) (Persistence) and 3(d) (Attention) were rated as partially effective. Rodriguez testified, and the evaluation reflected, that students could not do the problems on their own, always seeking Rios' approval and assistance. Some students were not paying attention when he was teaching.

Rios did not receive any effective ratings for the indicators in Competency 4. He received an ineffective rating for Competency 4(a) (Checks for Understanding) and 4(c) (Demonstration of Learning), and a partially effective rating for Competency 4(b) (Feedback). Rodriguez testified she was looking for, but did not see, the monitoring sheet that they had discussed at the pre-observation conference; as she explained to Rios, this was part of "getting a full understanding of where your kids are so you can adjust your lesson the next day or know how to pull your small group in and know what to work with the kids and tailor that instruction for them based on that data that you collect when you're tracking." (T. 16-19 Tr. at

118.) She also did not see him provide feedback to allow them to reflect on what they were doing and correct mistakes. There was also no independent work going on.

The evaluation also noted that in connection with the indicators he provided for growth in his CAP, he was rated ineffective on Clarity and partially effective on Responsiveness. There was no evidence during the observation of Using Data. Action steps were recommended.

A post observation conference was held on October 17, 2018. Rios did not sign the observation; a witness signature was obtained.

c. Formal Observation – January 16, 2019:

Cheryl Avraamides ("Avraamides"), Vice Principal, conducted a formal announced observation on January 16, 2019. She observed Rios teaching math to his first grade students. A pre-observation conference was held. Avraamides testified that during the pre-observation conference, they discussed the lesson that Rios planned to teach. Although after the observation rating was received Rios raised concerns about being observed so soon after he was assigned to the first grade class, Avraamides testified that Rios did not raise any such concern during the pre-observation conference; rather, he discussed the lesson he planned to teach that day and filled in the form. Indeed, Avraamides stated that while it was not necessary for this observation to be announced, as he already had an announced observation, she chose to make it an announced observation so that Rios could be better prepared, taking into account that this was a recent assignment.

Avraamides observed Rios' math lesson for 30 minutes. She testified that while the lesson was primarily taught in English, Rios translated into Spanish and the other teacher in the room translated to Portuguese to the extent that translations were needed for the students. According to Avraamides, the lesson appeared to be understood in the language Rios was using. She also testified that in providing the evaluation, she took into account that he had been in that class for a short time, as noted above, that was the reason she made it an announced observation. Rios received an overall rating of partially effective. (District Exhibit 17.)

Rios was rated partially effective for Competency 1(d) (Clarity), noting that "content and instruction was somewhat unclear as evidenced by students working independently; introduction was rushed." (District Exhibit 17.) Competency 2(b) (Questions and Tasks) and

2(e) (Responsiveness) were rated partially effective. Competency 3(a) (Enthusiasm for Learning) and 3(e) (Community) were rated effective. Competency 4(a) (Checks for Understanding) was rated partially effective. Details were provided in connection with each of these ratings. The evaluation also referenced the growth indicators from Rios' CAP noting that none were rated effective in this observation.

d. Mid-Year Evaluation:

Rodriguez testified that for the mid-year evaluation, she looked at the formal observations, her walk-throughs on a day-to-day basis and attendance. She noted that Rios was the only teacher who needed a second reminder to provide his reflection for the mid-year evaluation. (District Exhibit 53.) The mid-year evaluation took his changed assignment into account, including providing for a modification of the student goals in his CAP. Rodriguez noted, however, that notwithstanding that his assignment changed from sixth, seventh and eighth grade to first, it is still teaching; the ratings in the system align to whatever grade a teacher is assigned to teach. For example, clarity is clarity, regardless of the grade level. As to the different curriculum, she testified that both grades used Math in Focus, although geared to the different levels.

The mid-year evaluation conference was held on January 29, 2019. The overall rating was ineffective (or 7 total points). Rios was rated partially effective for Competency 1. Rodriguez noted that Rios did not meet expectations set forth in the Framework for Lesson Design and Focus. While he had implemented the math curriculum, he lacked in the implementation of the science curriculum notwithstanding that he was provided support for teaching the science curriculum. He generally did not use District materials and resources in teaching science. He received a partially effective for Competency 2 as he did not meet expectations in the Framework for Rigor and Inclusiveness and did not provide students with tailored instruction to move all students towards mastery.

Rios received a partially effective for Competency 3 as well as he did not meet the Framework expectations for Culture of Achievement. While students seemed to be engaged in learning and paying attention, students had difficulty completing tasks on their own. Competency 4 was rated ineffective. Notwithstanding receiving support on use of Active Monitoring of Record or AMOR sheets, he did not use them in the manner in which he was trained. Similarly, although the math coach provided support on implementing math centers,

neither use of centers nor small group instruction were evident in the middle school classes. He also did not complete the MH tracker.

Competency 5, which is rated only in the mid-year and annual evaluations, was rated slightly below expectations. Rodriguez testified that he exceeded expectations for attendance and promptness (Competency 5(d)), but lost points for leaving parent teacher conferences before 7:00 PM (the scheduled end time) and, therefore, missed meeting with four families. There was also no evidence of parent communication notwithstanding that teachers were encouraged to use ClassDojo for parent teacher communication. The evaluation also noted that Rios did not meet expectations in the Framework for Commitment to Personal and Collective Excellence. It was noted, however, that he did attend two Science HETI meetings.

As to the SGOs at mid-year, Rodriguez reviewed the progress made by his sixth and seventh grade students. She testified that she did not expect his students to have met the goals that were set for June, while the goals for June had not yet been met by the time the students were transferred. Rios was on track to meet the goals by June. As noted above, new student goals were set for his new teaching assignment in the first grade.

e. Formal Observation – April 3, 2019:

Petty conducted a formal observation of Rios teaching a math lesson in his first grade class on April 3, 2019. The observation was unannounced. Because Petty is no longer with the District[1] and was unavailable to testify, the evaluation was entered into evidence, but no testimony was provided by the District as to the details. As noted in the evaluation, Petty observed the math lesson for 25 minutes. Students were sitting in three groups of approximately five students each; one was working independently and Rios worked with one group while Kadus worked with another. The overall rating for the observation was ineffective. (District Exhibit 39.)

Rios was rated ineffective for Competency 1(a) (Lesson Sequence), 1(b) (Lesson Components) and 1(d) (Clarity), Competency 2(b) (Questions & Tasks), 2(c) (Responsiveness) and 2(d) (Precision and Evidence), Competency 3(b) (Persistence), 3(c) (Community), Competency 4(a) (Checks for Understanding), 4(b) (Feedback) and 4(c) (Demonstration of Learning). He received a partially effective rating for 3(a) (Enthusiasm for

[1] At the time of the hearing, Petty was the Superintendent of Lodi.

Learning). A post observation conference was held on April 9, 2019. It does not appear that Rios signed the observation, a witness signature appears. (District Exhibit 19.)

e. Annual Summative Evaluation – May 9, 2019:

Rodriguez prepared Rios' annual summative evaluation on May 9, 2019.[14] Rodriguez testified that in preparing the evaluation, she considered all of the data collected from the start of the school year, including formal observations, the walk throughs, attendance, trackers and other information on student progress.[15] Based on the evidence collected, Rios was rated partially effective for Competency 1, 2 and 3 and ineffective for Competency 4. In Competency 3, the evaluation noted strengths in two indicators, 3(a) (Enthusiasm for Learning), 3(c) (Community) and 3(e) (High Expectations). Nonetheless, based on the overall ratings for each of these competencies, Rios did not meet the expectations set forth in the Framework. For the indicators in Competency 5, Rios received two effective ratings and two partially effective ratings.

SGO scores for the second part of the school year for his first grade students are set forth in Competency 4(f). The rating was partially effective. The evaluation provided that:

> As of April 2019, 66% [of students scored a 65% or higher on the MIF chapter assessments from February to April 2019. Mr. Rios is a co-teacher teaching alongside with the general education teacher in the classroom. Students did not obtain proficiency scoring at this level. Therefore, goals were not met.

(District Exhibit 20.)

Based on these ratings, Rios had a total score of 5 points, an overall ineffective rating in the annual summative evaluation.

Rios' Testimony – Oliver H School:

Rios' testified that he did not arrive at the school until September 4 or 5, 2018 and that upon his arrival, Rodriguez told him that he would be teaching math to the sixth, seventh and eighth grade bilingual class. He testified that he initially taught all subjects and that he spent a lot of time preparing for all the classes, including working weekends. Rios' acknowledged,

[14] Rios was absent from work on an FMLA leave beginning approximately April 10, 2019 and returning in May 2019 before the end of the school year.

[15] Rodriguez testified that in completing the annual summative evaluation on EdReflect, prior ratings from the formal observations are already in the system providing guidance for the rating to be given in the annual summative evaluation. If the rating on a particular indicator in prior observations was ineffective or partially ineffective, the rating for that indicator must be informed by those prior ratings. (T. 16-20 to at 141.)

however, that by mid-September, another teacher was assigned to teach LLA and social studies. He testified that he did not know that he was required to teach the students science until Rodriguez asked him for lesson plans for science at the end of September. He was provided the science curriculum but nevertheless spent many hours preparing his lessons. Rios also testified that when teaching the sixth, seventh and eighth grade students, he had access to PowerTeacher because he was the homeroom teacher. He was not called to cover other classes during this time-frame.

When the middle school students were transferred from the school at the end of December, Rios was told that he would be transferred as well; he was waiting for the transfer letter when he began his assignment in Kadus' first grade class. Rios testified that he was not given a title when he was sent to Kadus' class and did not know what role he had in her classroom. In addition, Rios testified that he was not given a desk, chair or computer and did not have access to PowerTeacher, he did not ask that any of these items be provided to him. Further, he acknowledged that he was not prohibited from sitting or from using the closet in the classroom. He further testified that based on his many years working in Newark, teachers do not sit; "the teacher is always standing." (2/21/20 Tr. at 64.)

As with his experience at Abington School, Rios claimed that he was constantly called to cover other classes, either for a full day or for portions of a day. He did not keep any records but testified that it occurred frequently. Without specific dates, Rios testified that he provided coverage as follows: at least six full and four part days in January; at least fifteen full days and 1 part day in February, three full weeks of full day coverage in March and, in the first 10 days of April, "maybe" four full days. (2/20/20 Tr. at 191-198.) When asked if he wrote an email to Petty or Rodriguez to express concerns about the number of times he was called upon to cover or filed a grievance, Rios indicated that he did not; he testified that he understood that as an EWPS, it was his duty to cover classes. Rodriguez testified that Rios could have done coverage, "just like we had other teachers in the building also covering whenever we needed them." According to Rodriguez, however, it was not often that he was called upon to cover; while she could not recall an exact number, she estimated it was likely "two, three times" but noted that he was in his class most of the time. (2/16/20 Tr. at 213-214.)

Rios testified that his first observation in the new class was only 11 days after he was assigned to the class; he had only taught the students for approximately eight days prior to the observation, having been called to cover other classes during that period. According to Rios, he was pulled to cover other classes for three full days and at least twice to cover meetings. In addition, he testified that Avraamides did not show up on the day planned but came a couple days later when he was unprepared to be observed. Contrary to Avraamides testimony, Rios testified that he told Avraamides prior to the observation that it was unfair to observe him at that time. After receiving his evaluation, he wrote to Avraamides to request a new evaluation because he had eight days or less teaching the students prior to the observation and was not familiar with their prior learning other than by reference to the anchor charts. Avraamides responded noting that while it was not necessary to do so, she opted to conduct an announced observation because she "wanted to help prepare [him] and provide that extra support." She also noted that at no time during the pre-observation conference did Rios express these concerns about being observed at that time. (District Exhibit 55.)

Rios also testified that he did not receive any formal assistance or individual modeling from the teacher coach. Indeed, Rios maintained that he was not provided access to any coach at the school. He then indicated that he did have access to the math coach at Oliver I but that he never asked to meet with her.

Rios did meet with Rodriguez regarding his annual summative evaluation upon his return from leave. The Union representative and another first grade teacher, Sheila Coleman ("Coleman"), attended the meeting with him. According to Rios, Rodriguez listened to his concerns. Rios wrote a rebuttal to his annual summative evaluation raising many of the same issues raised in his testimony. He also maintained that contrary to the rating provided regarding the SGOs, the students in his and Kadus' first grade class had met the goals that were set; he provided data that Kadus gave to him as evidence in the rebuttal. (Respondent Exhibit 6.)

The Tenure Charges:

Roger Leon, Superintendent of Schools, filed charges of inefficiency against Rios pursuant to N.J.S.A. 18A:6-17.3. The inefficiency charges are detailed below:

TENURE CHARGE: INEFFICIENCY

Respondent has been rated less than effective in three consecutive annual summative evaluations, as follows:

1. Respondent was rated ineffective in his 2016-17 annual summative evaluation.
2. Respondent was rated partially effective in his 2017-18 annual summative evaluation.
3. Respondent was rated ineffective in his 2018-2019 annual summative evaluation.
4. Respondent has failed to effectively perform the duties of a teacher.
5. Respondent has failed to effectively use individual standard-aligned lessons to build on previous lessons and on students' prior knowledge.
6. Respondent has failed to effectively use standard-aligned lesson components to move students toward mastery of an objective that is aligned to objective that is aligned to (sic) essential understanding in the standards.
7. Respondent has failed [to] maximize learning time.
8. Respondent has failed to clearly and accurately communicate content and instructions.
9. Respondent has failed to effectively plan lesson plans that are also standards-based, grade-level appropriate, and reflect work toward annual student achievement goals.
10. Respondent has failed to effectively create lesson objectives which fit into a larger, coherent sequence that leads to student mastery of the appropriate standards.
11. Respondent has failed to effectively tailor instruction to move all students toward mastery.
12. Respondent has failed to effectively use questions and tasks to ensure student comprehension and ask for application, analysis, and/or synthesis.
13. Respondent has failed to effectively anticipate and respond to student reactions and misunderstandings by adjusting instructional strategies.
14. Respondent has failed to effectively require precision and evidence in tasks and responses from students and himself.
15. Respondent has failed to effectively demonstrate that student work includes revisions based on teacher and peer feedback, especially revised explanations and justifications to demonstrate student movement toward mastery.
16. Respondent has failed to effectively demonstrate that lesson objectives, tasks, and materials requires students to demonstrate recall and reproduction, basic application of concepts, strategic thinking, and extended thinking.

17. Respondent has failed to effectively demonstrate that students show persistence in confronting demanding concepts and tasks.
18. Respondent has failed to effectively use classroom norms that promote positive and productive teach-student and student-student relationships.
19. Respondent has failed to effectively demonstrate that his strategies and routines capture and maintain student attention on learning.
20. Respondent has failed to effectively demonstrate that he fosters a classroom culture that is consistently one of high expectations and hard work and has failed to effectively model excellence.
21. Respondent has failed to effectively demonstrate that students hold themselves and their peers accountable for learning and supporting the culture of the classroom.
22. Respondent has failed to consistently check for understanding effectively.
23. Respondent has failed to effectively demonstrate that he and his students give and receive timely, specific, and constructive feedback.
24. Respondent has failed to effectively demonstrate students know more at the end of the year than they did at the start.
25. Respondent has failed to effectively track assessment data to understand each student's progress toward mastery and that he uses results to guide planning, instruction.
26. Respondent has failed to effectively articulate specifically (and with evidence) whether or not each student has internalized grade-level standards and, if not, what he still needs to learn.
27. Respondent has failed to effectively demonstrate that data reflects that students are mastering the objectives of the focus areas, leading toward mastery of grade-level standards.
28. Respondent has failed to effectively demonstrate that he accurately self-assesses strengths and substantive growth areas, seeks and incorporates feedback from others, and pursues his own growth and development.
29. Respondent has failed to effectively contribute ideas and expertise to further colleagues' and the school's growth or incorporate productive insights into his or her own instruction.
30. Respondent has failed to effectively communicate student progress clearly and consistently to students, families, and school leaders.

WHEREFORE, the undersigned hereby requests the following relief:

a. Dismissal of Respondent from the position in which he has tenure in the Newark School District.
b. Suspension of Respondent, without pay, pending review and consideration of this Tenure Charge of inefficiency; and
c. Such further relief as may be authorized by law and deemed equitable by the Board of Education, the Commissioner of Education, or any assigned arbitrator.

(District Exhibit 1.)

Relevant Statutory Provisions – TEACHNJ:

N.J.S.A. 18A:6-17.2, Considerations for Arbitrator in Rendering Decision," provides as follows:

> a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for the considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.
>
> c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.
>
> d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

N.J.S.A. 18A:6-17.3, Evaluation Process, Determination of Charges, provides, in pertinent part, as follows:

> a. Notwithstanding the provisions of N.J.S.A. 18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal and vice-principal:
>
> (1) the Superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially ineffective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation.

Position of the Parties:

The parties' positions are summarized below. More detail is addressed in the discussion section of the Opinion

On this record, the District argues: (a) that under TEACHNJ, ineffieiency charges are required when a teacher receives an overall partially effective and ineffective in his annual summative evaluation, (b) that Rios' 2017-2018 overall rating was partially effective and his 2018-2019 overall rating was ineffective warranting ineffieiency charges in this case; (c) that the arbitrator's authority is limited under TEACHNJ; (d) that the District has proven that it has substantially adhered to the evaluation process; (e) that in each of the two school years, Rios was provided a CAP, at least three observations by at least two different administrators, a mid-year evaluation and an annual summative evaluation; (f) that Rios was provided professional support to improve his pedagogy; (g) that five different administrators observed Rios during this two year period and all expressed similar concerns regarding his teaching; (h) that the evaluations were all based on evidence obtained during the lessons observed or over time, as appropriate, and were based on the Framework; (i) that even if some deficiency is found to exist in the process, such as the failure to have one announced observation during 2017-2018, this failure did not materially affect the outcome.

Addressing the challenges to the tenure charges that Respondent raised, the District maintains: (a) that Rios' teaching assignments each year were appropriate given his certifications in math and bilingual education; (b) that Rios was observed only when teaching math; (c) that the evidence does not demonstrate that the District acted in an arbitrary and capricious manner towards Rios; (d) that the credible evidence does not support that Rios was set up to fail; (e) that the credible evidence does not support that Rios was required to provide coverage on a frequent basis as Rios claimed; (f) that Rios was not treated any differently than other bilingual teachers in the District with respect to materials; (g) that all teachers are required to be prepared for their classes; (h) that contrary to the Respondent's arguments, the SGOs were rated in each of the annual summative evaluations as part of Competency 4(f); (i) that even if the SGO rating had been effective, it would not have rendered his annual summative evaluations effective; and (j) that there is no evidence of any factual mistakes.

The Respondent, on the other hand, contends: (a) that the District did not substantially adhere to the evaluation process because it failed to provide a rating for the SGOs in the

annual summative evaluations; (b) that the District did not engage in a collaborative process to establish Rios' CAP; (c) that the District did not prove that Rios should have been on a CAP in the 2017-2018 school year having withdrawn the charges relating to the prior year; (d) that Rios did not receive any professional support; (e) that Rios did not receive an announced formal observation at Abington School; (f) that the evaluations fail to identify that his class was a bilingual class and that he served as a co-teacher; (g) that the District incorrectly claimed that the first grade class at Oliver II was a bilingual class; (h) that Rios was criticized in his ratings for items, such as not using Rich Tasks, that were not part of his CAP; (h) that he was rated partially effective and ineffective in areas where he had previously been rated effective; and (i) that the District failed to consider positive indicators from observations earlier in the year.

In addition, Respondent argues that the District's actions towards Rios were arbitrary and capricious. He maintains: (a) that as an EWPS, the District set Rios up to fail; (b) that he was subjected to degrading treatment; (c) that Rios was treated as just another body, without giving him any real assignment; (d) that Rios was not provided a desk or chair, requiring that he stand all day causing him to be exhausted; (e) that he was not provided with a computer or access to PowerTeacher and could not, therefore review student progress; (f) that the District failed to support bilingual education; (g) that the District failed to have bilingual materials for students as required; (h) that the District administrators who rated Rios were not bilingual educators; (i) that one administrator who observed Rios had no proficiency in Spanish; (j) that Rios was improperly observed shortly after being assigned to teach first grade at Oliver II; (k) that Rios was required to teach in areas outside of his certification, including science, LLA, music, gym, art and more; (l) that he was repeatedly required to cover other classes taking him away from teaching his students; (m) that he was required to teach other subjects when his co-teachers were absent; (n) that Rios' refusal to grade Spanish papers on one occasion at Abington resulted in Echevarria providing negative ratings; and (o) that Rios was required to teach multiple grades in the same classroom.

Respondent maintains that for all of these reasons, the tenure charges should be dismissed and Rios should be reinstated to employment with full back pay, benefits and seniority.

Discussion:

On the entire record before me, including my assessment of witnesses' credibility and the probative value of the evidence, the District has proven the tenure charges of inefficiency against Rios. I reach this conclusion for the reasons set forth below.

A couple of preliminary comments are appropriate before addressing the specifics of the tenure charges brought against Rios in this case. First, it is important to note that the arbitrator's authority in an inefficiency case under TEACHNJ is limited. An arbitrator is not permitted to second-guess the pedagogical conclusions reached by the administrators in the evaluation process. TEACHNJ expressly provides that the "evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review." N.J.S.A. 18A:6-17.3 (23.d). The statute sets forth four limited bases upon which an arbitrator may find that the inefficiency charges have not been proven. If the facts support any of the defenses set forth in the statute, the arbitrator must then determine if those facts materially affected the outcome of the evaluation, if it did not, then the arbitrator "shall" render a decision in favor of the District, upholding discharge. The District has the ultimate burden of demonstrating that the statutory criteria for tenure charges have been met.

In this case, the Respondent makes a host of arguments in an effort to establish that the evaluations did not substantially adhere to the evaluation process, that there were mistakes of fact and that the District acted in an arbitrary and capricious manner. In making several of his arguments, however, Respondent indirectly asks that the arbitrator review the evaluator's determination of the quality of Rios' teaching. This I cannot do. Accordingly, while all of the Respondent's arguments have been carefully considered, this decision will only discuss those arguments and facts that address the statutory criteria for challenging inefficiency charges but will not review whether particular ratings given by the administrator observing Rios were appropriate.

Second, Respondent relies, in part, on his experience as a bilingual math teacher and on his satisfactory performance Barringer High School as evidence that the ratings he received at Abington School and Oliver II and the inefficiency charges cannot be supported. This reliance is misplaced for several reasons. The framework for evaluating teachers during the ten-year period he was teaching at Barringer High School was not the same as the framework used during the relevant time periods. Further, while Rios was generally

determined to be "Proficient" under a rating system that included four ratings, i.e., Unsatisfactory, Basic, Proficient and Distinguished, based on the rubric in effect at that time. Respondent did not produce all evaluations during that time period. (See, Respondent Exhibit 7.) For example, his 2009 evaluation, providing a rating of "Basic" was not produced by Respondent. (District Exhibit 72.) More importantly, Rios has not worked at Barrington High School since June 2013 and he has not enjoyed the same success since leaving Barrington. Indeed, the District previously filed tenure charges against Rios based on inefficiency but withdrew the charges. Further, while the District withdrew the inefficiency charges in this matter relating to the 2016-2017 school year, the record reflects that he received an ineffective rating for that school year.[7] If prior evaluations are relevant at all, then his entire record is properly considered.

Significantly, however, the tenure charges in this case relate to a specific time period, i.e., the 2017-2018 and 2018-2019 school years. These two school years, therefore, are the relevant time period in this case. In this case, five separate administrators evaluated Rios' performance while teaching within his certification areas, i.e., mathematics and bilingual education. Rios' experience teaching at Abington School and Oliver II and his evaluations while at these two schools are what is at issue in this case and must, therefore, be the focus of this decision.

Finally, as will be discussed in more detail in connection with Respondent's arguments that the District acted in an arbitrary and capricious manner, Respondent's suggestion that he cannot be fairly rated because he is an EWPS (and, therefore, was set up to fail) must be rejected. Whether Rios had a permanent position or was assigned each year to work in schools needing the additional support, he is a teacher in the District. In each assignment, he had responsibilities to teach Newark students. The District has a right to expect that all of its teachers, even those working as an EWPS, meet basic standards of performance based on the Department approved evaluation system in effect during the relevant time. Indeed, the goal of TEACHNJ is to "raise student achievement by improving

[7] Although the charges relating to that year were withdrawn, there is no evidence to indicate that the annual summative evaluation for that year was changed. Respondent admitted in his Answer to these charges that he received an ineffective rating for that year, although he disagreed with the rating. While withdrawing the tenure charges as they related to that year, the District nonetheless indicated that "[t]he only mention of that school year will be for the fact that he did receive an ineffective during the annual evaluation which then required him to have a CAP the following school year." (12-10-19 Tr. at 8-9.)

instruction through the adoption of evaluations that provide specific feedback to educators, inform the provisions of aligned professional development, and inform personnel decision." N.J.S.A. 18A:6-118(a). Although the position of an LWPS may be a difficult one as the teacher does not have a permanent placement and may be reassigned each year,[17] Rios' status as an LWPS cannot excuse ineffective performance. To find otherwise would be inconsistent with the goals and provisions of TEACHNJ and would do a disservice to the District's students.

On the entirety of this record, the District met its ultimate burden of establishing that the statutory criteria for the tenure charges of inefficiency were met. To the extent that there were any deviations from the evaluation process, those deviations are not deemed material to the outcome of the evaluation. Each of the factors to be considered in an inefficiency case under TEACHNJ is discussed below, to the extent relevant to this case.[18]

A. Substantial Adherence to the Evaluation Process:

The District must establish that it substantially complied with the elements of the evaluation process. Those elements for each school year at issue include: (a) providing for a CAP; (b) three formal observations per school year by two separate administrators, with at least one announced observation with a pre-observation conference; (c) a mid-year evaluation; and (d) an annual summative evaluation. In addition, the District must establish that it provided professional support to the teacher.

Rios had a CAP in each of the two school years. The Respondent argues that there is no evidence that a CAP was appropriate for the 2017-2018 school year as the District withdrew the tenure charges relating to the 2016-2017 school year and, therefore, that he did not need three observations. I do not find this argument persuasive. The record, including the

[17] Teachers whose status is LWPS have the right to apply for permanent positions in the District. Mendez testified that some LWPS teachers remain in a particular school if a vacancy in that school opens whereas other LWPS teachers may be in a different school each year. All LWPS teachers have the opportunity to enter the pool to be considered for transfer to a permanent position in the District. It is the LWPS teacher's choice whether or not to enter the pool. According to Mendez, 70 to 75 percent of LWPS teachers choose not to even enter the pool, preferring to remain in LWPS status. Rios testified that he has entered the pool and applied for numerous permanent positions but has not been selected for the open positions.

[18] Respondent does not claim that "the charges would not have been brought but for the considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law." N.J.S.A. 18A:6-17.2a(a)(3). This section, therefore, will not be addressed in this decision.

tenure charges, establish that in the 2016-2017 school year Rios was rated ineffective in his annual summative evaluation; an ineffective rating in this school year required a CAP in the following school year. It is true that the District opted to rely only on the 2017-2018 and 2018-2019 school years to prove the inefficiency charges. That it chose to withdraw the charges as related to 2016-2017, however, does not change the rating for that year. Indeed, Respondent's Answer to the charges admitted that this was the rating for 2016-2017, although indicating that he did not agree with the rating. Further, when the District withdrew the charges, counsel expressly stated that the charges are withdrawn except to the extent reference to the charges are needed to establish that Rios was required to have a CAP in place during 2017-2018.

In addition, as the District noted in its Reply Brief, even assuming that no CAP was needed, it does not follow that Rios would not have been observed on three occasions. While only two observations would have been required, the District was free to observe Rios on more than one occasion. Further, it is purely speculative to conclude that if he had only two observations, he would have rated effective on one of them. It is just as possible that the two times he would have been observed would have been the lessons rated as partially effective and ineffective.

As to the CAPs themselves, Rios argued that they were not part of a collaborative process. The record does not support this conclusion. Indeed, Echevarria (for Abington School) and Rodriguez (for Oliver II) credibly testified as to the process followed each year to establish Rios' CAP. It is the teacher who initiates the process. The teacher selects the professional goals he wishes to work on during the year, selecting from indicators in the Framework. The teacher also identifies the student learning outcomes that he wishes to include in the CAP. After the teacher prepares this information, he submits it to his supervisor for review. This was done in both school years. After Rios's submitted the CAP to his supervisors, a discussion took place between Rios and Echavarria (for 2017-2018) and between Rios and Rodriguez (for 2018-2019) before the CAP was finalized. Indeed, Rodriguez testified that although Rios had signed the CAP before she had a chance to review it, she made suggestions for modification. Only Rios could accept those modifications by making changes to the CAP. He did so. The weight of the credible evidence does not rebut

that the CAP was initially prepared by Rios, that he then discussed it with his supervisors, and that Rios then finalized the CAP that was in effect for each year.

Respondent also suggests that if a particular issue is not addressed in the CAP, it is improper to rate him with respect to that issue. For example, Rios argues that he was criticized for not using rich tasks in his second observation at Abington School but that rich tasks were not included in his CAP. He also claims that the CAP did not provide that he should group students by English proficiency to differentiate instruction on this basis and yet he was criticized for not doing so. The fact that these items were not referenced in his CAP does not preclude the District from holding him accountable to implement best practices and to rate him on all competencies. Indeed, a CAP is not required to include all indicators; that does not mean that the teacher cannot be evaluated on all of the Competencies' indicators set forth in the Framework, whether or not it is one of the growth goals for the teacher.[7] The District is not limited to addressing the indicators the teacher selected for growth in assessing the quality of the teacher's performance. For all of the above reasons, Respondent's arguments that the CAP was not subject to any collaboration or that it was otherwise improper is rejected.

Rios received three formal observations in each school year. At least two evaluators observed his lessons in each year. At Abington School, Echevarria and Heintz conducted the observations. At Oliver H. Rodriguez, Petty and Avramides conducted the observations. Rios was only observed teaching math, which he is certified to teach. Except for the first observation by Echavarria, all other formal observations were rated either partially effective or ineffective. Rios' suggestion that he should have only been observed by evaluators who were bilingual educators is not supported by the record. While bilingual teachers must be observed by teachers qualified to conduct an observation, there is no evidence that any of these administrators were not qualified to observe him teaching a bilingual class. Each had received extensive training on an annual basis as to ratings under the Framework, including norming sessions to assure consistency throughout the District. Indeed, to find otherwise would require that at least two administrators in each school with a bilingual education class be certified in bilingual education. This is not practical nor is it required.

[7] Rios also claimed he was not trained regarding rich tasks. The record does not support this claim. Rich tasks were introduced at Abington School through professional development given to all teachers, including Rios, and was a subject of PLC meetings which he was expected to attend.

In particular, Rios complains that Heintz should not have been permitted to evaluate his lesson at Abington School because she is not Spanish speaking. He claims that he taught exclusively in English during that lesson because Heintz did not know Spanish and then concludes that the reason the students were not engaged was that he spoke English and that they did not understand, not because the lesson or his teaching was in any way lacking. There are several factual issues that require rejection of this argument. The most significant is that contrary to Rios' claim that he spoke only in English which resulted in the students not understanding and engaging in the lesson, Heintz expressly noted in her observation evaluation that Rios used both Spanish and English during the lesson. Indeed, she rated him effective with respect to Clarity, noting in relevant part as follows: "The teacher explained everything well to students in both English and Spanish ensuring that all the students had access to the information and that they understood it clearly." (District Exhibit 13.) In addition, the record establishes that no one suggested to Rios that he alter his teaching that day to use exclusively in English (and, as set forth above, the evidence makes clear he did not do so). Further, Heintz testified that while she is not fluent in Spanish, she does have some basic understanding of the language. Finally, not only is Rios' claim that the students were not engaged because he spoke only in English not supported by the detailed information set forth in the observation evaluation or by Heintz's testimony but is entirely speculative and self-serving.

Rios also raised several arguments regarding specific ratings and the conclusions the evaluators reached. For example, Rios argues that having been found effective as to a particular component and indicator earlier in the year, it was inappropriate to rate him partially effective or ineffective for a later lesson, suggesting that having demonstrated his competence in one lesson, it could not be rated lower at a later time. This is simply not the case. Each lesson must be observed and rated based on the evidence presented during that lesson. That a teacher may effectively address a particular indicator on one day does not mean that the same indicator is addressed effectively on another day during another lesson. Further, as Echevarria testified, he noticed a downward trajectory of Rios' teaching in areas such as community, for example, after his mid-year evaluation having not received an effective rating at that time. This, too, would explain differences in ratings on the same competencies as the year progressed.

Finally, as noted above, I am not authorized to second-guess the findings of the evaluators as to the quality of Rios' teaching. Suffice it to say, however, that each of the evaluators conducting the formal observations provided detailed descriptions of what they observed relevant to a particular indicator that was being rated, articulating the evidence upon which the conclusion was based and the reason for the rating provided. There is nothing in the ratings or in the testimony of any of the administrators who testified regarding their observation of Rios[5] to suggest that they were not acting in good faith and consistent with the Framework and the Guide in conducting their observations and in reaching the conclusions as to the ratings for each competency and indicator rated.

The above notwithstanding, it is undisputed that Rios did not receive an announced observation in the 2017-2018 school year. All three of the observations that year were unannounced. (The next year, two were announced and only one was unannounced.) The standards do require one announced observation. The question is whether the failure to provide the announced observation materially impacted the outcome of the evaluation. On this record, there is nothing to indicate that there would have been a different conclusion if one of the observations had been announced that year. Indeed, the following year, two of the three observations were announced, this fact did not materially impact the ratings for the particular observations or the overall ratings in the mid-year or annual summative evaluations.

The next requirement is a mid-year evaluation. Echevarria and Rodriguez credibly testified that the mid-year evaluations are based not only on formal observations, but also on informal observations walk throughs and other evidence obtained during the period prior to the mid-year evaluation. Both evaluations rated Rios on all of the competencies. They also addressed progress towards SGOs. While no modification was made to Rios' CAP in the 2017-2018 school year, a modification was made in 2018-2019 to reflect that he was assigned to teach math in the first grade class beginning in January. The SGO, therefore, was modified to reflect this change. No change in professional goals was made at that time. Rodriguez testified that indicators selected for professional growth remained applicable, whether teaching a middle school grade or first grade class.

[5] All of the evaluators testified at the hearing except for Petty. As indicated previously, Petty is no longer with the District. My assessment of that observation is, therefore, based solely on the written observation evaluation.

An annual summative evaluation is also required each year, rating the teacher in all of the competencies based not only upon the formal observations but the informal observations walk throughs and other evidence obtained throughout the school year. Once again, Rios received an annual summative evaluation from both Echevarria (for Abington School) and Rodriguez (for Oliver H). Rodriguez testified that when preparing the annual evaluation in the system, the prior ratings are all referenced in the system for all competencies and indicators providing guidance as to the appropriate rating, although the administrator may adjust based on other evidence. Rios makes several arguments in connection with the annual summative evaluations in an effort to establish that the District did not substantially adhere to the evaluation process.

With respect to the annual summative evaluation at Abington School, Rios asserts that Echevarria failed to consider the effective ratings in Competencies 2 and 4 from the first observation. Significantly, Echevarria only rated two competencies during the first observation when Rios received an overall effective rating; it was a short observation and it was not necessary to rate all competencies. Contrary to Rios' claim, Echevarria credibly testified that he did, in fact, consider the formal observations, as well as informal walk throughs and other evidence obtained during the course of the school year. Echevarria also credibly testified that in preparing the evaluation, he looked for the teacher's trajectory through the year. In Rios' situation, it was his opinion that Rios' trajectory was downward, particularly after the mid-year evaluation when Rios was dissatisfied with his rating and concerned about the impact of the rating given his prior ineffective rating.[7] Accordingly, while he rated Rios effective in certain indicators under Competency 4 in the first formal observation, Echevarria did not make a similar determination in the second formal observation. Instead he indicated that there were no strengths noted in this competency and in the two indicators that were rated in Competency 4, both were only partially effective. Similarly, Echevarria rated Rios effective for the Competency 2(c) (Responsiveness) in the first observation but only partially effective in the same indicator in the second observation.

[7] Rios asserted that Echevarria's attitude towards him became more negative after he refused to grade Spanish papers as requested. Velez then agreed to grade all the papers. Rios presented no evidence to support this belief, other than the fact that his ratings were not as good as in the first formal observation. I am not persuaded by Rios' testimony. Rather, Echevarria credibly testified as to the basis for his ratings and did not demonstrate any animus towards Rios. Further, he explained his view that Rios' attitude and his performance was in a downward trajectory after he received his mid year evaluation given his dissatisfaction with the rating.

Heintz did not rate Rios in either Competency 2 or 4.[3] Under these circumstances, that Echevarria concluded after reviewing all of the evidence that a partially effective rating was appropriate for Competency 4 is not subject to review.

A review of the ratings for Competency 2(b) (Questions and Tasks) does suggest that Echevarria may not have taken into account that Rios was rated effective in this indicator in the first two formal observations and was not rated on this indicator in the third formal observations. Echevarria's basis for rating this indicator partially effective in the annual summative evaluation is not evident on this record. Having received two effective ratings, and no partially effective or ineffective rating for this indicator, it would appear that this rating is a mistake. This mistake in the annual summative evaluation, however, is insufficient to find that the District failed to substantially adhere to the evaluation process. Even assuming that the evaluation should have reflected an effective rating in this indicator, the change would add only one point to his final score, moving it from an eight (for Competencies 1 to 4) to a nine. This score is still within the range of partially effective for an overall rating. Thus, this issue did not materially impact his annual summative evaluation.

Rios also maintains that the District ignored the requirement to provide SGO scores, a fatal defect in the evaluation process, citing cases finding that the failure to provide an SGO rating provided grounds to find that the tenure charges cannot be sustained. N.J.A.C. 6A:10-4.1(c). See also, *IMO Tenure Charges of Joel Dawkins (State-Operated School District of the City of Newark, County of Essex)*, Agency Docket No. 277-9/15 at p. 39 (Arbitrator Stephen M. Bluth, October 21, 2016) ("[F]ailure to compute a separate score for Respondent based on student growth" constituted a material error.); *IMO Tenure Charges of Donielle Carroll (State-Operated School District of the City of Newark)*, Agency Docket No. 261-9/15 at p. 46 (Arbitrator Robert T. Simmelkjaer, December 30, 2016) ("Annual Summative Evaluations devoid of data-based SGOs in either school year preclude the District from establishing the

[3] Echevarria also noted that Rios was effective in Pacing and Momentum in the first formal observation in the comment section, although he did not put a rating into the system for that indicator. He did not make any comment regarding Responsiveness in the narrative section but did rate Rios effective for Responsiveness in the system. This confusion would not have impacted the overall rating for that observation which was effective. In his second formal observation, Echevarria rated Rios partially effective for Pacing and Momentum, once again Heintz did not rate that indicator. Accordingly, with respect to Pacing and Momentum the same rationale set forth above applies. Echevarria's determination that the final rating should be partially effective has a rational basis and is not subject to review.

two consecutive years of 'ineffective' or 'partially effective' performance evaluations necessary to pursue charges under Section 25 of the Act.")

Respondent's argument fails to recognize that, as Mendez testified, the District received Department approval to address SGOs as part of Competency 4 in the annual summative evaluation. See, e.g., *IMO Tenure Charges of Ursula Whitehurst (State-Operated School District of the City of Newark, Essex County)*, Agency Docket No.: 263-9/16 at p. 51 (Arbitrator Ruth Moscovitch, March 30, 2017). Indeed, in the annual summative evaluations from Abington School and Oliver H. Rios did in fact receive an SGO rating under Competency 4(f) (Progress Towards Goals). Contrary to Rios' arguments, therefore, the District did not fail to provide a separate rating for SGO scores as required nor did it ignore this issue in the evaluations; both expressly addressed the issue in providing the rating. In both school years, he received a partially effective rating. Accordingly, Respondent's argument that the District failed to properly provide an SGO rating must be rejected.

Respondent also argues that the partially effective ratings for Competency 4 in both years are improper as the SGOs were not based on specific objective criteria. The record does not support this conclusion. In his CAP at Abington School, Rios included two goals for student growth, one for CCSS Math Content 7NSA1C and CCSS Math Content 7NSA1B. The goals for both were the same, i.e., for 15 of the 19 students to prove mastery in the standard by June. At the time of the annual summative evaluation in April, Echevarria concluded that he had only partially met this objective. The assessments were to include the "Math in Focus pre and post tests, the interim assessments and other assessments." (District Exhibit 14.) He further noted that the data tracker was showing students making progress since first being assessed in September. Rios claims, however, that he understood the term mastery to mean that 15 of 19 students had achieved a passing grade of 65 or more and that his students did, in fact, achieve this goal. He argues that SGOs must be "specific and measurable" (*N.J.A.C.* 6A:10-4.2) and that mastery would be a subjective criterion based on Echavarria's testimony that mastery would require a grade of at least 75, if not higher.

Echevarria disagreed that a student who has received a barely passing grade has mastered the content. He credibly testified that "[m]astery is understood in the educational setting as being able to do a skill and to be able to do it well." (1/16/20 Tr at p. 23.). Moreover, Echevarria pointed out that Rios' own analysis when he prepared his CAP and set

the goals reflect that he understood that just passing was not considered mastery. In his CAP, Rios noted that 2 of 19 students were well prepared, 10 of 19 students needed to work harder and 7 of 19 students were not ready based on the results of the pre-test assessment in September. (The 19 was based on the number of students initially in the class; the class grew to approximately 23.) A review of the grades obtained by the students in the pre-test shows that two of students had grades of 75 and 80, respectively, which would correlate to Rios' assessment that 2 of 19 were well prepared. Of the remaining students, two obtained a grade of 60, five obtained a grade of 65 and two obtained a grade of 70; the remaining students received grades below 60. Having concluded that only two of the students had grades that rendered them well prepared, Rios' own analysis indicates that he interpreted mastery to mean a grade of 75 or higher, a specific and measurable standard; that is the standard that Echevarria applied (while testifying that some would find that mastery was a grade of 80 or 90). Indeed, if Rios understood that mastery was obtaining a grade of 65 or better, then his own analysis would have provided that nine, not two, students had already attained mastery or were "well prepared." The post tests in these content areas indicated that although 21 of 23 students passed with a grade of 65 or more, only eight students obtained a grade of 75 or higher, thereby reaching mastery. Given these facts, Rios' testimony that he understood mastery to be a grade of 65 or more is not credible. Indeed, the SGO rating of partially effective is consistent with Rios' own analysis and conclusions of what constituted mastery when preparing his CAP and the goals he set for his students.

Rios also maintains that the SGO score at Oliver II was subjective and incorrect. During the mid-year evaluation, Rodriguez noted that Rios was on track to meet the goals set for his sixth and seventh grade math class; i.e., that 75% of the sixth grade students and all of the seventh grade students will score 75% or higher in the math content areas identified. Because those students were all transferred at the end of December and he was assigned to the first grade class, his student learning goals were changed in the mid-year evaluation. His mid-year evaluation modified the goal to provide that "[b]y June 2019, at least 65% of students will score 65% or grow 20% points" in identified math content areas. (District Exhibit 18.) While Rios claims that this revised goal was not then approved or inserted into the CAP, the mid-year evaluation sets forth the revised goals for student learning outcomes.

In addressing the SGO scores in the annual summative evaluation, Rodriguez testified that she did not consider the goals set for the first half of the year; she only considered the goals set for the first grade class. She reiterated in the annual summative evaluation that the student learning goals, as revised, provided that "[b]y June 2019, at least 65% of students will score 65% or grow 20 points." (District Exhibit 20.) In rating Rios in connection with the SGO, however, Rodriguez provided as follows:

> As of April 2019, 66% of students scored a 65% or higher on the MII chapter assessments from February to April 2019. Mr. Rios is a co-teacher teaching alongside with the general education teacher in the classroom. Students did not obtain proficiency scoring at this level. Therefore, goals were not met.

(District Exhibit 20.) Rios was rated partially effective on the SGO score. Rios argues that the term proficiency is not used in the goal set and is subjective.[24]

Rodriguez testified that in setting student learning outcomes, "we always want 75 percent or higher, ...or 20 points of growth" from the students' beginning results. (1T 16-20 1T; at 201-202.) That said, she indicated that it is "up to the teacher what they want to do" but that a goal of 50% passing would not be acceptable; a goal of 65% passing would be a minimum.[25] (1T 16-20 1T; at 202.) Rodriguez indicated that this goal is indeed quantifiable. When asked what goal Rios had selected, Rodriguez testified that he included the 75% in his CAP and that there was nothing in writing about a 65%. In this testimony, she was mistaken. While Rios' original goal for his sixth and seventh grade math students had been 75% of sixth grade students achieving 75% and all seventh grade students achieving 75%,[26] it was changed in the mid-year evaluation to reflect that 65% of students in his first grade class would achieve 65% or grow 20 point in the math content areas identified. This was confirmed in the annual summative evaluation. Thus, her conclusion that Rios' only partially met this objective when 66% of the students scored 65% or higher is indeed a mistake.

[24] Counsel did not question Rodriguez as to the use of the term proficiency. Use of that term in the evaluation did not, however, determine Rios' rating. Rodriguez' testimony made clear that the goals set were quantifiable, using a percentage passing or a number achieving 20 points or more. Thus, Rios' arguments regarding the use of the term "proficient" is not material to the rating.

[25] Consistent with this testimony, the Student Growth Objectives, NJ Department of Education (updated 10-17) provides that SGOs should be driven by high expectations for students. Given this provision, it would appear that a goal to have 65% of students just pass the class, i.e., a 65% or higher, would be a minimum. A score of 75% or higher would be more consistent with the requirement that SGOs be driven by high expectations for students.

[26] Rios received a partially effective rating in Competency 4(f) in his mid-year evaluation based on the performance of his 6th and 7th grade students at that time.

This mistake, however, is not fatal to the evaluation process. Contrary to the Respondent's claims, the District did not fail to provide an SGO score or otherwise ignore student achievement. Rather the issue is the impact of the mistake on Rios' overall rating in his annual summative evaluation, i.e., whether this mistake – incorrectly identifying the applicable SGO standard -- was material to the overall evaluation.[26] On this record, I conclude it was not. Indeed, this mistake directly impacted only one of the indicators in Competency 4, i.e., Competency 4(f) (Progress Towards Goals); there is no basis to find that this mistake of fact impacted any of the other ratings in Competency 4. Significantly, the Guide expressly provides that in assessing Competency 4, the administrator is to consider not only the SGO score but also the other evidence gathered over time. While "there should be general alignment between the over-time Indicators in Competency 4 and whether a teacher did not meet, partially met, met or exceeded their student goals," all evidence is properly considered in rating the various indicators. (District Exhibit 71 at p. 21.)

That Rios just barely exceeded the minimal expectations he set for student progress, with 66% of students achieving a passing grade of 65%, does not demonstrate that the ratings in the other indicators are the result of a mistake of fact. These other indicators rate different, albeit related, skills under Competency 4 which were properly evaluated based on all of the evidence over time. On this record, I cannot conclude that the other indicators are not in general alignment with the minimal success achieved in the SGO. Under these circumstances, there is no basis to review the administrator's determination on the ratings in these other indicators. Given the ratings in all of the indicators in Competency 4, i.e., three ineffective and three partially effective, even if indicator 4(f) had been rated effective (to reflect that he minimally met the revised SGO), the increase from partially effective to effective in that one indicator would have added only one point to the overall score. The annual summative evaluation indicates that Rios' overall score was a 5. Even with one more point added,

[26] See, *Dodson v. State-Operated Dist. Of Newark*, Dkt. No. A-2506-16T4 2018 N.J. Super. Unpub. LEXIS 2230 (App. Div. October 11, 2018) (The arbitrator's determination that the District failed to include an SGO score was not the end of the process; under TEACHNJ, the arbitrator is then required to determine whether this failure was material. The arbitrator determined that the teacher's scores were so low that even if the SGO score was included in the analysis, his total score remained too low for an "effective" rating and would still have been subject to tenure charges. Therefore, the arbitrator concluded that that the failure to substantially comply with the evaluative process did not materially affect the outcome, requiring a decision in favor of the district. The arbitrator's decision was upheld.)

therefore, the overall rating, at a 6, would remain ineffective. Accordingly, any mistake of fact in the SGO score for Competency 4(D) was not material to the outcome of the evaluation.

Finally, Rios argues that the District failed to provide professional development and support to Rios as required given his CAP. The facts do not support this conclusion. As set forth in the Background section, both Echevarria and Rodriguez described the support that was provided to Rios over each school year. In addition to significant professional development offered to all teachers, including PLC and SIP and District and other school based programs, other support was provided to Rios. In both schools, administrators met with Rios informally, as part of their informal observations, to discuss their observations and provide individual guidance. Rios was afforded opportunities to observe others modeling lessons. The record also demonstrates that Rios did meet with coaches; while meetings with coaches may not have been frequent or regular, opportunities to have such meetings were provided. Further, arrangements were made for an instructional special assistant from the math department to visit Rios class with Echevarria and to provide guidance. On-line resources to support Rios in various areas were given to Rios.

Rios claims that he received no professional development. I do not credit this testimony given the documentary evidence and the credible testimony of administrators. Indeed, Rios testified that he was never provided training on topics such as rich tasks or silent signals when the record demonstrates that training programs in these areas were offered to all teachers. His blanket denial in the face of the evidence produced impacts the credibility of Rios' testimony overall. Although is true that administrators were unable to confirm in their testimony how often Rios met with the resources provided or attended certain professional development meetings, the record supports that these resources were provided to Rios. To the extent that Rios did not take the initiative to take advantage of the opportunities that were provided to him, that failure cannot be attributed to the District.

On the entirety of the record, therefore, the District has proven that it substantially adhered to each aspect of the evaluation process during the 2017-2018 and 2018-2019 school years. For the reasons set forth above, any deviation from the process did not materially impact the overall ratings Rios received for each of these school years.

B. Mistake of Fact:

Rios next challenges the evaluations claiming that there were mistakes of fact impacting the validity of the evaluation. In particular, Respondent argues that the evaluations incorrectly identified his first grade class as a bilingual class and that both evaluations failed to note that he was a co-teacher.[57]

As to the first issue, any mistaken belief that his first grade class was a bilingual class was not material to Rios' ratings. The only reference in the evaluations to the class being bilingual was in the summary of performance in the annual summative evaluation at Oliver II: Rodriguez wrote that "Mr. Rios began the year by teaching 6-8 bilingual students in the areas of Math & Science. By January 2019, he was the co-teacher for the bilingual first grade classroom." (District Exhibit 20.) While true that the class was not formally designated a bilingual class, it is undisputed that the class had a large number of students who spoke either Spanish or Portuguese and that the teachers translated as needed to assist the students; this may explain the confusion. Nonetheless, there is nothing in the evaluation to suggest that his ratings in any competency would have been any different had the evaluation not incorrectly referenced the first grade class as bilingual in the summary. That the class was not bilingual was not relevant to whether Rios was certified to teach the class. Rios led and was observed only in math instruction, which was within his certifications even in a non-bilingual class setting. All other classes were properly identified as bilingual.

Respondent also maintains that the failure to indicate that he was a co-teacher is a mistake of fact and, further, that as a co-teacher he should not have been rated on certain competencies, citing Mendez' testimony. As a preliminary matter, I note that his annual summative evaluation at Oliver II expressly stated that he was a co-teacher in the first-grade class where his role, other than in teaching math, was largely supporting Kadus. As to his other assignments at Abington School and Oliver II, although Rios was a co-teacher, he was responsible for teaching math to the students while the co-teacher taught ELA and social studies.[58] He planned and delivered the lessons. That he was a co-teacher did not lessen his responsibilities to his students, as measured by the Framework, in any competency. That the

[57] Other mistakes of fact were addressed in the prior section; as indicated, to the extent there were any mistakes of fact, they were not material to the outcome of the evaluations in this case. Other alleged "mistakes" would require that I second guess the evaluators' pedagogical determinations which I have no authority to do.

[58] At Oliver II, Rios also taught science to the sixth, seventh and eighth grade students.

evaluations at Abingdon School did not mention that he was a co-teacher was not material as he was responsible for his area of specialization and Velez was responsible for her area of specialization. He was not observed in areas he simply supported while Velez taught, but rather in his area of specialization, i.e., math. The same is true at Oliver II for the first half of the school year. Even when teaching in first grade at Oliver II, Rios led the math instruction while supporting Kadus in the other areas. He was not evaluated, however, while acting in a supporting role in the classroom, rather, he was evaluated teaching math lessons to the students. In that capacity, it was Kadus who was in the supporting role. While Kadus prepared the lesson plans, she credibly testified that Rios had access to the lesson plans, as well as all of the materials and that Rios was free to modify the lesson or deliver it in a different manner if he chose to do so.

More importantly, contrary to Respondent's claims, Mendez did not testify that as a co-teacher, the teacher has any less responsibility for performance in each of the competencies in the Framework. While Mendez testified that not all competencies must be rated in all observations, a review of her testimony does not persuade me that Rios could not be rated in Competency 1 or any other competency as a result of being a co-teacher. Rather, Mendez testified that

> a co-teacher would be an individual that would be literally working in conjunction with another teacher. A co-teacher is not less than, is not more than another teacher, but literally would be another licensed individual that is responsible for the students in the class but would specialize in whatever area they possess a license for, but is just literally another individual that is in the class and would enhance the learning the idea being that there would be an opportunity for two individuals that are licensed, and in this case, have a license or specialization in different areas that can only enhance the learning environment.

(2.12.20 Tr. at 22.) Even in those instances where another teacher prepares the lesson, Mendez testified that a teacher still has an important role to play in each of the competencies; she did not testify that the District was precluded from rating a co-teacher in certain competencies.

For all of these reasons, neither the incorrect designation of the first grade class as a bilingual class nor the failure to identify that he was in a co-teaching situation in certain evaluations were mistakes of fact that had any impact on the ratings at issue in this case; these

mistakes, if they can be deemed mistakes at all, were not material to the overall ratings in this case.

C. Arbitrary and Capricious Action by the District:

Respondent maintains that the District treated him in an arbitrary and capricious manner and for that reason, the tenure charges cannot stand. According to Respondent, the District's actions did not make it possible for Rios to succeed. In so arguing, Respondent presents a multitude of grievances, from his treatment as an EWPS to the failure of the District to properly implement bilingual education and provide appropriate materials. His complaints include, but are not limited to, the failure to provide a chair in his classrooms rendering him exhausted from standing all day, to excessive coverages, to requiring that he spend a substantial amount of time preparing for his classes. While I will try to address each one of the claimed offenses, the failure to address them all should not be considered a failure to consider them all. Having carefully reviewed the record, I do not find that any of the arguments that Respondent raised, viewed individually or in totality, support the conclusion that the District's treatment of Rios was arbitrary and capricious.

Rios status as an EWPS was not unique to him, there are many other teachers in that status throughout the District.[29] While it is clear that Rios would prefer a permanent placement and does not want to be an EWPS with a new assignment each year, not every teacher in this position feel as he does. Indeed, Mendez testified that although all teachers with this status are able to enter the pool to apply for transfer to permanent positions – and Rios, while not successful, did so – 70-75 percent of EWPS teachers choose not to enter the pool to be considered for a transfer to a permanent position. This evidence is inconsistent with Rios' claim that the District treats EWPS teachers poorly and without respect.

Further, having had the opportunity to hear from the administrators and two of his colleagues at Oliver H, there was no evidence at all of a lack of respect for Rios. I am persuaded that in each school, Rios was treated as other teachers on staff, whether or not he was listed under the heading of bilingual teacher on the Abington School organization chart.

[29] In *IMO Tenure Hearing of Yesenia Gonzalez (State Operated School District of the City of Newark, Essex County)*, Agency Docket No. 264-9/15 (Arbitrator Timothy Brown, March 3, 2016), Respondent made similar arguments, claiming that being designated an EWPS and reassigning him to an elementary school rather than the high school where he successfully taught for years, set him up for failure and constituted arbitrary and capricious conduct by the District; the arbitrator rejected these arguments.

Indeed, while Echavarria testified that he was aware that Rios was an EWPS as his compensation was not on the school's budget, Rodriguez testified that she was not aware of Rios' status as an EWPS while he was at Oliver II. In addition, Coleman, who was called as a witness on Rios' behalf, also testified that she did not know that Rios was an EWPS during the time he was teaching at Oliver II.

Rios complains that he was not provided a chair or desk or space for his personal belongings in either Abington School or Oliver II (only in the first grade classroom). In fact, he had a similar complaint about his prior assignment at Washington Carver Elementary School. He conceded, however, that he was not prohibited from sitting and that there was indeed space where he could have stored his personal belongings. Rios also testified that it was not proper for a teacher to sit in the classroom; teachers are expected to stand. Thus, having to stand while teaching did not make his status as an EWPS any different than other teachers in the school. Nor do I find that the fact that he was not provided a chair caused him to be unable to competently perform his teaching duties. Rather, this is one more complaint that Rios asserts in an effort to dismiss the tenure charges.

Rios complains that when he was not the homeroom teacher, he did not have his own access to PowerTeacher. Rios admitted, however, that the fact that he did not have his own access code was because he was not the homeroom teacher; it had nothing to do with his status as an EWPS. Indeed, when he was the homeroom teacher for the first half of the school year at Oliver II, it was he and not the co-teacher who had access. There is no indication that his performance was improved during that time as a result of having access to PowerTeacher. Further, PowerTeacher is a tool used for keeping attendance and grades. That he had to input his grades when Velez was in the classroom at Abington School, while inconvenient, did not materially impact his ability to teach his classes. Further, neither the fact that he may have had to track student grades and progress on paper or in some other manner for his own reference, nor that he had to note attendance on paper when the homeroom teacher was absent, can be deemed to have created an obstacle to Rios providing effective teaching to his students. (Indeed, before computers, all teachers kept these records in grade books or other non-electronic means.) Significantly, Rios had access to a computer and to on-line materials, including curriculum, separate and apart from the PowerTeacher program. I am not persuaded that failure to have his own access code to PowerTeacher when working with

another teacher who was designated the homeroom teacher can be deemed arbitrary and capricious treatment or was otherwise set up to make him unsuccessful as a teacher.[30]

Rios also argues that he was constantly being called out of his classroom to provide coverage for absent teachers or for meetings and that he was required to proctor certain state mandated exams. Addressing the coverage issue first, the administrators who testified did not deny that Rios was asked to cover classes on occasion, either for a full day or for a period or two. All of the administrators, however, testified that this was not a frequent occurrence. Rios, on the other hand, suggests that he was out of his classroom performing coverage – and unable to teach his students – for a significant period every month. While he only kept track of coverages for a short time while at Abington School – and during that time, most of the coverages were for short periods during the day – he claims without any backup that the coverages were far more significant during subsequent periods. As is not unusual in such cases, the truth likely lies somewhere between the administrators' claim that he covered classes on only a handful of occasions and Rios' claim that it was constant.

The District's witnesses acknowledged that in any class with two licensed teachers, one of the teachers may be asked to cover for another teacher on a short-term basis – either to cover a particular class or for a full day if the school cannot find a substitute for the day. Mendez testified that any teacher with more than four prep periods a week can be asked to cover other classes during a prep period without additional compensation. If asked to cover a class during one of the four prep periods, the teacher is paid for the extra time.[31] There is no evidence that Rios ever sought payment for covering classes notwithstanding his claim that he was constantly asked to cover classes, including during prep periods. Moreover, while Rios complains about excessive requests for coverage, at no time did he file a grievance at either Abington School or Oliver II regarding these requests. Further, Rios had a certain number of periods where he was supporting the co-teacher, but not leading the math lesson, asking that

[30] See, *IMO Jones, Camden v. Tonya DeLaire, Board of Education of the City of Newark, Essex County*, Agency Docket No. 210-8/18 (Arbitrator Earl Pfeffer, August 29, 2019) (Respondent argued that her inability to access the GOLD system used for data collection and student assessment became a negative factor in her observations and evaluations. The arbitrator stated that notwithstanding these difficulties, "it remains that it was a requirement she maintain data on her students, track their development and differentiate her instruction, independent of her ability to utilize the GOLD system. Her obligation to record data and assess her student's progress was not tied to her ability to access GOLD. Those obligations existed apart from and even pre-dated the GOLD system, which was merely the tool she was expected to use in aid of that process." *Id.* at 75-76.)

[31] Rodriguez testified that when teaching the 6th and 7th graders at Oliver II, he had five prep periods.

he provide coverage during those periods would not impact his teaching math. While Rios claimed that he was often asked to cover classes even when he was supposed to be teaching math – and, in fact, was pulled out for coverage in the middle of teaching a math lesson -- this testimony is not credited. Indeed, while teaching with Velez at Abington School, Velez was teaching ELA when Rios taught math and could not simply take over his math class.[33]

In Oliver II, Rios does not claim that he was called upon to cover classes when he was teaching the sixth, seventh and eighth graders. Instead he claims that he was constantly called upon to cover classes when assigned as a co-teacher with Kadus. Once again, however, his testimony as to the number of days is not credited. Indeed, according to Rios, between January 2 and April 10, 2019, he was called upon to cover classes on 40 separate full school days and five times for meetings or preps; if this were true, it would represent well over 50 percent of school days during that time. This testimony was not supported by notes of any kind or the testimony of any of the other witnesses. Moreover, as with his testimony overall, this claim appears to be exaggerated. Indeed, his testimony regarding coverage appeared off-the-cuff, often qualified by "maybe," e.g. "maybe" five days, "maybe" more.

Kadus, his co-teacher, testified that he was asked to cover at least three times during the first couple of weeks he was in her classroom and then intermittently thereafter during a prep period; she could not recall how often he was called to cover other classes. She testified that he would still teach the math class, but if the coverage did impact the math period, she was always prepared to teach the math lesson to the students. Similarly, Coleman testified that Rios was asked to cover classes but she, too, did not know how often that occurred. She testified that Rios covered for her on three occasions for 30 minutes to an hour, and once for a full day (which was inconsistent with Rios' testimony as to his coverage for Coleman). I am persuaded that if Rios was called upon to cover classes with the frequency he claimed during that short time period, Kadus would have recalled that it was excessive, even if she did not recall the precise number of days. The same is true for Coleman, who was also serving as the Union representative for the school and whose classroom was near Rios' and Kadus' classroom.

[33] Rios did not call Velez as a witness to confirm his claim that he was constantly asked to cover classes while teaching with Velez requiring that Velez take over for his math lesson while she was teaching ELA.

As to time proctoring, it is undisputed that all teachers are called upon to proctor exams. The resources needed to be able to meet the requirements for state testing mandated that all licensed teachers who could be available for testing served as proctors. Mendez testified that depending on the school size, testing could take several weeks and that extensive planning is required for coverage based on the mandates for testifying. Those who teach ESL, co-teachers, resource teachers and others who have extra prep periods or are not attached to a classroom are often called upon to proctor exams; it is widely understood throughout the District and by the Union that this would occur. Heintz, who was responsible for testing at Abington School, testified consistently: any licensed teacher who could be available to proctor was called upon to do so. According to Heintz, this is the reality of testing in New Jersey. (1T 16-20 to 1T at 77.) Rios was not treated differently than other teachers as relates to proctoring. It is a difficult situation that all schools must address. That he was required to proctor exams cannot be deemed arbitrary and capricious treatment of Rios, as an LWPS or otherwise.

Rios also maintains that the District's actions were arbitrary and capricious because he was observed at Oliver II just 11 days after his reassignment to the first grade class. He claims that he was called to cover other classes on five of those dates and, therefore, had only a few days with the students before the observation.[1] Each of the cases Respondent cites in support of this claim are distinguishable. See, e.g., *IMO Tenure Charges of Jodi Thompson (State-Operated School District of the City of Newark)*, Agency Docket No.: 240-8/14 and 16-1/15 (Arbitrator Daniel Brent, June 19, 2015) (Held that tenure charges were improper, in part, where one of the observations occurred on the teacher's first day teaching a new subject to a new group of students upon returning from leave, undermining the validity of the 2013-2014 annual summative evaluation.); *IMO Tenure Charges of Rinita Williams (State-Operated School District of the City of Newark)*, Agency Docket No.: 241-8/14 (Arbitrator Tia Schneider Denenberg, January 31, 2015) (Finding that observation conducted on the day after a teacher returned from an extended leave was arbitrary.); *IMO Tenure Charges of Patsy Contrera (Passaic County Vocational School District)*, Agency Docket No. 223-8/15 (Arbitrator Martyce Gandel, November 27, 2015) (Finding observation arbitrary when

[1] Kadus testified that he was called to cover three times during those first weeks, not five.

conducted on the day after a teacher's return from an extended leave and when observations were conducted on back to back days.)

In this case, Rios was not observed on his first day back from a medical or other leave, nor on his first day of a new assignment. The observation took place 11 days after he arrived in Kadus' first grade class. Although in an email to Avraamides after the post observation conference he claimed that he was called to do coverages on three full days and two other days to cover meetings or preps, providing him eight days in the classroom with the students prior to the observation, when asked how many days he had with students prior to the observation, Rios testified "[i]t was maybe five days, but maybe I was calling to cover." (2/20/20 Tr. at 190.) Indeed, he provided this testimony after discussing the email, written closer in time, wherein he stated that he had eight days with the students prior to the observation, once again raising questions as to the overall credibility of Rios' testimony. Further, teaching first grade was not new to Rios; he taught first grade while at one of his prior assignments. He was also observed teaching in his area of specialization, i.e., math.

More importantly, however, while it was not necessary to conduct another announced formal observation as his prior observation was announced, Avraamides testified that she decided to conduct an announced observation precisely because of the recent move to first grade. By making it another announced observation, including a pre-observation conference, Rios would have time to prepare for the lesson. While Rios claims that he was not present to determine prior learning other than anchor charts in the room, by making it an announced lesson, he had the opportunity to review prior learning, either by review of student work, review of lesson plans and or conversations with Kadus, to be fully prepared for the lesson, that he did not do so cannot be grounds to invalidate the observation.

Significantly, although Rios claims he raised his concern that it was too soon to observe him in this assignment during the pre-observation conference, Avraamides testified that no such concern was raised. Rather, he completed the form and they discussed the lesson. I credit Avraamides' testimony. Indeed, in his January 25, 2019 email to Avraamides complaining about the observation (after he received his rating), Rios does not claim that he had raised this concern with Avraamides at the pre-observation conference. I am persuaded that if this concern had been raised before the observation, Rios would have referenced it in this email. Further, Rios claimed that although this was an announced observation,

Avraamides did not show up when planned; she observed a few days later (on an unknown date) when he was not prepared to be observed. Once again, I do not credit this testimony. If this had been the case, it is not credible that Rios would not have raised this issue in his email to Avraamides following the observation. Further, although Respondent had the opportunity to ask Avraamides whether she observed the lesson on the planned date, she was not asked this question. Indeed, nothing in her testimony or the evaluation suggested that the announced observation did not occur on the date planned or that it was not the lesson discussed during the pre-observation conference. To the contrary, the observation evaluation indicates that the lesson taught was the same as the lesson discussed at the pre-observation conference.

Rios also claims that the District treated him in an arbitrary and capricious manner as he was required to teach outside of his areas of certification and, citing *Pugliese v. State Operated School District of Newark*, 2018 N.J. Super. Unpub. LEXIS 1999, *22-23 (App. Div. 2018) asserts that this fact alone renders the tenure charges void on its face. The facts in *Pugliese*, however, are distinguishable. In that case, the teacher held an elementary school teacher certificate which did not authorize her to teach departmentalized social studies to middle school students. Nonetheless, she was evaluated and terminated for inefficiency in teaching social studies. The Court found that evaluating and terminating the teacher for inefficiency based on teaching in a subject matter that was outside her certification was improper.[4] In this case, however, contrary to Rios' claim that he had extensive assignments to teach outside his certification, Rios' primary assignment during these two school years was teaching math, in most cases in a bilingual education classroom. Moreover, he was observed only in his content area. The assertion that "it caused untold stress to Rios, who knew he could not teach so many different subjects, and was forced to spend inordinate time educating himself, to no avail" and taking time needed to be a successful math teacher, is not supported by the facts.

Significantly, Rios primary assignment in Abington was teaching math to a bilingual class; this was precisely in his area of certification. The administrators testified that Rios was not assigned to teach other subjects. While he may have assisted Velez in the classroom during ELA and System 44, he was not required to prepare for these subjects. Nor was he

[4] The tenure charges were found invalid on other grounds as well, not relevant to this case.

observed while in this role. That he may have covered for Velez when she was absent, teaching all subjects on those days, such short-term assignment was not his primary responsibility and was not unusual in a co-teaching situation. There is no evidence that Velez was absent on a substantial number of days. Nor is it clear that he was required to prepare the lesson plans for the other subjects on those dates. Rios did not establish that the time spent teaching the class when Velez was absent was so substantial that it could reasonably cause him to be unsuccessful in teaching his primary subject, math.

Similarly, in his first assignment at Oliver H, he taught a bilingual class both math and science. Avraamides testified that every math teacher in the District, except at the high school level, teaches either math and science or ELA and social studies. That is how the subjects are paired off. "No one has a special science cert. If you do, then you are in a different type of school with a different type of class that's strictly science." (2-12-20 Tr. at 107.) There was no evidence introduced to rebut this testimony. Indeed, this testimony is consistent with his prior assignment at William Horton School where he was assigned to teach math and science to seventh and eighth grade students.

While teaching science was an additional responsibility that was outside his certification, it is significant that he was not observed teaching science; he was always observed while teaching in his strength area, math. Further, the record is clear that he was provided with resources to facilitate teaching science. (See, e.g., District Exhibit 33.) In asking that Rios teach science to sixth, seventh and eighth grade students, Rios was not treated differently than other teachers in the District. The fact that it required additional preparation time is not a basis to find that the District acted in an arbitrary and capricious manner."

As to his assignment in the first grade classroom, once again Rios led math instruction for which he was certified and had prior experience. He was not required to prepare for any other subject. That he found it difficult to assist Kadus in small groups in System 44 or other ELA related subjects for first graders – areas for which he did not lead instruction or prepare the lessons and was not observed – cannot be cause to invalidate his evaluations which were

[1] Rios also claimed that for the first two weeks of his assignment at Oliver H, he was required to teach all subjects. A long term substitute was then located to teach ELA and social studies, with a permanent teacher hired thereafter. Rios was not required to teach all subjects for a substantial amount of time and was not evaluated during those first two weeks.

based on his math instruction, not his abilities in assisting Kadus with other subjects that she was responsible for teaching.

Rios also claims that he was not qualified to teach the subject matter in the various classes that he was asked to cover. He was not an art, music or gym teacher. He claims that often when he took his class to such special class, the teacher was absent and he was required to return to the classroom and remain with the class; he testified that he was unable to teach in the subject area planned for that period. This complaint does not establish that the District required that he teach in an area outside his certification or that he was treated any differently than other teachers. Indeed, Rios admitted that this happened to all teachers in the school; it was not just him. Moreover, Rios admitted that no one ever told him that he was required to teach music, art, gym or any other subject during these times. Finally, while I am persuaded that this situation did occur on occasion, I am not persuaded that it was a frequent occurrence. Indeed, Rios did not complain to anyone about this situation or seek compensation for covering a class during his prep period or otherwise file a grievance.

Rios also asserts that the District failed to understand and properly implement bilingual education, to have bilingual education administrators to evaluate bilingual education teachers and to provide the necessary resources which further contributed to the District's arbitrary and capricious conduct. As a preliminary matter, I note that this is not the appropriate forum to decide whether the District is in compliance with all statutory and regulatory requirements for bilingual education. To the extent, however, that the arguments raised apply to Rios' claims of arbitrary and capricious treatment, I will address them. As Respondent notes, a bilingual education program refers to instruction in two languages, English and the native language of the student. "According to the New Jersey legislature, 'experience has shown that public school classes in which instruction is given only in English are often inadequate for the education of children whose native tongue is another language' and therefore bilingual programs were established 'pursuant to the policy of the State to insure equal educational opportunity to every child.' N.J.S.A. 18A:35-15." (Respondent's Closing Brief at p. 6.) As Ruiz testified, while a teacher in a bilingual program uses both English and the native language (for Rios, Spanish) to teach, the goal is to provide a transition to learning in the English language.

Rios testified that while the District provided appropriate bilingual materials when he taught at the high school level, the District did not provide materials in both languages at the other grade levels requiring that he spend an inordinate amount of time translating materials for use in the classroom. Respondent claims that the District's failure to provide Rios with materials necessary to carry on instruction in two languages requiring this additional preparation time, as well as the distress caused by this failure, "perpetuated educational disadvantages that Rios is tasked with ameliorating as a bilingual instructor, but could not due to the failings of the District." (Respondent's Closing Brief at p. 81.) To support his claims, Rios cites an Office of Civil Rights and Department of Justice "Dear Colleagues" letter dated January 7, 2015 (the "Letter"), which is recognized as authoritative by the Department in its "Fall Checklist for New Bilingual ESL ELS Supervisors and Coordinators." (Respondent's Closing Brief at 6.) Although Rios selectively quoted part of a sentence in the Letter, under Staffing and Supporting EL Programs, the Letter provides, in part, as follows:

> School districts have an obligation to provide the personnel and resources necessary to effectively implement their chosen EL programs. This obligation includes having highly qualified teachers to provide language assistance services, trained administrators who can evaluate these teachers, and adequate and appropriate materials for the EL programs.
>
> At a minimum, every school district is responsible for ensuring that there is an adequate number of teachers to instruct EL students and that these teachers have mastered the skills necessary to effectively teach in the district's program for EL students.

(Letter at p. 14.) No testimony, case law or other authority was provided to provide guidance as to these provisions.

The District has followed the guidance provided in this Letter by establishing a bilingual education program and hiring bilingual educators to teach those programs. While the Letter indicates that appropriate materials must be provided for use in bilingual education classes, it does not provide that all materials used must be in both English and the native language in order to meet the requirements. Further, the Letter's language that Respondent relies upon does not indicate that a district fails to have appropriate materials for the program when it has a bilingual teacher, fluent in the native language, able to translate the instruction and materials, as appropriate, into the native language for the students.

Rios was not creating materials out of whole cloth; curricula materials were provided by the District and, in some instances, materials were provided in Spanish. (See e.g., District Exhibit 41, an email to Rios from Rodriguez regarding Math Online Resource in Spanish and District Exhibit 44, an email from Stavrou, the Oliver II math coach, to Rios providing a link to examples of Spanish math anchor charts for Rios' use.) In addition, this was not the first time Rios was teaching math and science to middle school grades. Neither the fact that his preparation as a bilingual teacher included translating some or all of the math (and at Oliver II sixth, seventh and eighth grade science) materials into Spanish to assure that the students were able to understand the materials and ultimately transition to more English instruction, nor that he spent significant time preparing his materials for class can be considered arbitrary and capricious treatment. Rather, as the District argues, "[c]reating lesson plans and preparing materials to teach his students is part of his job as a teacher." (District's Reply Brief at p. 11.) It is also worth noting that Rios was not the only bilingual education teacher at the lower grade levels. No evidence was presented to indicate that the alleged lack of bilingual materials was a problem for any other bilingual education teacher in the District or that Rios, or any other employee, filed a grievance or otherwise complained about the lack of material translated into the native language of their particular students.

With respect to Rios' argument that the District's actions were arbitrary and capricious because it did not have bilingual education administrators evaluate his performance, the language Rios relies upon in the Letter does not contain such requirement and no other authority has been cited that imposes such requirement. The Letter requires that districts have "trained administrators evaluate these teachers." All of the administrators who observed Rios teach in a bilingual class were fully trained to evaluate teachers in the District. Further, all of the administrators who observed Rios, with the exception of Heintz, were fluent Spanish speakers. While Heintz was not fluent, she testified that she grew up in a Spanish speaking area, her children are fluent Spanish speakers and that she understands enough Spanish to get the gist of what was being said. She is able to meet with parents who speak only Spanish, understanding what they say, although responding in English. As to the class she observed Rios teach, she testified that "[h]e was saying it in English and then saying it in Spanish" and that she was able to understand the bulk of what Rios said in class that day. Her observation evaluation of his teaching that day expressly noted that he spoke in both languages. On this

record, and without authority to support that only administrators certified in bilingual education and only administrators fluent in the native language can evaluate teachers in a bilingual classroom. I do not conclude that the observation by Heintz, must be disregarded as inconsistent with the requirements for bilingual education.

Finally, while relying on a particular sentence in the Letter, Respondent eliminated the reference to the obligation to have "highly qualified teachers" to provide language assistance services for bilingual education. In this case, the District, through the evaluation process, is endeavoring to assure that it does, in fact, have highly qualified teachers provide bilingual education. Having determined, over the course of two school years, that Rios is not an effective teacher under the Framework criteria, and having brought these inefficiency charges, the District endeavors to assure that its teachers, whether in bilingual education instruction or otherwise, are effective teachers throughout the District, consistent with TEACHNJ as well as the requirement set forth in the Letter for bilingual education.

For all of the foregoing reasons, Respondent's claim that the tenure charges should be dismissed because the District acted in an arbitrary and capricious manner is rejected.

*****

In conclusion, the District has met its burden of establishing that the statutory criteria for tenure charges have been met. For the reasons set forth above, to the extent that there was any deviation in the evaluation process as outlined in paragraphs 61 to 64 of *N.J.S.A.* 18A:6-17.2, I do not find that the deviation materially affected the outcome of the evaluations. Accordingly, pursuant to TEACHNJ, I am required to render a decision in favor of the District and to dismiss the employee.

By reason of the foregoing, I issue the following:

AWARD

The Tenure Charges brought against the Respondent, Gustavo Rios, based on inefficiency as a tenured teacher are sustained. Rios shall be dismissed as a teacher for the District.

Dated: August 14, 2020

Melissa H. Biren

State of New Jersey)

County of Morris)

On this 14th day of August 2020 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Notary Public

Robert D Agree
Notary Public
New Jersey
My Commission Expires February 8, 2023
No. 2429835

188-20

New Jersey Commissioner of Education

Final Decision

R.P. on behalf of minor children, V.P.,

Petitioner,

v.

Board of Education of the Hunterdon Central Regional High School District, Hunterdon, County,

Respondent.

Synopsis

Petitioner appealed the respondent Board's determination that his daughter, V.P., was not legally entitled to a free public education in the Hunterdon Central Regional High School District (District) during the 2018-19 and 2019-20 school years. Petitioner argued that he had made good faith efforts to establish a domicile within the District's resident area, but that several attempts to buy or lease a house in the school district had all fallen through. The Board sought tuition reimbursement for the period of V.P's ineligible attendance. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:38-1(a), public schools are free to any person over five and under twenty years of age who is domiciled within the school district; petitioner has the burden of proof by a preponderance of the evidence to prove that he is domiciled in the school district. *N.J.S.A.* 18A:38-1(b)(2); the record reflects petitioner's intent to reside within the District's area of attendance, yet it is clear that – to date – the family has never actually lived there; instead, at all relevant times, the family has resided in an extended stay hotel in Branchburg, outside of the District's area of attendance. The ALJ concluded that petitioner failed to sustain his burden of proof to show that V.P. was entitled to a free public education in the District during the 2018-19 and 2019-20 school years. Accordingly, the ALJ ordered tuition reimbursement in the amount of $26,699.85, plus $112.49 for each day beyond December 16, 2019 that V.P. remained enrolled in the District.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and – finding petitioner's exceptions to be unpersuasive – adopted the Initial Decision of the OAL as the final decision in this matter. The petitioner was ordered to reimburse the District for tuition costs in the amount of $26,688.85, plus $112.49 per day for each day beyond December 16, 2019 that V.P. remained enrolled in the District. 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.

188-20

OAL Dkt. No. EDU 12353-19
Agency Dkt. No. 63-3/19

New Jersey Commissioner of Education

Final Decision

R.P., on behalf of minor child, V.P.,

Petitioner,

v.

Board of Education of the Hunterdon Central Regional High School District, Hunterdon, County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, petitioner is challenging the Board's determination that his minor child was ineligible to attend school in the Hunterdon Central Regional High School District (District). The Administrative Law Judge (ALJ) found that petitioner did not meet his burden of demonstrating that he was a resident of the District's attendance area during the 2018-19 and 2019-20 school years. Despite several attempts by petitioner to move into the District, his family has never lived within the District's attendance area. Accordingly, the ALJ ordered tuition reimbursement in the amount of $26,699.85, plus $112.49 for each day beyond December 16, 2019 that the minor child remained enrolled in the District.

In his exceptions, petitioner argues that *N.J.A.C.* 6A:22-6.3(b) permits the Board or Commissioner to make an equitable determination with respect to tuition and the ALJ failed to address why equity does not apply to petitioner's circumstances. According to petitioner, he was in "constant contact" with the school about setbacks regarding his intended move into the attendance area – specifically, that agreements to lease or buy three homes fell through – and he should therefore not have to pay tuition. (Petitioner's Exceptions at 5). Petitioner also contends that the ALJ overlooked the fact that the Board failed to inform him that the District was a choice school. Petitioner maintains that the Board has an affirmative duty to guide students with respect to applying to the choice program, and if it had done so, V.P. could have been enrolled in the District as a choice student. Pursuant to *N.J.A.C.* 18A:36B-21b and *N.J.A.C.* 6A:12-1.2(c), districts who participate in the choice program cannot also enroll students on a tuition basis. As such, petitioner argues that the Board is legally prohibited from requesting tuition in this case. Petitioner distinguishes this matter from *T.F., on behalf of minor child, T.N. v. Board of Education of the City of Ocean City, Cape May County*, EDU 10336-16, Initial Decision (March 16, 2017), *adopted*, Commissioner's Decision No. 122-17, decided April 28, 2017, which was cited by the ALJ. Petitioner explains that the facts here are different from *T.F.*, in which the petitioner was assessed tuition after being rejected from the choice program, only to then enroll her daughter in the district using a false address. Finally, petitioner claims that the ALJ erred in refusing to permit oral argument in this matter. Accordingly, petitioner requests that the Initial Decision and any assessment of tuition be rejected.

In reply, the Board argues that petitioner's unfortunate trouble securing housing within the District is not an equitable consideration. Additionally, the Board contends that petitioner is not entitled to automatically be enrolled as a choice student; there is an established

application and selection process with a fixed number of seats, and petitioner has not submitted an application. Finally, contrary to petitioner's arguments, the Board maintains that it is not operating a tuition program in violation of *N.J.A.C.* 18A:36B-21b and *N.J.A.C.* 6A:12-1.2(c), but rather is asserting its right to seek an assessment of tuition under *N.J.A.C.* 18A:38-1b based on V.P.'s ineligible attendance. Accordingly, the Board urges the Commissioner to adopt the Initial Decision, including the assessment of tuition.

Upon review, the Commissioner concurs with the ALJ's finding that petitioner failed to sustain his burden of establishing that he was domiciled in the District's attendance area during the 2018-19 and 2019-20 school years as it is established that he never resided within the District. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the period during which the minor child was ineligible to attend school in the District. Therefore, the Board is entitled to tuition reimbursement in the amount of $26,688.85 ($19,377 for the entire 2018-19 school year and $7,311.85 for the first 65 days of the 2019-20 school year) plus $112.49 per day for each day beyond December 16, 2019 that the minor child remains enrolled in the District.

The Commissioner does not find petitioner's exceptions to be persuasive. While it seems that petitioner intended to move into the District's attendance area and suffered several frustrating setbacks in his attempts to purchase or rent a home, he never lived within the District. The fact that petitioner kept the Board informed of his efforts does not entitle him to a free public education in the District's schools. Additionally, the Board was not required to enroll V.P. in the choice program, as there is an application and selection process. Furthermore, while a district's

participation in the choice program prohibits it from simultaneously running a tuition program, it is not prohibited from seeking tuition reimbursement from students who are ineligibly enrolled in the district. There is no evidence here that the Board was admitting students on a tuition basis; it simply assessed tuition for the period of V.P.'s ineligible attendance, in accordance with *N.J.S.A.* 18A:38-1b. Petitioner's attempt to distinguish the facts of *T.F., supra,* falls flat. The ALJ cited the case to demonstrate that the Commissioner has previously assessed tuition in a choice district, so the specific facts of the case are irrelevant. Finally, according to *N.J.A.C.* 1:1-12.2(d), written motions – as the parties filed here – shall be decided on the papers unless oral argument is directed by the judge. As such, it was within the ALJ's discretion to decide the written motion without oral argument.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $26,688.85, plus $112.49 per day for each day beyond December 16, 2019 that the minor child remains enrolled in the District, for tuition costs incurred during the period in which V.P. was ineligible to attend school in the Hunterdon Central Regional High School District. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 27, 2020
Date of Mailing: August 31, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 12353-19
AGENCY DKT. NO. 63-3/19

R.P., on behalf of minor child, V.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,
Respondent.

Steven D. Farsiou, Esq., for petitioner (Trinity & Farsiou, LLC, attorneys)

Alicia D'Anella, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record closed: July 13, 2020 Decided: July 13, 2020

BEFORE **JOSEPH ASCIONE,** ALJ:

BEFORE **JOSEPH ASCIONE,** ALJ:

STATEMENT OF THE CASE

Petitioner, R.P., challenges the residency determination made by the Hunterdon Central Regional High School District Board of Education ("Board") about his minor daughter, V.P. On April 15, 2019, respondent submitted an Answer, which was filed with the Commissioner of Education on the same day. Respondent's demand included a request that the Commissioner find V.P. ineligible to attend Hunterdon Central Regional High School District ("District" or "HCRHS") and that the petitioner be assessed a tuition charge for each day of V.P.'s ineligible attendance in the Board's schools for the 2018-2019 school year and for any future school years pending the completion or withdrawal of the appeal. The matter was transmitted to the Office of Administrative Law where it was filed as a contested case on April 17, 2019. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to -13. An undiscovered error delayed docketing of the matter until September 9, 2019.

Respondent filed a Motion for Summary Decision on December 16, 2019. Petitioner filed Opposition to the Motion and a Cross-Motion for Summary Decision on January 3, 2020. Respondent filed a Brief in Support of its Motion for Summary Decision and in Opposition to Petitioner's Motion for Summary Decision on January 13, 2020.

FACTUAL DISCUSSION

Petitioner, R.P., is the father of V.P. Prior to the 2018-2019 school year, V.P. attended public school in Metuchen, New Jersey. Petitioner and his family determined to relocate to Raritan Township with the intention of having V.P. attend HCRHS.

On or about June 4, 2018, Petitioner signed a lease agreement for a property located on Altamont Drive in Flemington, New Jersey, which is within District's attendance area. Thereafter, on or about July 24, 2018, Petitioner submitted to District an enrollment application on behalf of V.P. In support of V.P.'s application for enrollment, R.P. submitted a copy of the lease agreement for the Altamont property. At that time, District issued to R.P. a written "Notice of Defect in Application – Potential Ineligibility." The document notified R.P. that, although V.P. was being accepted for enrollment on a

preliminary basis, he was required to submit additional proofs of his residency at the Altamont property by August 24, 2018.

Petitioner never moved into the Altamont property, as the lease fell through when the property owner apparently signed two contracts for the same property. Over a period of months, Petitioner made various other attempts to obtain housing within the District's attendance area, but these attempts were similarly unsuccessful.

No additional proofs of residency within the District's attendance area were submitted and, on this basis, respondent determined V.P. was ineligible to attend school in the District. Respondent asserts that on February 5, 2019, Petitioner was hand-delivered a letter notifying him of the determination of ineligibility and Petitioner's opportunity to appear before the Board of Education on February 25, 2019. Petitioner failed to appear before the Board of Education on February 25 and an email was sent to Petitioner on February 26 advising that V.P. was deemed ineligible to attend Hunterdon Central Regional High School because V.P. did not live in-district. Petitioner alleges that he did not receive the email until March 21, 2019. Petitioner filed an appeal on March 22, 2019.

At all relevant times, Petitioner has lived at an extended-stay hotel located in Branchburg, which is outside of the District's attendance area. As of the close of the record on this motion, Petitioner has yet to relocate to a home within the District's attendance area.[1]

The District's daily tuition rate for the 2018-2019 school year was $107.65 per day. The District's daily tuition rate for the 2019-2020 school year is $112.49 per day. The District participates in the Interdistrict Public School Choice Program.

LEGAL DISCUSSION

[1] Petitioner certifies that the family has entered into a contract to build a new home that is within the District's attendance area. However, it is undisputed that closing has not yet occurred and the family has not yet moved into the property.

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

Whether V.P. is entitled to attend the District schools as a domiciliary

In the present matter, R.P. does not dispute that, to date, his family has never lived within District's attendance area. Thus, there are no genuine issues of material fact. The question is whether the Board is entitled to summary decision as a matter of law.

Public schools shall be free to students over five and under 20 years of age if they are domiciled within the school district. N.J.S.A. 18A:38-1(a). However, a district board of education may order the transfer or removal of a child from school if the board of education has determined that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district. N.J.S.A. 18A:38-1(b)(2). To that end, "[i]f the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled

within the district . . . , the superintendent or administrative principal may apply to the board of education for the removal of the child." N.J.S.A. 18A:38-1(b)(2). The parents may contest a local school board's decision regarding the student's right to attend school in the district to the Commissioner of Education and "shall have the burden of proof by a preponderance of the evidence" to prove domicile in the school district. N.J.S.A. 18A:38-1(b)(2).

If an appeal is filed, and the petitioner fails to sustain the burden of demonstrating the student's right to attend the school district, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance prior to the appeal's filing and including the 21-day period to file an appeal. N.J.A.C. 6A:22-6.2(a). Such tuition assessment "shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. The individual student's record of daily attendance shall not impact on such calculation." N.J.A.C. 6A:22-6.3(a). However, "[n]othing in this chapter shall preclude an equitable determination, by the district board of education or the Commissioner, that, when the circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." N.J.A.C.6A:22-6.3(b).

A child's domicile is normally that of his or her parents. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999). A person's domicile continues until superseded by a new domicile. Id. at 377.

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; 2) whether the subject had an intention to make his home there permanently or at least indefinitely; and 3) whether the subject had an intention to abandon his old domicile. Unanue, 255 N.J. Super at 376 (citations omitted). Thus, although a person's intent with respect to domicile is very important, it is not alone sufficient. Rather, a concurrence of physical presence and an intention to make that place one's home is required. Ibid.

Here, the record reflects a strong intention to reside within District's area of attendance. Petitioner certifies that he has made three earnest (albeit unsuccessful) attempts to establish such residency and that he is scheduled to close on a newly constructed home imminently. However, the record is equally clear that, to date, the family has never actually lived in District's area of attendance. As such, Petitioner's intention to do so is irrelevant. The family has never established an actual and physical abode in the District's attendance area. Thus, they lacked the necessary concurrence of physical presence and intention to establish domicile there.

Petitioner has failed to sustain the burden of demonstrating that V.P. was entitled to a free public education in Hunterdon Central Regional High School District as a domiciliary for the 2018-2019 and 2019-2020 school years. Thus, the Board is entitled to summary decision in its favor on this issue.

Whether HCRHSD's counterclaim for tuition is incompatible with its participation in the Interdistrict Public School Choice Program

Petitioner argues that, by virtue of its participation in the Interdistrict Public School Choice Program ("Choice Program"), HCRHSD is precluded from seeking tuition for the period of V.P.'s ineligible attendance. For support, Petitioner relies on N.J.S.A. 18A:36B-21b and N.J.A.C. 6A:12-1.2(c), which prohibit choice districts from utilizing a tuition program pursuant to N.J.S.A. 18A:38-3. Petitioner's reliance is misplaced.

Generally, local boards of education may admit otherwise eligible non-resident students on a tuition basis. N.J.S.A. 18A:38-3. However, districts that have applied and been accepted into the Choice Program are statutorily precluded from doing so. N.J.S.A. 18A:36B-21b. The applicable regulations make clear that a choice district "may not maintain at the same time both a tuition program pursuant to N.J.S.A. 18A:38-3 and a choice program..."

Here, there is nothing in the record to suggest that HCRHSD admitted V.P. as a non-resident student on a tuition basis. Rather, HCRHSD enrolled V.P. as a presumed domiciliary based upon the information that petitioner provided on the enrollment application, which indicated that he resided at an address within the HCRHSD attendance area. The instant request for tuition arises out of the later determination that petitioner was never in fact a domiciliary and V.P. was, therefore, ineligible to attend HCRHSD's schools. Recovery of tuition under these circumstances is specifically permitted under N.J.S.A. 18A:38-1(b)(1) and N.J.A.C. 6A:22-6.2. And, there is nothing in the statutory or regulatory framework to support Petitioner's contention that HCRHSD is prohibited from recovering tuition in accordance with those provisions because of its participation in the Choice Program. Moreover, the Commissioner has previously assessed tuition for ineligible attendance in choice districts. See e.g., T.F. o/b/o minor child, T.N. v. Bd. of Educ. of the City of Ocean City, EDU 10336-16, Initial Decision, (March 16, 2017), adopted, Comm'r (April 28, 2017) <http://lawlibrary.rutgers.edu/oal/search.html >

Calculation of Tuition

When the evidence does not support the claim of domicile, N.J.S.A. 18A:38-1(b)(1) provides that tuition shall be assessed "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The regulations clarify that the tuition assessed covers the period during which the hearing and decision on appeal were

pending, and for up to one year of a student's ineligible attendance prior to the appeal's filing and including the 21-day period to file an appeal. N.J.A.C. 6A:22-6.2(a).

Here, the record supports a finding that V.P. has never been eligible to attend the schools of HCRHSD. Thus, tuition should be assessed for the entire period of V.P.'s attendance. It is undisputed that V.P. has been enrolled and attending Hunterdon Central Regional High School since the 2018-2019 school year commenced. The District's daily tuition rate for the 2018-2019 school year was $107.65 per day, for a total of $19,377. The District's daily tuition rate for the 2019-2020 school year is $112.49 per day. As of the filing of the instant motion, 65 school days had elapsed, for a total of $7,311.85.

Tuition is assessed in the amount of $26,688.85, subject to increase at the rate of $112.49 per school day of V.P.'s continued attendance.

CONCLUSION

I **CONCLUDE** that there is no genuine issue of material fact and that the Board is entitled to summary decision as a matter of law.

I **CONCLUDE** that the Board properly found V.P. ineligible to attend the schools of the district and that the Board is entitled to tuition reimbursement at the applicable rate for the period of V.P.'s ineligible attendance during the 2018–2019 and 2019–2020 school years.

Finally, I **CONCLUDE** that, given the imminent closing on a home within the District's attendance area and the fact that there is no other cause for removal, V.P. should be allowed to finish out the 2019-2020 school year in District, with payment of tuition as indicated above.

DECISION AND ORDER

Based upon the conclusions stated above that V.P. was not a domiciliary of the District, I hereby **ORDER** that respondent's motion for summary decision is **GRANTED**, and petitioner's appeal is **DISMISSED**.

IT IS FURTHER ORDERED, the District is due from petitioner the amount of $26,688.85 for tuition for the 2018/2019 school year and the 2019/2020 school year through December 16, 2019; and the per diem sum of $112.49 from December 16, 2019, to the date domicile in the district is established.

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

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

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

July 13, 2020
DATE

JOSEPH ASCIONE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

189-20

OAL Dkt. No. EDU 09958-19
Agency Dkt. No. 120-5/19

New Jersey Commissioner of Education

Final Decision

M.P., on behalf of minor child, A.S.,

Petitioner,

v.

Board of Education of the Somerset Hills Regional School District, Somerset County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled June 22, 2020 OAL hearing, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 28, 2020
Date of Mailing: August 31, 2020

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

190-20

New Jersey Commissioner of Education

Final Decision

Raymond Vella,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent, New Jersey Department of Education, Office of Student Protection (OSP), that he is permanently disqualified from employment in New Jersey public schools. Petitioner was disqualified as the result of information revealed during a criminal history background check pursuant to *N.J.S.A.* 18A-6.7.1. Respondent filed a motion to dismiss the petition.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner's criminal history background check revealed that in 2008, in connection with his work as a contractor, petitioner was convicted of several separate acts of Federal crimes, including five counts of mail fraud, one count of making a corrupt payment, Theft or Bribery Concerning Programs Receiving Federal Funds and obtaining property by fraud involving Federal Funds; petitioner was sentenced to thirty-nine months and ordered to pay $82,705 in restitution; petitioner did not dispute any of his federal convictions, but argued that those crimes were not "substantially equivalent" to any New Jersey crime of the second degree, which would be disqualifying. The ALJ concluded, *inter alia*, that: USC Section 666 (a) (2) (A) and *N.J.S.A.* 2C:27-2 are statutes seeking to punish the bribing of public officials and obtaining rewards in return for payments or other consideration and are substantially equivalent to each other; the controlling statute here, *N.J.S.A.* 18A:6-7.1, mandates permanent disqualification and does not provide any leniency or discretion in regard to its application. Accordingly, the ALJ granted the OSP's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

190-20

OAL Dkt. No. EDU 03040-20
Agency Dkt. No. 29-2/20

New Jersey Commissioner of Education

Final Decision

Raymond Vella,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

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

Upon review, the Commissioner concurs with the ALJ that petitioner is permanently disqualified from employment in any educational institution under the supervision of the Department of Education. The Commissioner agrees with the ALJ's conclusion that the federal crimes of which petitioner was convicted are substantially similar to New Jersey crimes of the second degree, which makes his disqualification mandatory pursuant to *N.J.S.A.* 18A:6-7.1.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 28, 2020
Date of Mailing: August 31, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 03040-20

AGENCY DKT. NO. 29-2/20

RAYMOND VELLA,

Petitioner,

v.

NJ DEPARTMENT OF EDUCATION

OFFICE OF STUDENT PROTECTION,

Respondent.

Bianca P. Pereiras, Esq. for petitioner

Sydney Finklestein, Deputy Attorney General, for Respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorneys)

Record Closed: May 4, 2020 Decided: July 20, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Raymond Vella (Vella or petitioner) challenges an administrative determination, by letter dated November 18, 2019, by the New Jersey Department of Education Office of Student Protection (respondent) which disqualified him from "serving in any

position, paid or unpaid, with an educational institution under the supervision of the Department of Education or with a contracted service provided under contract with said school or educational facility." On February 1, 2020, Vella filed an appeal with the Commissioner of Education. The appeal was transmitted to the Office of Administrative Law (OAL) by the respondent, where it was filed on March 2, 2020, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Respondent filed a motion for Summary Decision seeking a dismissal, with a brief and Exhibits, in lieu of filing an Answer. Petitioner filed a brief and exhibits in opposition to the motion on March 13, 2020.

I convened a pre-hearing conference of May 4, 2020, at which time counsel for petitioner and respondent both agreed that no further briefing or oral argument was requested or necessary and that the motion was ripe for decision.

MOTION UNDER CONSIDERATION

Respondent moves for summary disposition from the appeal of the respondent's determination to disqualify petitioner from holding any position, paid or unpaid, or to contract with the Department of Education on the basis of the disqualifying criminal convictions on his record that was revealed in a background check.

FACTUAL DISCUSSION

Based upon the papers submitted, by both sides all of the relevant facts are uncontested, and accordingly I **FIND** the following to be undisputed facts.

1. Petitioner was a contractor in and around Elizabeth, New Jersey. He performed contract work with the Linden Neighborhood Preservation Program (LNPP/ Program), which received federal funds through the United States Department of Housing and Urban Development (HUD).

2. As a contractor for the LNPP, petitioner made bids for certain work and if selected, he was contracted to rehabilitate work on homes for individuals who qualified for the LNPP.

3. During the time he was a contractor for the LNPP, the petitioner, to induce procurement of contracts with him, made illegal payments to the head of the Program.

4. In 2008, as a result of these illegal payments, the petitioner was convicted of several Federal crimes, including five counts of mail fraud, one count of making a corrupt payment, Theft or Bribery Concerning Programs Receiving Federal Funds and obtaining property by fraud involving Federal Funds. He was sentenced to thirty-nine months. As a part of the petitioner's online application he was required to proceed through a series of questions and screens that each required imprisonment and ordered to pay $82,705 in restitution. After prison, the petitioner was put on supervisory release.

5. In 2019, the petitioner underwent a criminal background check as part of seeking employment with the Elizabeth, NJ school district. On November 18, 2019, the Office of Student Protection (OSP) for the NJ Department of Education (DOE) wrote the Petitioner a letter advising him that, as a result of his criminal convictions, he was "permanently disqualified" from serving in any position paid or unpaid "with any educational institution under the DOE's supervision," or "with a contracted service provider under contract" of such educational facilities." Petitioner completed the online application without the acknowledgment that he had been convicted of the aforesaid robbery offense.

ANALYSIS AND CONCLUSIONS OF LAW

If there is no genuine issue as to any material fact, a moving party is entitled to prevail on a motion for summary disposition as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public

resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Id.

In the present matter, the respondent seeks a Summary Dismissal of petitioner's case because the criminal background check revealed "disqualifying offenses." N.J.S.A. 18A:6-7.1 (d). A disqualifying offense is any conviction under the laws of the State of NJ or "under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense." The person who has been convicted of any crime of the first or second degree is "permanently disqualified form employment or service under the act." Respondent argues that Petitioner's convictions for the eight separate acts of federal crimes are substantially similar to two different second-degree crimes in the State of NJ. Specifically, Respondent believes petitioner's conviction for offering a corrupt payment (a violation of 18 U.S.C. Section 666 (a) (2) (a)), is substantially similar to N.J.S.A. 2C:27-2, Bribery in Official and Political Matters, a crime of the second degree. Further, petitioner pled guilty to two counts of obtaining property by fraud involving federal funds, in violation of 18 U.S.C. Section 666 (a) (1) (A). Respondent argues that crime is substantially equivalent to N.J.S.A. 2C:20-9 which grades a certain type of theft as a crime of the second degree. Under the New Jersey statute, the person who commits an act of purposefully obtaining or retaining property upon agreement or subject to a known legal obligation to make a specified payment or disposition is "guilty of theft if he deals with the property obtained as his own and fails to make the required payment or disposition."

Petitioner does not dispute any of the aforesaid facts. He does not argue that there were procedural defects or inaccuracy in the criminal background check. He does not dispute the DOE's authority to require such background checks nor even their authority to bar employment pursuant to the authorizing legislation, N.J.S.A. 18A:6-7.2, N.J.S.A. 18A:6-4.13 of N.J.S.A. 18A:12-1.2. Nor, as mentioned, does he dispute any of the convictions for federal crimes. He argues that those crimes, however, were not "substantially equivalent" to any New Jersey crime of the second degree.

Respondent finds a distinction between the conviction for offering a corrupt payment, the federal offense, and Bribery in Official and Political matters, the New Jersey offense. He argues that under the New Jersey offense he would have to have been found guilty of acting "purposefully.". He cites the Jury Charge for N.J.S.A. 27-2, page 2. Under the Federal Crime the language of the statute does not characterize the guilty person's actions as requiring them to be purposeful. He further argues the respondent would have no basis for characterizing the Petitioner's actions as purposeful. Thus, he argues, the two offenses can't be substantially equivalent. Further, he argues that he was "forced" to make the illegal payments to the public official who was running the Program as he "demanded" the corrupt payment in return for rewarding a contract.

I cannot agree with this creative analysis. Under the New Jersey crime the "person is guilty of bribery if he directly or indirectly offers confers or agrees to confer on another or solicits, accepts or agrees to accept from another any benefit as consideration for the performance of official duties." N.J.S.A. 2C:27-2 (d). The federal conviction to which respondent pled guilty characterizes one as guilty of theft or bribery concerning receiving federal funds when they "corruptly give , offer or agree to give anything of value to any person with intent to influence or reward an agent of an organization of a state local or individual tribal government or any agency thereof, in connection with any business..." Both offenses make illegal bribing or offering to bribe officials or agreeing to make corrupt payments in order to obtain a reward or benefit from the performance of official duties to whom the payment is offered or made.

Other than the fact that the offenses facially appear the same and to have the same intent, to wit, punishing those who make or offer corrupt payments or to induce a corrupt act by public officials and thus are substantially equivalent, there are other fatal flaws in petitioner's arguments. One, he cites the NJ Jury charge as the basis for distinction of the two crimes, but does not cite the Federal jury charge, which indeed may use the term "purposeful" or a substantially similar term. If one is going to argue the Jury charge trumps the actual wording of the statute when weighing whether the State crime is not substantially equivalent to the federal crime, it would seem incumbent

to analyze and cite the Federal Jury Charge to distinguish the crimes. The New Jersey Statute does not use the word purposeful, and neither does the Federal statute, so it is incumbent to compare apples to apples to analyze anything beyond the precise wording of the applicable two statutes. Two, as stated by petitioner, the applicable NJ crime, under the jury charge, would require a "jury would have to find" that the defendant acted purposefully. However, here the defendant pled guilty to the offense. Under the applicable statute, the offenses themselves have to be substantially equivalent. If one upholds petitioner's arguments, one could never accept, where conviction was by pleas of guilty, two statutes as being substantially equivalent without going into on unintended, unnecessary, time consuming and torturous process of determining what a jury could have found under the evidence that was never actually proffered, because the defendant pled guilty. In essence, it would negate the ability to find acts as being substantially equivalent if the conviction was obtained, as the vast majority of all of them are by guilty pleas. Finally, it is not necessary under the federal statute to use the word purposeful in order for the two offenses to be substantially equivalent. If we focus, as we should on the elements of the crime, the respondent would have us believe that you can be guilty of the offense of providing corrupt payments and bribing public officials without having the purpose to do so, i.e. he bribed a public official by mistake or accident! In fact, respondent actually argues he was "required" to pay the corrupt official his bribe money in order to get the contract. That is the essence, it would seem, or bribing public officials. It doesn't matter whose idea it was, the official demanding it, or the one who agrees to give the bribe. In fact, to pose such an argument gives one pause to believe the respondent has learned anything, so far, from his punishment.

I mention without much elaboration, that respondent's claim that one has to compare the sentencing under the respondent's federal crimes to the sentencing he would have received under the applicable New Jersey offenses is without merit. Such a comparison would require imprecise speculation. He argues that his actual sentence was the result of the "relatively minor nature" of his offense which led the sentencing judge to issue a sentence "akin" to one being sentenced for third degree offenses is also highly speculative and without merit. In fact, 39 months' imprisonment would appear to be a harsh penalty for a New Jersey third-degree offense which permits as

little as no imprisonment and a maximum of five years. And in this instance, imprisonment of thirty-nine months would in any event, be a lawful sentence under many NJ second degree crimes as in some cases, defendants plead guilty to 2nd degree crimes, but by plea bargain get sentenced as if convicted of a third-degree offense. It is common knowledge that the State does not admit that a crime is any less heinous because one pled guilty to it rather than was found guilty of it. It simply gives in appropriate cases lesser sentences to those who plead guilty by sparing the State the trouble of ensuring a conviction by trial or by cooperating on other matters (such as insuring the conviction of codefendants).

There is no question that the USC Section 666 (a) (2) (A) and N.J.S.A. 2C:27-2 are statutes seeking to punish bribing public officials and obtaining rewards in return for payments or other consideration are substantially equivalent to each other. No evidence has been presented to the contrary and I must find as a matter of law that the lifetime prohibition on employment and contracting with DOE's institutions as the substantially equivalent New Jersey offense is a crime of the 2nd degree is therefore justified. I make no determination on Respondent's additional argument that the other two federal offenses cited pertaining to obtaining federal funds by fraud are substantially similar to N.J.S.A. 2C:20-9. The lifetime prohibition imposed by the DOE requires the conviction of only one commission of a New Jersey second degree crime or a substantially equivalent United States or other state offense to sustain the prohibition,

Accordingly, I **CONCLUDE** as a matter of undisputed fact and law that the decision of the agency must be upheld.

ORDER

For the reasons set forth above, the motion for summary disposition filed by the respondent, New Jersey Department of Education is hereby **GRANTED** and that the petitioner's demand for relief be **DISMISSED.**

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

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

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

Ernest M. Bongiovanni

July 20, 2020
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 7/20/20

Mailed to Parties: 7/20/20

id

APPENDIX

List of Moving Papers

For Petitioner:

Petitioner's certification, exhibits and brief in Opposition to Respondent's motion for Summary Decision, dated March 9, 2020 and received March 13, 2020

For Respondent:

Brief in lieu of Answer in support of Respondent's Motion for Summary Decision dated February 25, 2020

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

KEVIN DEHMER
Interim Commissioner

August 31, 2020

Maryann Moretti
12 Meadow Ridge Lane
Lafayette, NJ 07932

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
115 West Century Road, Suite 100
Paramus, NJ 07652

Re: *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, Agency Dkt. No. 94-5/20.*

Dear Parties:

I have reviewed the materials filed in connection with petitioner's Motion to Reopen pursuant to *N.J.A.C.* 1:1-18.5. Petitioner argues that she was not afforded a hearing or oral argument to present evidence in response to the Motion to Dismiss filed by the Lafayette Board of Education. Petitioner further argues that the Administrative Law Judge (ALJ) disregarded the arguments in her written opposition to the Motion to Dismiss.

Petitioner points to no statute or regulation requiring an ALJ to hold a hearing or oral argument prior to ruling on a Motion to Dismiss. To the contrary, *N.J.A.C.* 1:1-12.3, setting forth procedures when oral argument is directed, clearly contemplates that oral argument may not be directed for every motion. Furthermore, the ALJ has wide latitude to determine the proceedings of a case, including declaring hearing dates unnecessary, pursuant to *N.J.A.C.* 1:1-14.6.

Regarding petitioner's argument that the ALJ disregarded her written opposition to the Motion to Dismiss, disagreement with the outcome of the Initial Decision does not warrant reopening the matter. The appropriate mechanism to argue that the Initial Decision was incorrectly decided is in exceptions to the Initial Decision.

Accordingly, the Motion to Reopen is DENIED.

Sincerely,

Kevin Dehmer
Interim Commissioner

191-20L Corrected

192-20E

OAL Dkt. No. EDU 06947-20
Agency Dkt. No. 166-8/20

New Jersey Commissioner of Education

Order on Emergent Relief

Ralph Johnson,

Petitioner,

v.

Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

The record of this emergent matter, the sound recording of the proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, petitioner, a former member of the respondent Board, seeks emergent relief to challenge his removal from his position on the Board of Education. *N.J.S.A.* 18A:12-3 provides that "any member who fails to attend three consecutive meetings of the board without good cause may be removed by it." It is undisputed that petitioner failed to attend meetings on March 12, April 30, and May 14, 2020. Petitioner alleges that he attended the meeting on April 9, 2020 in part, thereby not missing three consecutive meetings, while the Board contends that the law is unsettled regarding partial attendance.[1] Petitioner also contends that the technological issues he experienced connecting to the remote April 9, 2020 Board meeting constituted good cause for his partial attendance, and his essential employment during the COVID-19 pandemic was good cause for his remaining absences. The ALJ granted emergent relief to petitioner and ordered that petitioner be reinstated to his position on the Board.

[1] The April 9, 2020 Board meeting was conducted virtually due to the COVID-19 pandemic. Petitioner contends that due to poor cellular service at the correctional facility where he works as an essential employee, he was unable to connect to the meeting via Zoom. He called the Director of Administrative Services, who placed him on speaker phone, but the connection was lost after 13 minutes.

Upon such review, the Commissioner concurs with the ALJ that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, granting petitioner's application for emergent relief, is adopted for the reasons expressed by the ALJ. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure. During the pendency of this matter, petitioner shall be reinstated to his position on the Board.

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 4, 2020
Date of Mailing: September 4, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 06947-20
AGENCY DKT. NO. 166-8/20

RALPH JOHNSON,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

Brett M. Pugach, Esq., for petitioner (Bromberg Law LLC, attorneys)

Howard B. Mankoff, Esq., for respondent (Marshall, Dennehey, Warner, Coleman & Goggin, LLP, attorneys)

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

Petitioner Ralph Johnson (petitioner or Johnson), a former member of the Piscataway Township Board of Education (Board or respondent), challenges his removal from the Board and seeks an order pending a final decision from the Commissioner of Education (Commissioner): (1) staying the enforcement of respondent's resolution passed on July 9, 2020, which removed petitioner from the Board for allegedly missing

three consecutive Board meetings without good cause; (2) granting emergent relief enjoining and restraining the Board from taking any steps to fill the vacancy caused by petitioner's removal and from proceeding with an election to fill the remainder of the unexpired term at the November 3, 2020, election; and/or (3) determining this matter in an expedited manner and issuing a scheduling order to ensure that the Commissioner's final decision can be issued prior to September 14, 2020, which is the deadline for preparation of official general election ballots for printing.

PROCEDURAL HISTORY

On August 3, 2020, Johnson filed with the Commissioner, New Jersey State Department of Education, Bureau of Controversies and Disputes, a petition of appeal and notice of motion for stay and emergent relief and for expedited review, alleging that the Board's action of July 9, 2020, to remove him as a member of the Board was void *ab initio* and its determination that Johnson's absences were without good cause was arbitrary, capricious and unreasonable and induced by improper motive. Johnson seeks an order nullifying the Board's action of July 9, 2020, and restoring him to membership on the Board, awarding him reasonable attorney fees and costs and such other relief as the Commissioner deems appropriate.

On August 5, 2020, the Commissioner transmitted the petition and motion for emergent relief to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13; N.J.A.C. 1:1-8.2. Argument on the matter was held on August 11, 2020.

FACTUAL DISCUSSION AND FINDINGS

Based upon a review of the documents from the parties, the facts in this case are not disputed. Johnson was first elected to the Board on November 5, 2013, for a three-year term and was re-elected for two additional terms serving a total of seven years until 2020. (Petition of Appeal, ¶ 2-4.) During his tenure, Johnson has attended 85% of all Board meetings. (Id. at ¶ 6.) Johnson is employed as a Lieutenant by the Essex County Department of Correctional Police where he is assigned as a Shift Commander. (Id. at ¶ 7.) Prior to March, 2020, when assigned to work shifts that coincided with Board

meetings, which are typically held on Thursday evenings, Johnson has used personal time, vacation days, compensatory time and swapped shifts with his partner through a reciprocal program in order to attend the Board meetings. (Id. at ¶ 9.)

On March 9, 2020, the Governor of New Jersey, through Executive Order 103, declared a public health emergency and state of emergency in New Jersey. (Id. at Exh. B.) On March 16, 2020, Governor Murphy issued Executive Order 104 which ordered all public, private and parochial elementary and secondary schools closed. (Id. at Exh. D.) As a result, the Board transitioned to its first video teleconference meeting on April 9, 2020. (Id. at ¶ 16.) Johnson was assigned to work on April 9, 2020, but he used his break time to participate in the Board meeting. (Id. at ¶ 16.) He had to use his personal cell phone because the correctional facility does not have wifi and the cellular service is unreliable. (Id.) After several unsuccessful attempts to dial into the meeting using the Zoom dial-in number on his cell phone, he was able to connect into the meeting by contacting the Director of Administrative Services who used her cell phone to place Johnson on speaker phone which enabled him to participate in the meeting. (Id.) However, after thirteen minutes, the connection was lost, and Johnson was unable to subsequently reconnect into the meeting despite repeated attempts. (Id.)

The minutes from the April 9, 2020, Board meeting reflect that Johnson was present at the meeting, arriving at 5:55 p.m., exiting at 6:08 p.m. and the meeting adjourned at 7:02 p.m. (Id. at ¶ 17; Exh. E.) The April 9, 2020, minutes of the Business Meeting and Executive Session showing Johnson's attendance were unanimously approved by the Board without revision on April 30, 2020. (Id. at Exh. F.) At the following Board meeting held on April 30, 2020, three Board members also experienced connection challenges calling into the meeting and were marked present. (Id. at ¶ 21; Exh. F.)

It is undisputed that Johnson missed the March 12, 2020, in-person Board meeting, and video conference meetings via Zoom on April 30, 2020, and May 14, 2020, due to his work schedule. (Id. at ¶ 15-22.) Johnson's absences were attributable to the changes in his work schedule which was altered by the COVID-19 pandemic and state of emergency requiring him to work additional hours to cover for employees who tested positive for the virus and had to be quarantined. (Id. at 15-22; 34.) As a correctional

police lieutenant, Johnson was on call as an essential worker who had to report to work. (Respondent's letter brief; Transcript of July 9, 2020 meeting, p. 50a, lines 5-8.) Johnson notified the Superintendent and Board President of his absences for the April 30 and May 14, 2020, meetings. (Id. at ¶ 21,22; Respondent's Letter Brief, Exh. 5a, 6a, 7a.)

Johnson's request for a shift change was granted, effective May 16, 2020, and he has attended all Board meetings until his removal on July 9, 2020. (Id. at ¶ 23-25.)

The Board voted six in favor and three opposed to remove Johnson on July 9, 2020. (Id. at ¶ 30.) Johnson's removal creates a vacancy of over two years left on his term of office. (Id. at ¶ 37.)

Board meetings start with a one-hour executive session which is private and allows the Board to discuss confidential matters followed by the public portion of the meetings which includes presentations by staff and students, public discussion of issues as appropriate under the Open Public Meetings Act, N.J.S.A. 10:4-8 *et seq.*, and formal voting on the Board agenda. (Certification of Shelia Hobson, p. 2.) Accordingly, at the April 9, 2020, meeting, Johnson was present for only a portion of the executive session and did not vote on any public matters. (Id. at 3.)

LEGAL ANALYSIS AND CONCLUSION

Emergent Relief

The regulations governing controversies and disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education . . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, a petitioner must show that he/she satisfies each of the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b) (citing Crowe v. DeGioia, 90 N.J. 126 (1982)).]

Thus, the purpose of emergent relief is "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, 90 N.J. at 132 (citing Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)).

Irreparable Harm

Johnson has demonstrated that he will suffer irreparable harm if the requested relief is not granted, because "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," Crowe, 90 N.J. at 132–33. In addition, the irreparable harm standard contemplates that the harm be substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). Here, Johnson persuasively argues, and the Board does not dispute, "[n]o monetary award can adequately address [his] rights in this matter or protect the public interest and as such temporary restraints should issue." (Petitioner's Memorandum of Law in Support of Motion for Emergent Relief, at 8.) "If the vacancy remains in place, candidates who have already submitted petitions for nomination for the unexpired term will be included in a ballot draw (on August 10, 2020) to determine the order that candidate names will appear on a ballot for an election that should not even take place." Id.

Moreover, "the subsequent election of another candidate to replace [Johnson] could potentially moot the ability of the Commissioner or a Court to grant reinstatement. See, Esteves v. Bd. of Ed. of the Town of Kearny, OAL Docket No. EDU 13424-15, 2016 N.J. AGEN LEXIS 101, *11-13 (March 7, 2016)." Id. at 9.

Right to Claim is Settled

Next, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J. Eq. 299, 304–05 (E & A 1878)). Here, however, the law regarding removal from membership on a board of education is settled by N.J.S.A. 18A:12-3, which provides in relevant part:

> . . . any member who fails to attend three consecutive meetings of the board without good cause may be removed by it.
>
> [Ibid.]

The Board asserts that Johnson's thirteen-minute presence at the April 9, 2020, Board meeting did not constitute attendance and thus he failed to attend three consecutive meetings having missed the March 12, April 9, April 30, and May 14, 2020, meetings which violates the above-referenced statute. Petitioner counters that the interruption of his attendance at the April 9 meeting was the result of technical difficulties beyond his control; difficulties that three fellow Board members similarly experienced at a subsequent meeting. He did not choose to leave the meeting early. (Petitioner's post-hearing reply letter brief, at 3.)

A review of the Board minutes for the April 9, 2020, meeting show that Johnson was marked present and these minutes were approved unanimously at the following meeting. The minutes do not reveal that any Board member challenged Johnson's attendance at the prior meeting. Petitioner persuasively states: "That Johnson was unable to remain for the entire duration of the meeting due to a connectivity issue, in light of April 9, 2020, being the first meeting where the new teleconferencing format of the

Board was adopted in the wake of the COVID pandemic . . . does not in any way negate the fact that he attended the meeting." Id. at 11. Neither statute, case law nor Board policy dictate that attendance for thirteen minutes is insufficient to qualify as attendance at a Board meeting. Importantly, an "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960) (citations omitted).

The Board offers no rational basis for its determination that thirteen minutes does not qualify as attendance at a Board meeting, especially under the circumstances presented here where absent the technical difficulties, Johnson would have remained on the call. Indeed, following the Board's logic would render the statute as a "gotcha" law wherein a Board member can be removed for committing a violation without being advised of the conditions which will warrant their removal (i.e. that attending a Board meeting for thirteen minutes constitutes a violation of the attendance statute). This "fits the very definition of arbitrary and capricious action" and is an untenable position. (Petitioner's post-hearing reply letter brief, at 3.)

Moreover, Johnson contends that even if he missed three consecutive meetings, there was "good cause." Johnson relies upon Commissioner's and court decisions that address this issue. First, in Golaine v. Cardinale, 142 N.J. Super. 385 (Law Division, 1976), *aff'd* 163 N.J. Super. 453 (App. Div. 1978), the plaintiff, a member of the planning board, was removed because he had to take an eleven-month leave of absence because of a job reassignment overseas. He notified the board of his absence and offered to resign or take a leave of absence with the intent to return. The planning board granted him a six-month leave of absence. Plaintiff requested an extension; however, the newly elected mayor advised plaintiff that he would be removed for neglect of duty unless he resigned. Plaintiff refused to resign and was removed by the planning board.

The court entered judgment for the plaintiff ordering him reinstated to the planning board finding that his absences did not constitute actionable neglect of duty.[1] The court

[1] The relevant removal statute, N.J.S.A. 40:55-1.4, requires a showing of neglect of duty.

was persuaded that the notice provided by plaintiff was sufficient and adequately conveyed his intention to return to his duties. He also had more than a year and a half of his term remaining. In addition, the court reasoned that unpaid voluntary service by members of the community "is a burden whose undertaking should be encouraged, at least by the insistence upon fair dealing by the community to those who have undertaken that burden. In that light, the circumstances hardly warrant the stigma and opprobrium of a removal for neglect of duty." Id. at 400. However, the court cautioned that "prolonged, continuous absence for whatever reason" could constitute grounds for removal. Id.

The statute in question in Golaine, 142 N.J. Super. 385 (Law Division, 1976), *aff'd* 163 N.J. Super. 453 (App. Div. 1978) applied to the removal of planning board members, however, the court addressed the "good cause" standard required under N.J.S.A. 18A:12-3 which is instructive. The court stated: "'[g]ood cause' in that as yet unconstrued legislation clearly means, in the particular circumstances obtaining, without a 'reasonable excuse' as that term is generally understood as a matter of plain common sense." Id. at 398.

Petitioner also relies upon the Commissioner's decision in Daniel Esteves v. Bd. of Ed. of Town of Kearny, (citation omitted) wherein petitioner was removed from the board of education for failure to attend three consecutive meetings without good cause. Esteves was a police officer assigned to work the night shift which conflicted with the board meetings. He missed approximately sixteen meetings in 2014 and 2015. He argued that his work schedule was good cause for missing the meetings. The board defended on grounds that it had the discretion to determine good cause. The commissioner relied upon the general definition of "cause" as stated in Golaine, (citation omitted) which requires "substantial cause touching qualifications appropriate to the office or employment or to its administration." Id. at 396 quoting Berardi v. Rutter, 42 N.J. Super. 39, 27 (App. Div. 1956), *aff'd sub nom.* In re Berardi, 23 N.J. 485 (1957). In addition, [i]t also necessarily implies such degree of misconduct or culpability on the part of the office holder as clearly implicates the public interest in precluding his continuance in that particular office." Esteves, 2016 N.J. AGEN LEXIS at *9-10, quoting Golaine, 142 N.J. Super. at 396. The commissioner concluded there must be an act of "misfeasance or nonfeasance," and must be, "an element of fault." Id. at *11. However, the commissioner

conceded that based upon the holding in Golaine, (citation omitted) "'the misfeasance or nonfeasance' of not attending the [b]oard meetings cannot be based on behavior that he can be faulted with – he was on-duty when the meetings were held." Id. at *12.

Applying this standard to the facts, the commissioner ruled that the petitioner did not sustain its burden of proof that the board's decision was improper. The commissioner distinguished the facts in Golaine (citation omitted) finding that Esteves' term was due to expire at the end of the year, "a replacement [b]oard member was elected in November 2015, and it is not clear whether the petitioner will be able to return to office given his work schedule." Id. at *12. The commissioner also stated . . . "the [b]oard could have concluded that his numerous absences were inimical to its interests." Id.

The Board conversely asserts that there is no decisional law that defines whether "good cause" applies to each absence or the series of absences and thus, the law in this regard is unsettled and emergent relief cannot succeed. (Respondent's post-hearing reply letter brief, at 2.) The Board relies upon the commissioner's decision in Wesley Smith v. Bd. of Ed. of the Twp of Hazlet, EDU 53-99; 1999 N.J. AGEN LEXIS 1370 (March 8, 1999) in which the commissioner reversed the administrative law judge's order granting emergent relief. The commissioner was not persuaded that the law underlying the petitioner's legal claim was settled but instead determined that there was no case law which "resolves the question of whether 'good cause' is required for each individual board member absence or for the period of absence." Id. at *7.

However, the decision in Golaine, 142 N.J. Super. 385 (Law Division, 1976), *aff'd* 163 N.J. Super. 453 (App. Div. 1978) does specifically articulate a definition of "good cause" that is applicable to the relevant statute in this case, namely N.J.S.A. 18A:12-3. As stated above, this definition provides:

> 'Good cause' in that as yet unconstrued legislation clearly means, in the particular circumstances obtaining, without a 'reasonable excuse' as that term is generally understood as a matter of plain common sense.

Id. at 398.

Applying this definition to the present controversy requires a finding that based upon the particular circumstances, Johnson had a "'reasonable excuse' as that term is generally understood as a matter of plain common sense" for not being present for the entire Board meeting on July 9, 2020. And the "circumstances here hardly warrant the stigma and opprobrium of a removal" for failure to attend a meeting where the failure was due to technical difficulties experienced at the Board's first Zoom meeting during a global pandemic. Id. at 400.

Moreover, the commissioner's decision to sustain the board's removal of Esteves is distinguishable to the facts herein in that the commissioner underscores the uncertainty of Esteves' ability to return to office in light of his work schedule and the expiration of his term by 2015 and an elected replacement board member. Esteves, 2016 N.J. AGEN LEXIS at *12. The petitioner herein has changed his schedule to accommodate the Board meetings and has attended every Board meeting until his removal. In addition, Johnson has more than two years left on his term and currently his seat remains vacant. Thus, the Board's decision to remove him appears arbitrary, without rational basis or induced by improper motive.

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)). This typically "'involves a prediction of the probable outcome of the case' based on each party's initial proofs, usually limited to documents." Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)). However, emergent relief "should not issue where all material facts are controverted." Crowe, 90 N.J. at 133 (citing Citizens Coach, supra, 29 N.J. Eq. at 305–06). Here, the material facts are not controverted. Johnson failed to attend the March 12, April 30 and May 14 meetings because of his work schedule which was altered by the Governor's state of emergency declaration that required Johnson to work more hours because of the impact of COVID-19 on his unit. However, he did attend the April 9 meeting but was cut off after thirteen minutes because of technical challenges. He

made numerous attempts to reconnect but to no avail. At the following Board meeting, three other Board members had similar technical difficulties. The decision in Golaine, and Esteves support Johnson's likelihood to prevail on the merits.

Balancing of the Equities

The fourth and final emergent relief standard involves "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)). It is a balancing of the equities and the interests of the parties. Here, the Board asserts that it will suffer greater harm because it will be prohibited from voting on important issues concerning District governance if all Board members are not present. (Respondent's Post-hearing letter brief, at 9.) The Board also submits that Johnson's failure to attend meetings constitutes a failure to fulfill his duties as a Board member. Id. The Board also takes issue with Johnson calling into the Board meetings from a prison stating there are "serious, legitimate concerns surrounding privacy and distraction." Id. at 10.

The evidence, however, reveals that Johnson has attended 85% of the Board meetings during his tenure. He had trouble attending several meetings during an unprecedented global pandemic and state of emergency which required that he work longer hours without breaks. He communicated his inability to attend the meetings with the Superintendent and copied the Board President.[2] In addition, he requested a shift change which was granted and since the change, has attended all Board meetings until his removal in July. The Board failed to demonstrate that it was unable to conduct its business as a result of Johnson's truncated attendance on July 9, 2020, or that there was any confidentiality breach.

Johnson has more than two years left on his term and thus his removal undermines the will of the public who elected him and unduly smears his reputation. In addition, Johnson points out if his unexpired term is filled at the upcoming November election, it is

[2] During oral argument, counsel for the Board conceded there was no Board policy mandating a Board member contact the Board President to report an absence.

unlikely any remedy can be afforded to him. (Petitioner's Memorandum of Law at 9, citing Esteves, 2016 N.J. AGEN LEXIS 101, *13.) All these factors support that Johnson will suffer greater harm than the Board if relief is not granted.

Conclusion

Based on the foregoing, the motion for emergent relief is granted.

ORDER

I **ORDER** that the motion for emergent relief is **GRANTED**. Petitioner is ordered reinstated as a member of the Board.

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

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 days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 20, 2020
DATE

Kim C. Belin
KIM C. BELIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/vj

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Petition, Memorandum of Law, and Post-hearing Letter Brief

For respondent:

Answer, and Post-hearing Letter Brief

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

KEVIN DEHMER
Interim Commissioner

200-20L

September 11, 2020

Andrew Jennings
711 Laurel Street
Boonton, NJ 07005

James L. Plosia, Jr., Esq.
Plosia Cohen LLC
Chester Woods Complex
385 Route 24, Suite 3G
Chester, NJ 07930

Re: *A.J., on behalf of minor child, J.J. v. Board of Education of the Town of Boonton, Morris County, Agency Dkt. No. 158-7/19.*

Dear Parties:

I have reviewed the materials filed in connection with petitioner's Motion for Reconsideration of the Commissioner's July 10, 2020 decision, affirming the decision of the Boonton Board of Education that petitioner's minor child committed an act of harassment, intimidation, and bullying (HIB).

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

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

Upon review and consideration of the submissions, I find that petitioner has failed to satisfy the factors set forth in *N.J.A.C.* 6A:3-1.15(b)(2). Petitioner's motion is based on arguments already made by petitioner during the proceedings before the Office of Administrative Law and in his exceptions, which were duly considered by the Commissioner. It is clear that petitioner's disagreement is with the outcome of the decision, which is not a sufficient basis for the decision to be reconsidered. Petitioner also argues that counsel for the Board engaged in misconduct by providing information from an unrelated case. This information was not considered in issuing the decision and, therefore, is not a sufficient basis for reconsideration of the decision. Accordingly, the Motion for Reconsideration is hereby DENIED.[1]

Petitioner also asks the Commissioner to clarify whether "third-party bullying" can be supported by the statute. The Commissioner's July 10, 2020 decision in this matter is based on the facts at issue in this particular case, which demonstrate that the Board was not arbitrary, capricious, or unreasonable in determining that petitioner's minor child committed an act of HIB under the statute. The Commissioner notes that HIB cases are fact-sensitive and the Commissioner evaluates these issues on a case-by-case basis.

Accordingly, the petitioner's Motion for Consideration is hereby denied.

Sincerely,

Kevin Dehmer
Interim Commissioner

KD/JKH/JS

VIA EMAIL ONLY

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

201-20

OAL Dkt. No. EDU 11438-19
Agency Dkt. No. 167-7/19

New Jersey Commissioner of Education

Final Decision

D.W., on behalf of minor child, S.D.,

Petitioner,

v.

Board of Education of the Bridgewater-Raritan 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 and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the ALJ that petitioner's claim is moot because the suspension imposed by the Board on S.D. has been expunged. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 11, 2020
Date of Mailing: September 11, 2020

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING MOTION TO DISMISS

D.W. ON BEHALF OF MINOR CHILD, S.D.,
Petitioner,
v.
BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, SOMERSET COUNTY,
Respondents.

OAL DKT. NO. EDU 11438-2019
AGENCY DKT. NO. 167-7/19

Moshood Muftau, Esq., for petitioner

Nicholas Celso ,III, Esq., for respondent (Busch Law Group, LLC, attorneys)

Record Closed: July 24, 2020 Decided: July 29, 2020

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE

Petitioner D.W. filed this petition on behalf of her minor child S.D., a student who attended schools within the within the purview of Respondent, the Bridgewater-Raritan School District Board of Education (Board), in April 2019. The petition was filed challenging the suspension of S.D. imposed by the Board for a ten day period on April 3, 2019.

PROCEDURAL HISTORY

Petitioner appealed the decision of the Board and the matter was transmitted by the New Jersey Department of Education, Office of Controversies and Disputes as a contested case on August 8, 2019.

During prehearing conferences held with the parties, a hearing was scheduled for April 27, 2020 and April 28, 2020. These dates were subsequently adjourned due to COVID-19 issues. On June 11, 2020 respondent filed a Notice of Motion to Dismiss with Prejudice, averring that the subject matter of the appeal (that being the ten day suspension of S.D. of April 3, 2019) was expunged by action of the Board on June 9, 2020.

Respondent Bridgewater-Raritan School District Board of Education filed a Motion for Dismissal of the petition on June 11, 2020.[1]

Subsequent to this action by the Board, a telephone conference in this matter was held on June 22, 2020. Counsel for the Board provided to the Court a copy of a of the resolution expunging the suspension made at the Board's meeting of June 9, 2020. Counsel for petitioner was queried on why the petition had not been withdrawn, considering the subject of the appeal no longer existed. Petitioner's counsel stated that his client did not wish to withdraw her appeal, notwithstanding that she understood that the underlying issue on which the appeal was based was now moot.

Counsel for respondent stated to the Court that as his filing was made on June 11, 2020, and that no response was received by petitioner's counsel, that petitioner's counsel was foreclosed from any filing due to time bar of N.J.A.C. §1:1-12.2. The Court provided petitioner's counsel with an additional ten day period should he wish to make a filing.

No filing from petitioner's counsel was received.

FACTUAL DISCUSSION AND FINDINGS

On April 1, 2019 S.D. was alleged to be under the influence of drugs while in school. On April 3, 2019 the school suspended S.D. for ten days. A manifestation hearing was held and the District upheld the suspension.

On June 9, 2020 the Board expunged the suspension of S.D. as evidenced by the Board Resolution signed on June 10, 2020.

---

[1] Due to technical issues, this filing was not received by the Court until June 23, 2020.

LEGAL ANALYSIS AND CONCLUSIONS

Respondent's counsel lists as a cause of action for their motion the fact that the Board expunged the suspension at its meeting of June 9, 2020. That fact was not challenged by petitioner's counsel. Nor did petitioner's counsel challenge that fact that the issue is now moot.

The Court will not entertain a case where a controversy no longer exists and the issues in dispute have become moot. DeVesa v. Dorsey, 134 N.J. 420, 428 (1993). The case is moot where the original issue presented has been resolved. Ibid. Likewise, an issue is moot when the decision sought and the matter can have no practical effect on the existing controversy. Greenfield v. N.J. Dep't of Corr., 382 and. J. Super. 254, 257 – 58; Commissioner of Education, E. G., Price v. Bd. of Educ. of Washington Twp., OAL Dkt. No. EDU 6121-07, Initial Decision (December 7, 2007), adopted Comm'r, (January 23, 2008, https://njlaw.rutgers.edu/collections/oal/html/initial/edu06121-07_1.html).

In light of this information I **FIND** that any claims petitioner might have against the Bridgewater-Raritan School District that are subject to the jurisdiction of the Commissioner of Education are moot as the suspension of student S.D. has been expunged. Further, any other decision that the Court might render following a plenary hearing would have no practical effect on the outcome. I **CONCLUDE** therefore that petitioner's appeal must and should be **DISMISSED.**

Therefore, I **CONCLUDE** that petitioner's claim against the Bridgewater-Raritan School District should be **DISMISSED.**

The petition warrants dismissal on the count that the underlying issue on which the appeal is based has been expunged by Respondent Board. The claim must be dismissed considering this fact.

For the reasons stated herein, I **FIND** that the petition filed by petitioner does not comply with the appropriate rules and administrative guidelines as the underlying suspension no longer exists in the record of student S.D. Therefore, I **CONCLUDE** that petitioner's claim should be **DISMISSED.**

ORDER

Based upon all of the foregoing, it is hereby **ORDERED** that the petition in this matter be and hereby is **DISMISSED**.

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

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

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

July 29, 2020
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: July 29, 2020

Date Mailed to Parties: July 29, 2020 (emailed)

CVB/nd

APPENDIX

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Petitioner's letter to the Commissioner of Education (undated)

R-2 Board Resolution adopted June 9, 2020, dated June 10, 2020

202-20

OAL Dkt. No. EDU 00613-20
Agency Dkt. No. 325-12/19

New Jersey Commissioner of Education

Final Decision

Jenny Gonzalez,

Petitioner,

v.

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

Respondent.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 11, 2020
Date of Mailing: September 11, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 00613-20
AGENCY DKT. NO. 325-12/19

JENNY GONZALEZ,
Petitioner,
v.
UNION CITY BOARD OF EDUCATION,
Respondent.

Jenny Gonzalez, petitioner, pro se

Susanne Lavelle, Esq., for respondent

Record Closed: July 17, 2020 Decided: July 30, 2020

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 14, 2020. The parties were advised that a prehearing telephone conference was scheduled for February 12, 2020. Petitioner did not participate in the scheduled prehearing telephone conference and did not call the OAL to explain why she was unable to do so. A hearing was subsequently scheduled for July 17, 2020.

On or around May 20, 2020, respondent filed a Motion to Compel Discovery, or in the Alternative to Dismiss the Appeal. By letter dated May 28, 2020, I informed petitioner that she had until June 10, 2020 to file an opposition to the Motion to Compel. Petitioner never filed an opposition to the Motion, and on June 16, 2020, I granted the respondent's Motion to Compel Discovery, and ordered that petitioner respond to interrogatories and respond to the Request for Admissions by June 26, 2020. The Order also authorized respondent to file a Motion to Dismiss should petitioner not provide the requested discovery by June 26, 2020. On June 29, 2020, respondent filed a Notice of Motion to Dismiss the Petition of Appeal on the basis that petitioner had not complied with the June 16, 2020 Order compelling discovery. Counsel for respondent certified that neither interrogatory answers nor responses to Requests for Admissions were provided to respondent, and no prior correspondence had been returned to respondent's counsel as undelivered/undeliverable. Finally, petitioner did not present for the July 17, 2020 hearing.

Petitioner never called or forwarded a letter to the OAL explaining her failure to appear for the prehearing conference or the hearing, nor her failure to respond to the Motion to Compel or the Motion to Dismiss the Petition. Accordingly, I **CONCLUDE** that petitioner has abandoned her appeal, and that dismissal is therefore appropriate.

ORDER

It is hereby **ORDERED** that this appeal be **DISMISSED**.

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

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

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

July 30, 2020
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: July 30, 2020

Date Mailed to Parties: August 6, 2020

jb

204-20

OAL Dkt. No. EDU 09636-19
Agency Dkt. No. 118-5/19

New Jersey Commissioner of Education

Final Decision

K.G. and K.G., on behalf of minor child, S.S.,

Petitioners,

v.

Board of Education of the Township of West Orange, Essex County,

Respondent.

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

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

IT IS SO ORDERED.



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2020
Date of Mailing: September 21, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09636-19
AGENCY DOCKET NO. 118-5/19

K.G. & K.G. ON BEHALF OF MINOR CHILD S.S.,

Petitioners,

v.

WEST ORANGE BOARD OF EDUCATION

Respondents.

Elizabeth Athos, Esq. appearing on behalf of petitioners

Frances L. Febres, Esq., appearing on behalf of respondent (Cleary Giacobbe Alfieri Jacobs, LLC)

Record Closed: July 24, 2020 Decided: July 29, 2020

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 18, 2019, 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. Telephone prehearings were conducted on August 7, 2019 and September 12, 2019 wherein hearing dates were scheduled. A status conference was

scheduled for July 30, 2020. Prior to that date, respondent's counsel submitted a Global Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

July 29, 2020

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: July 29, 2020

Date Mailed to Parties: July 29, 2020

ljb

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

FRANCES L. FEBRES, Partner
ffebres@cgajlaw.com

Reply to: Oakland Office

July 16, 2020

VIA Regular Mail & Email (Latoya.Bryant@oal.nj.gov)
Honorable Kimberly Moss, A.L.J.
State of New Jersey, Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: K.G. and K.G. o/b/o S.S. v. Twp. Of West Orange, BOE, Essex County
OAL Docket Number: EDU 09636-2019N
Agency Reference Number: 118-5/19

Dear Judge Moss:

Regarding the above-referenced matter, please be reminded that this firm is counsel to the West Orange Board of Education (the "Board") and represents it in the above-referenced matter. There currently is a status conference scheduled before your Honor for July 30, 2020 at 3:00 p.m.

I am pleased to notify you that the parties have reached a settlement in this matter. Enclosed please find a copy of the fully executed settlement agreement for your review and approval should it meet with same.

I thank Your Honor for your courtesies in this matter.

Respectfully submitted,

Frances L. Febres, Esq.
FLF/kfs

C: Dr. J. Scott Cascone, Superintendent of Schools (by e-mail)
Elizabeth Athos, Esq. (by e-mail)

CLEARY, GIACOBBE, ALFIERI & JACOBS, LLC
Attorneys at Law
169 Ramapo Valley Road
Upper Level - Suite 105
Oakland, New Jersey 07436
(973)845-6700
Frances L. Febres, Esq. (ID No. 018542012)
Attorneys for Respondent

K.G. and K.G. on behalf of minor child, S.S., Petitioners, vs. WEST ORANGE BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 09636-19 AGENCY REF. NO. 118-5/19
K.G. Individually and o/b/o her minor child, Student 1, Petitioners, vs. WEST ORANGE BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY DEPARTMENT OF LAW DIVISION OF CIVIL RIGHTS DCR DOCKET NO.: PG22WE-67277 **GLOBAL SETTLEMENT AGREEMENT**

This Agreement is entered into by and between the Board of Education of the Township of West Orange, Essex County (the "Board"), and Kateaya Green ("K.G."), individually and on behalf of her child, Sanayah Stewart ("S.S.") and S.S. individually (K.G. and S.S. are collectively referred to as the "Claimants"), and supersedes and replaces any and all prior agreements between the Board and the Claimants.

WHEREAS, S.S. was a student of the Board enrolled in the West Orange School District ("District") until her graduation in June 2020; and

WHEREAS, S.S. turned 18 on September 19, 2019; and

WHEREAS, Claimants had reported certain prior incidents to the District, which were alleged to constitute harassment, intimidation or bullying ("HIB") against S.S. as that term is defined by N.J.S.A. 18A:37-14; and

WHEREAS, Claimants appealed the Board's decision concerning HIB Investigation 050-004 to the New Jersey Commissioner of Education, OAL DOCKET NO. EDU 09636-19, and the New Jersey Division on Civil Rights, DCR Docket No.: PG22WE-67277; and

WHEREAS, a dispute exists regarding HIB Investigation No. 050-004, which was conducted during the 2018-2019 school year, including the Board's February 28, 2019 affirmance thereof; and

WHEREAS, a dispute exists regarding whether S.S. was subject to a hostile educational environment at West Orange High School in violation of the New Jersey Law Against Discrimination; and

WHEREAS, without waiving their respective positions and without admissions by either party, the Board and the Claimants desire to resolve all outstanding issues between them amicably and without the need for further litigation;

WHEREAS, the West Orange Board of Education and the Claimants have reached a settlement agreement that the Board has determined is in the best interest of the parties; and

NOW, THEREFORE, in consideration of the foregoing, the Board and the Claimants stipulate and agree as follows:

1. The West Orange Board of Education shall pay Claimants Nine Thousand Six Hundred Dollars ($9,600.00) conditioned upon the following:

a. Within thirty (30) days following the New Jersey Commissioner of Education's final decision approving the Global Settlement Agreement and (a) originally-executed Stipulations of Dismissal with Prejudice in the forms attached hereto as Exhibit A and Exhibit B (the "Stipulations"), (b) S.S.' date of birth, current address and social security number, and (c) an Internal Revenue Service ("IRS") Form W-9 from Claimants' counsel, then the Board's insurance carrier, Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation, shall cause to be issued a settlement check in the amount of Nine Thousand Six Hundred Dollars ($9,600.00), the "Settlement Sum") payable to "Education Law Center Trust Account on behalf of Sanayah Stewart" (otherwise referred to as "Claimants and their counsel") and shall cause the check to be mailed to Claimants and their counsel. Claimants shall be solely responsible for the payment of all taxes related to the Settlement Sum and shall indemnify and hold harmless the Board, including the Board's officers, employees, agents, representatives and insurers including Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation, for any amounts found due and owing to any tax authorities for any tax liabilities for which Claimants may be or are found liable.

b. Any payment made in accordance with Paragraph 1 shall be reported to the IRS using Form 1099.

c. K.G. expressly agrees that the Settlement Sum shall be payable to the payee identified in Paragraph 1a and that no additional monies are due to her.

2. In exchange for and consideration of the Board's payment of $9,600.00, Claimants, agree to waive and release all rights and claims that they may have and may hold against the Board, including the Board's officers, employees, agents, representatives and insurers including Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation ("Releasees"), under the Anti-Bullying Bill of Rights Act ("ABR"), N.J.S.A. 18A:37-13 et seq., New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 et seq., the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, N.J.S.A. 18A:46-1 et seq., N.J.A.C. 6A:14-1.1 et seq., or any other statute, regulation, or other legal authority relating to the education and/or public accommodation of students with disabilities, relative to the claims they may have regarding S.S.'s enrollment in the West Orange School District. This Release of Claims also includes, but is not limited to Claimants' asserted claims and requests for relief, attorney's fees and legal costs set forth in their Complaint filed with the New Jersey Division on Civil Rights, in the action captioned: K.G., individually and on behalf of minor child Student 1 v. West Orange Board of Education, DCR Docket No.: PG22WE-67277, the release of claims in any and all actions before the New Jersey Commissioner of Education, including, but not limited to, K.G. and K.G. on behalf of her minor child, S.S., OAL DOCKET NO. EDU 09636-19, Agency Ref. No. 118-5/19; and/or charges and/or claims filed with any other governmental agency. This Release further includes the waiver of any and all attorneys' fees and legal costs that the Claimants' may have incurred.

3. Claimants hereby agree that no representations have been made by the Board as to either the taxability or non-taxability of the Board's payment set forth herein, and Claimants hereby waive any and all claims against the Board in the event that the Federal or State authorities deem this Agreement, or any portion thereof, to be taxable. Claimants further acknowledge that they have not relied upon nor will they rely upon any tax information provided by the Board and/or it's the Releasees. Upon such an occurrence, Claimants alone are solely responsible for the payment of any such taxes.

4. In executing this Agreement, Claimants further acknowledge and confirm that neither K.G. nor S.S. received health care treatment as a result of alleged injuries by the Board and/or Releasees. Claimants further acknowledge and confirm that S.S., a Medicaid recipient, has notified the Division of Medical Assistance and Health Services ("DMAHS") of her pending claims against the Board and/or Releasees. K.G., a Medicare recipient, has not alleged injuries of her own by the Board and/or Releasees and confirms that she has none. S.S. agrees to accept sole responsibility for paying whatever final lien amount is or may be due to DMAHS, or its contractor, HMS, as a result of receiving the Settlement Sum.

5. Nothing in any other documents developed pursuant to this Agreement shall supersede the terms of this Agreement.

6. Each party shall bear its or his/her own counsel fees incurred in connection with this matter. Neither party shall be considered a prevailing party for purposes of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 et seq., the Americans with Disabilities Act, 42 U.S.C. 12101 set seq., Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, N.J.S.A. 18A:46-1 et seq., N.J.A.C. 6A:14-1.1 et seq., or any other statute, regulation, or other legal authority providing for the reimbursement of reasonable attorney's fees and costs. The Claimants waive

the right to pursue an award of attorney's fees and costs under any of these fee-shifting statutes for all claims settled by this Agreement.

7. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the Board and/or the Claimants, and shall not be referred to in any subsequent proceeding by any party other than to enforce its terms. Rather, this Agreement shall constitute an express denial of liability by the Board of Education, including its officers, employees, agents, representatives and insurers including Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation. Should a dispute arise in the future with respect to this Agreement, nothing in this Agreement shall serve to waive any party's respective position(s) in this matter. In the event that this Agreement is not fully executed and approved by all parties hereto, it shall become null and void and shall neither constitute an admission of any party nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

8. By signing this Agreement, the Claimants and the Board each certifies that (a) they have read the Agreement; (b) have had the opportunity to discuss this Agreement with their attorney(s), and did so; (c) enter into this Agreement knowingly, willingly, and without coercion or improper inducement; and (d) are satisfied with their legal representation in this matter.

9. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

10. All Parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, is also bound. This Agreement is made for the benefit of all the Parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.

11. As further consideration for the Agreement, the Parties agree that they will keep all terms of this Agreement completely confidential. Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that neither party nor any representative of the parties will take any action to disclose the terms or nature of this Agreement except that disclosure is permitted: (i) as necessary with regard to any proceeding for the enforcement of this Agreement; (ii) to the Claimants' immediate family, accountants and attorneys, who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (iii) as may be required, through subpoena or otherwise, by any court or agency of competent jurisdiction; (iv) as may be required pursuant to the Open Public Records Act; and (iv) as may be required by law. In the event the Claimants violate this provision (if proven by a Court of competent jurisdiction), the Board shall have no further obligation under this Agreement. If the Board or any of its officers or employees violates this provision, as found by a court of competent jurisdiction, the Claimants shall have no further obligation to comply with this confidentiality provision.

12. The Parties agree that, in any communications with the press, other media or any other individual, they shall not criticize, ridicule or make any statement which disparages or is derogatory of each other, which includes the Board or its employees, elected officials, directors, senior officers, agents, representatives and insurers, including Glatfelter Claims Management,

Inc. and American Alternative Insurance Corporation. In the event of any inquiries into this matter, the parties shall respond that the matter has been resolved.

13. The Parties further acknowledge that neither this Agreement, nor the terms herein, are precedent setting.

14. This Agreement constitutes the full and complete agreement of the Parties with respect to its subject matter. This Agreement supersedes any prior or contemporaneous representations, whether oral or written, and it may not be modified or amended except by a written agreement signed by all parties hereto.

15. This Agreement may be executed in counterparts, each of which shall be deemed a duplicate original. Counterparts shall only become binding and effective when this Agreement is signed by all Parties.

16. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified.

By signing below, the Parties hereby consent and agree to the above terms and conditions.

The Claimants:

Kateyea Green, Parent

Dated: 7/3/26

Sanayah Stewart, Student and Child of K.G.

Dated: 7-2-20

For the Board:

Ken Alper
Board President

Date: 7/9/20

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 a Virtual Special/Work session on July 9, 2020 at 6:30 P.M.

The following members of the Board of Education were present:
President Alper, Mrs. Trigg-Scales, Mrs. Merklinger, Mr. Rothstein, Mrs. Tunnicliffe

The following motion was offered by Mrs. Tunnicliffe and seconded by Mrs. Trigg-Scales and adopted by the Board of Education by the following roll call vote:

Recommend approval of Settlement Agreement regarding GCM Claim No. NJPF19040002 in the matter of Student # 2604093.

ROLL CALL: Ayes: President Alper, Mrs. Trigg-Scales, Mr. Rothstein, Mrs. Merklinger, Mrs. Tunnicliffe

Abstain: None

CERTIFICATE

I, John Calavano, 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 July 9, 2020, 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, 2020.

John Calavano, Board Secretary

CLEARY, GIACOBBE, ALFIERI & JACOBS, LLC
Attorneys at Law
169 Ramapo Valley Road
Upper Level - Suite 105
Oakland, New Jersey 07436
(973)845-6700
Frances L. Febres, Esq. (ID No. 018542012)
Attorneys for Respondent

K.G. and K.G. on behalf of minor child, S.S., Petitioners, vs. WEST ORANGE BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 09636-19 AGENCY REF. NO. 118-5/19
K.G. Individually and o/b/o her minor child, Student 1, Petitioners, vs. WEST ORANGE BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY DEPARTMENT OF LAW DIVISION OF CIVIL RIGHTS DCR DOCKET NO.: PG22WE-67277 **GLOBAL SETTLEMENT AGREEMENT**

This Agreement is entered into by and between the Board of Education of the Township of West Orange, Essex County (the "Board"), and Kateaya Green ("K.G."), individually and on behalf of her child, Sanayah Stewart ("S.S.") and S.S. individually (K.G. and S.S. are collectively referred to as the "Claimants"), and supersedes and replaces any and all prior agreements between the Board and the Claimants.

WHEREAS, S.S. was a student of the Board enrolled in the West Orange School District ("District") until her graduation in June 2020; and

WHEREAS, S.S. turned 18 on September 19, 2019; and

WHEREAS, Claimants had reported certain prior incidents to the District, which were alleged to constitute harassment, intimidation or bullying ("HIB") against S.S. as that term is defined by N.J.S.A. 18A:37-14; and

WHEREAS, Claimants appealed the Board's decision concerning HIB Investigation 050-004 to the New Jersey Commissioner of Education, OAL DOCKET NO. EDU 09636-19, and the New Jersey Division on Civil Rights, DCR Docket No.: PG22WE-67277; and

WHEREAS, a dispute exists regarding HIB Investigation No. 050-004, which was conducted during the 2018-2019 school year, including the Board's February 28, 2019 affirmance thereof; and

WHEREAS, a dispute exists regarding whether S.S. was subject to a hostile educational environment at West Orange High School in violation of the New Jersey Law Against Discrimination; and

WHEREAS, without waiving their respective positions and without admissions by either party, the Board and the Claimants desire to resolve all outstanding issues between them amicably and without the need for further litigation;

WHEREAS, the West Orange Board of Education and the Claimants have reached a settlement agreement that the Board has determined is in the best interest of the parties; and

NOW, THEREFORE, in consideration of the foregoing, the Board and the Claimants stipulate and agree as follows:

1. The West Orange Board of Education shall pay Claimants Nine Thousand Six Hundred Dollars ($9,600.00) conditioned upon the following:

a. Within thirty (30) days following the New Jersey Commissioner of Education's final decision approving the Global Settlement Agreement and (a) originally-executed Stipulations of Dismissal with Prejudice in the forms attached hereto as Exhibit A and Exhibit B (the "Stipulations"), (b) S.S.' date of birth, current address and social security number, and (c) an Internal Revenue Service ("IRS") Form W-9 from Claimants' counsel, then the Board's insurance carrier, Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation, shall cause to be issued a settlement check in the amount of Nine Thousand Six Hundred Dollars ($9,600.00), the "Settlement Sum") payable to "Education Law Center Trust Account on behalf of Sanayah Stewart" (otherwise referred to as "Claimants and their counsel") and shall cause the check to be mailed to Claimants and their counsel. Claimants shall be solely responsible for the payment of all taxes related to the Settlement Sum and shall indemnify and hold harmless the Board, including the Board's officers, employees, agents, representatives and insurers including Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation, for any amounts found due and owing to any tax authorities for any tax liabilities for which Claimants may be or are found liable.

b. Any payment made in accordance with Paragraph 1 shall be reported to the IRS using Form 1099.

c. K.G. expressly agrees that the Settlement Sum shall be payable to the payee identified in Paragraph 1a and that no additional monies are due to her.

2. In exchange for and consideration of the Board's payment of $9,600.00, Claimants, agree to waive and release all rights and claims that they may have and may hold against the Board, including the Board's officers, employees, agents, representatives and insurers including Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation ("Releasees"), under the Anti-Bullying Bill of Rights Act ("ABR"), N.J.S.A. 18A:37-13 et seq., New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 et seq., the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, N.J.S.A. 18A:46-1 et seq., N.J.A.C. 6A:14-1.1 et seq., or any other statute, regulation, or other legal authority relating to the education and/or public accommodation of students with disabilities, relative to the claims they may have regarding S.S.'s enrollment in the West Orange School District. This Release of Claims also includes, but is not limited to Claimants' asserted claims and requests for relief, attorney's fees and legal costs set forth in their Complaint filed with the New Jersey Division on Civil Rights, in the action captioned: KG., individually and on behalf of minor child Student 1 v. West Orange Board of Education, DCR Docket No.: PG22WE-67277, the release of claims in any and all actions before the New Jersey Commissioner of Education, including, but not limited to, K.G. and K.G. on behalf of her minor child, S.S., OAL DOCKET NO. EDU 09636-19, Agency Ref. No. 118-5/19; and/or charges and/or claims filed with any other governmental agency. This Release further includes the waiver of any and all attorneys' fees and legal costs that the Claimants' may have incurred.

3. Claimants hereby agree that no representations have been made by the Board as to either the taxability or non-taxability of the Board's payment set forth herein, and Claimants hereby waive any and all claims against the Board in the event that the Federal or State authorities deem this Agreement, or any portion thereof, to be taxable. Claimants further acknowledge that they have not relied upon nor will they rely upon any tax information provided by the Board and/or it's the Releasees. Upon such an occurrence, Claimants alone are solely responsible for the payment of any such taxes.

4. In executing this Agreement, Claimants further acknowledge and confirm that neither K.G. nor S.S. received health care treatment as a result of alleged injuries by the Board and/or Releasees. Claimants further acknowledge and confirm that S.S., a Medicaid recipient, has notified the Division of Medical Assistance and Health Services ("DMAHS") of her pending claims against the Board and/or Releasees. K.G., a Medicare recipient, has not alleged injuries of her own by the Board and/or Releasees and confirms that she has none. S.S. agrees to accept sole responsibility for paying whatever final lien amount is or may be due to DMAHS, or its contractor, HMS, as a result of receiving the Settlement Sum.

5. Nothing in any other documents developed pursuant to this Agreement shall supersede the terms of this Agreement.

6. Each party shall bear its or his/her own counsel fees incurred in connection with this matter. Neither party shall be considered a prevailing party for purposes of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 et seq., the Americans with Disabilities Act, 42 U.S.C. 12101 set seq., Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, N.J.S.A. 18A:46-1 et seq., N.J.A.C. 6A:14-1.1 et seq., or any other statute, regulation, or other legal authority providing for the reimbursement of reasonable attorney's fees and costs. The Claimants waive

the right to pursue an award of attorney's fees and costs under any of these fee-shifting statutes for all claims settled by this Agreement.

7. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the Board and/or the Claimants, and shall not be referred to in any subsequent proceeding by any party other than to enforce its terms. Rather, this Agreement shall constitute an express denial of liability by the Board of Education, including its officers, employees, agents, representatives and insurers including Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation. Should a dispute arise in the future with respect to this Agreement, nothing in this Agreement shall serve to waive any party's respective position(s) in this matter. In the event that this Agreement is not fully executed and approved by all parties hereto, it shall become null and void and shall neither constitute an admission of any party nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

8. By signing this Agreement, the Claimants and the Board each certifies that (a) they have read the Agreement; (b) have had the opportunity to discuss this Agreement with their attorney(s), and did so; (c) enter into this Agreement knowingly, willingly, and without coercion or improper inducement; and (d) are satisfied with their legal representation in this matter.

9. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

10. All Parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, is also bound. This Agreement is made for the benefit of all the Parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.

11. As further consideration for the Agreement, the Parties agree that they will keep all terms of this Agreement completely confidential. Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that neither party nor any representative of the parties will take any action to disclose the terms or nature of this Agreement except that disclosure is permitted: (i) as necessary with regard to any proceeding for the enforcement of this Agreement; (ii) to the Claimants' immediate family, accountants and attorneys, who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (iii) as may be required, through subpoena or otherwise, by any court or agency of competent jurisdiction; (iv) as may be required pursuant to the Open Public Records Act; and (iv) as may be required by law. In the event the Claimants violate this provision (if proven by a Court of competent jurisdiction), the Board shall have no further obligation under this Agreement. If the Board or any of its officers or employees violates this provision, as found by a court of competent jurisdiction, the Claimants shall have no further obligation to comply with this confidentiality provision.

12. The Parties agree that, in any communications with the press, other media or any other individual, they shall not criticize, ridicule or make any statement which disparages or is derogatory of each other, which includes the Board or its employees, elected officials, directors, senior officers, agents, representatives and insurers, including Glatfelter Claims Management,

Inc. and American Alternative Insurance Corporation. In the event of any inquiries into this matter, the parties shall respond that the matter has been resolved.

13. The Parties further acknowledge that neither this Agreement, nor the terms herein, are precedent setting.

14. This Agreement constitutes the full and complete agreement of the Parties with respect to its subject matter. This Agreement supersedes any prior or contemporaneous representations, whether oral or written, and it may not be modified or amended except by a written agreement signed by all parties hereto.

15. This Agreement may be executed in counterparts, each of which shall be deemed a duplicate original. Counterparts shall only become binding and effective when this Agreement is signed by all Parties.

16. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified.

By signing below, the Parties hereby consent and agree to the above terms and conditions.

The Claimants:

Kateyea Green, Parent

Dated: 7/3/20

Sanayah Stewart, Student and Child of K.G.

Dated: 7-2-20

For the Board:

Ken Alper
Board President

Date: 7/9/20

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 a Virtual Special/Work session on July 9, 2020 at 6:30 P.M.

The following members of the Board of Education were present:
President Alper, Mrs. Trigg-Scales, Mrs. Merklinger, Mr. Rothstein, Mrs. Tunnicliffe

The following motion was offered by Mrs. Tunnicliffe and seconded by Mrs. Trigg-Scales and adopted by the Board of Education by the following roll call vote:

Recommend approval of Settlement Agreement regarding GCM Claim No. NJPF19040002 in the matter of Student # 2604093.

ROLL CALL: Ayes: President Alper, Mrs. Trigg-Scales, Mr. Rothstein, Mrs. Merklinger, Mrs. Tunnicliffe

Abstain: None

CERTIFICATE

I, John Calavano, 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 July 9, 2020, 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, 2020.

John Calavano, Board Secretary

205-20

OAL Dkt. No. EDU 04413-18
Agency Dkt. No. 51-3/18

New Jersey Commissioner of Education

Final Decision

Trevor Sanders,

Petitioner,

v.

State-Operated School District of the City of Paterson, Passaic County,

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 18, 2020
Date of Mailing: September 21, 2020

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

33 Washington Street
Newark, NJ 07102
(973) 648-6008

A copy of the administrative law
judge's decision is enclosed.

This decision was mailed to the parties
on August 13, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04413-18

AGENCY DKT. NO. 51-3/18

TREVOR SANDERS,

Petitioner,

v.

CITY OF PATERSON STATE-OPERATED SCHOOL DISTRCT, PASSAIC COUNTY,

Respondent.

Ronald J. Ricci, Esq., for petitioner (Ricci & Fava, LLC, attorneys)

Lester E. Taylor, III, Esq., for respondent (Florio Perrucci Steinhardt & Cappelli, LLC, attorneys)

Record Closed: August 5, 2020 Decided: August 6, 2020

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

This matter was transmitted to the Office of Administrative Law (OAL) on March 23, 2018, 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.

The attached Settlement Agreement and General Release were submitted on August 5, 2020, indicating the terms of agreement which are incorporated herein by reference.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or 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 therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 6, 2020
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: August 13, 2020

Date Mailed to Parties: August 13, 2020

dr

FPSC | FLORIO PERRUCCI STEINHARDT & CAPPELLI LLC

218 Rt. 17 North, Suite 410
Rochelle Park, NJ 07662

o 201.843.5858
F 201.843.5877

Lester E. Taylor III, Esq. | Partner
201-373-8935 Direct Dial
ltaylor@floriolaw.com

July 25, 2019

VIA HAND DELIVERY
Ronald J. Ricci
Ricci Fava L.L.C.
16 Furler Street, 2nd Dloor
Totowa, New Jersey 07512

Re: Trevor Sanders v. State-Operated School District of the City of Paterson, Passaic County
OAL Dkt. No. EDU 04413-2018N; Agency Ref. No. 51-3/18

Dear Mr. Ricci:

Enclosed please find the following documents in connection with the above referenced matter:

1. Copy of the fully Executed Settlement Agreement and General Release ("Agreement").
2. Check No. 0001011327 ($23,545.29); Check No. 0001011328 ($43,022.37); Check No. 0001011329 ($47,645.15), and 0001011330 ($47,495.32), representing the payment for backpay, minus usual and customary deductions, pursuant to Paragraph 1 of the Agreement.
3. Check No. 0001011331 ($797.32), representing a refund for Pension and Contributory Insurance deductions.
4. Check No. 0000218540 ($169,000), representing the payment for legal costs and fees to Ricci and Fava, LLC, pursuant to Paragraph 2 of the Agreement.
5. Copies of Certification and the Board's Resolution approving the Agreement.

Upon receipt of the payments, please forward to our office an irrevocable letter of resignation from your client to the Board, pursuant to Paragraph 4 of the Agreement. Additionally, it is our expectation that you will seek withdrawal, with prejudice, of the above-captioned matter in accordance with Paragraph 5 of the Agreement.

Very truly yours,

s/ Lester E. Taylor
Lester E. Taylor III, Esq.

LET/AAG

Enc.
c: Robert E. Murray, Esq., *via email only*

Ramos, Damaris

From: Lester Taylor <ltaylor@floriolaw.com>
Sent: Tuesday, August 4, 2020 8:05 PM
To: Ramos, Damaris; Ron Ricci
Cc: Diane Goldsholl; David Solomon
Subject: [EXTERNAL] RE: EDU 4413-18 Sanders, Trevor v. City of Paterson State-Operated School Dist., Passaic County
Attachments: Complete Set of Settlement Documents Re. Sanders (00750575xBA998).pdf

Ms. Ramos,

Please see a copy of the fully executed settlement agreement which was sent yesterday evening.

Thx

Lester E. Taylor, Esq.
Florio Perrucci Steinhardt, Cappelli, Tipton and Taylor, LLC.
218 Route 17 North, Suite 410
Rochelle Park, NJ 07662
Direct Dial: 201.373.8935
Office: 201.843.5858
Cell: 973.583.9906
Fax: 201.843.2032
Email: ltaylor@floriolaw.com
Web: https://urldefense.com/v3/__http://www.floriolaw.com__;!!J30X0ZrnC1oQtbA!agPN-X0leBePcXTt4hZzdRLRkuV2ft5HQsVqPw_R54Sseh_hXzzkNOmQnWGhTjJfDNCY_A$
Bio: https://urldefense.com/v3/__http://www.floriolaw.com/attorneys/lestertaylor__;!!J30X0ZrnC1oQtbA!agPN-X0leBePcXTt4hZzdRLRkuV2ft5HQsVqPw_R54Sseh_hXzzkNOmQnWGhTjKkYJtIjg$

STATEMENT OF CONFIDENTIALITY: The information contained in this transmission including any attached documentation is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify Florio, Perrucci, Steinhardt, & Cappelli, LLC immediately by replying to this e-mail. Please delete all copies of this message and any attachments immediately.

IRS CIRCULAR 230 DISCLOSURE: As required by U.S. Treasury Regulations governing tax practice, you are advised that any written tax advice contained herein was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding tax penalties that may be imposed under the Internal Revenue Code.

-----Original Message-----
From: Ramos, Damaris <Damaris.Ramos@oal.nj.gov>
Sent: Tuesday, August 04, 2020 3:06 PM
To: Ron Ricci <rricci@riccifavalaw.com>; Lester Taylor <ltaylor@floriolaw.com>
Cc: Diane Goldsholl <dgoldsholl@floriolaw.com>; David Solomon <DSolomon@floriolaw.com>
Subject: RE: EDU 4413-18 Sanders, Trevor v. City of Paterson State-Operated School Dist., Passaic County

If there's a fully executed agreement, please forward it to me.

If not a withdrawal letter indicating parties have resolved the matter and petitioner is withdrawing the due process petition.

I await to hear from the parties.

-----Original Message-----
From: Ron Ricci <rricci@riccifavalaw.com>
Sent: Tuesday, August 4, 2020 3:02 PM
To: Lester Taylor <ltaylor@floriolaw.com>
Cc: Ramos, Damaris <Damaris.Ramos@oal.nj.gov>; Diane Goldsholl <dgoldsholl@floriolaw.com>; David Solomon <DSolomon@floriolaw.com>
Subject: [EXTERNAL] Re: EDU 4413-18 Sanders, Trevor v. City of Paterson State-Operated School Dist., Passaic County

I have to pull file from storage

Sent from my iPhone

> On Aug 3, 2020, at 11:13 PM, Lester Taylor <ltaylor@floriolaw.com> wrote:
>
> Ms. Ramos,
>
> Thanks for the clarification. Attached please find a copy of the following documents:
>
>
> 1. Fully executed settlement agreement with attachments; 2.
> November 12, 2019 correspondence to Ron Ricci, Esq. from State of New
> Jersey Division of Pensions and Benefits
>
> Please note that upon information and belief Mr. Ricci provided me with a hard copy of Mr. Sanders' letter of resignation when I personally delivered the settlement checks and fully executed agreement to this office. I do not appear to have a scanned copy of the resignation letter in my email in box but I will attempt to get the file from storage and/or check to see if same was scanned into our document management system.
>
> In the interest of time I would ask Mr. Ricci to forward a copy of the resignation letter.
>
> Please feel free to contact me if you have any further questions.
>
> Thanks,
>
> Lester
>
>
>
> Lester E. Taylor, Esq.
> Florio Perrucci Steinhardt, Cappelli, Tipton and Taylor, LLC.
> 218 Route 17 North, Suite 410
> Rochelle Park, NJ 07662
> Direct Dial: 201.373.8935
> Office: 201.843.5858

> Cell: 973.583.9906
> Fax: 201.843.2032
> Email: ltaylor@floriolaw.com<mailto:ltaylor@floriolaw.com>
> Web:
> https://urldefense.com/v3/__http://www.floriolaw.com__;!!J30X0ZrnC1oQt
> bA!YA2sOV62V7yP0larXO8cYOH9PMST6jBdkXOWmK5HdvCN-Vxipb9wjVbBcCEDOWBAFG-
> ufQ$
> Bio:
> https://urldefense.com/v3/__http://www.floriolaw.com/attorneys/lestert
> aylor__;!!J30X0ZrnC1oQtbA!YA2sOV62V7yP0larXO8cYOH9PMST6jBdkXOWmK5HdvCN
> -Vxipb9wjVbBcCEDOWBDnTt8bw$
> <https://urldefense.com/v3/__http://www.floriolaw.com/attorneys/lester
> taylor__;!!J30X0ZrnC1oQtbA!YA2sOV62V7yP0larXO8cYOH9PMST6jBdkXOWmK5HdvC
> N-Vxipb9wjVbBcCEDOWBDnTt8bw$ >
>
> [cid:image001.png@01D669E9.D39A2780]
>
> STATEMENT OF CONFIDENTIALITY: The information contained in this transmission including any attached documentation is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify Florio, Perrucci, Steinhardt, & Cappelli, LLC immediately by replying to this e-mail. Please delete all copies of this message and any attachments immediately.
>
> IRS CIRCULAR 230 DISCLOSURE: As required by U.S. Treasury Regulations governing tax practice, you are advised that any written tax advice contained herein was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding tax penalties that may be imposed under the Internal Revenue Code.
>
>
> From: Ramos, Damaris <Damaris.Ramos@oal.nj.gov>
> Sent: Monday, August 03, 2020 2:09 PM
> To: Lester Taylor <ltaylor@floriolaw.com>
> Cc: Ron Ricci <rricci@riccifavalaw.com>; Diane Goldsholl
> <dgoldsholl@floriolaw.com>
> Subject: RE: EDU 4413-18 Sanders, Trevor v. City of Paterson
> State-Operated School Dist., Passaic County
>
> Judge Celentano would like to know the status of this case.
>
> I have a note that the matter was resolved but a settlement and/or withdrawal was not received.
>
>
>
> From: Lester Taylor
> <ltaylor@floriolaw.com<mailto:ltaylor@floriolaw.com>>
> Sent: Friday, July 31, 2020 8:07 PM
> To: Ramos, Damaris
> <Damaris.Ramos@oal.nj.gov<mailto:Damaris.Ramos@oal.nj.gov>>
> Cc: Ron Ricci
> <rricci@riccifavalaw.com<mailto:rricci@riccifavalaw.com>>; Diane
> Goldsholl <dgoldsholl@floriolaw.com<mailto:dgoldsholl@floriolaw.com>>
> Subject: [EXTERNAL] Re: EDU 4413-18 Sanders, Trevor v. City of

> Paterson State-Operated School Dist., Passaic County
>
> Ms. Ramos,
>
> I have other matters scheduled on both of those dates. May I ask what the purpose of this call is? I dint have the file with me now but I believe this matter is/was resolved some time ago.
>
> Thx
> Lester E. Taylor, Esq.
> Florio Perrucci Steinhardt, Cappelli, Tipton and Taylor, LLC.
> 218 Route 17 North, Suite 410<x-apple-data-detectors://1/0> Rochelle
> Park, NJ 07662<x-apple-data-detectors://1/0>
> Direct Dial: 201.373.8935<tel:201.373.8935>
> Office: 201.843.5858<tel:201.843.5858>
> Cell: 973.583.9906<tel:973.583.9906>
> Fax: 201.843.2032<tel:201.843.2032>
> Email: ltaylor@floriolaw.com<mailto:ltaylor@floriolaw.com>
> Web:
> https://urldefense.com/v3/__http://www.floriolaw.com__;!!J30X0ZrnC1oQt
> bA!YA2sOV62V7yP0larXO8cYOH9PMST6jBdkXOWmK5HdvCN-Vxipb9wjVbBcCEDOWBAFG-
> ufQ$
> <https://urldefense.com/v3/__http:/www.floriolaw.com/__;!!J30X0ZrnC1oQ
> tbA!b4uWOWSOlDZLegJhuChgIHJH2ZyDjLtO1ggycqu8KWgIHa2B53VM41OXRKnimG68jC
> BXqg$>
> Bio:
> https://urldefense.com/v3/__http://www.floriolaw.com/attorneys/lestert
> aylor__;!!J30X0ZrnC1oQtbA!YA2sOV62V7yP0larXO8cYOH9PMST6jBdkXOWmK5HdvCN
> -Vxipb9wjVbBcCEDOWBDnTt8bw$
> <https://urldefense.com/v3/__http:/www.floriolaw.com/attorneys/lestert
> aylor__;!!J30X0ZrnC1oQtbA!b4uWOWSOlDZLegJhuChgIHJH2ZyDjLtO1ggycqu8KWgI
> Ha2B53VM41OXRKnimG4zr6qzRA$>
>
> [cid:image002.png@01D5ED7C.BB5846F0]
>
> On Jul 31, 2020, at 6:53 PM, Ramos, Damaris <Damaris.Ramos@oal.nj.gov<mailto:Damaris.Ramos@oal.nj.gov>>
wrote:
>
> Dear Counsel,
>
> Please advise if you will be available for a telephone conference as follows:
>
> August 12 at 10, 10:30, 11, 11:30 or 1 August 13 between 9 and 11 or
> between 1 and 3
>
> Also, please note these dates have been offered to other parties and will be scheduled on a first come basis.
>
> Notice
>
> If you have received this e-mail in error, please immediately notify us by return e-mail or by telephone me at the number referenced below and delete this message.
>

> This e-mail message and any attachment to this e-mail message contain information that may be legally privileged and confidential from the State of New Jersey, Office of Administrative Law. If you are not the intended recipient, you must not review, transmit, convert to hard copy, copy, use or disseminate this e-mail or any attachments to it.
>
> Damaris Ramos
> Office of Administrative Law
> 33 Washington Street, 7th Floor
> Newark, N.J. 07102
>
> Assistant to:
> Honorable Leslie Z. Celentano - (973) 648-6048 Honorable Barry E.
> Moscowitz - (973) 648-6076
>
> Fax. 973-648-2358
> Email: Damaris.Ramos@oal.nj.gov<mailto:Damaris.Ramos@oal.nj.gov>
>
> _____
>
> STATEMENT OF CONFIDENTIALITY: The information contained in this transmission including any attached documentation is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify Florio Perrucci Steinhardt Cappelli Tipton & Taylor LLC immediately by replying to this e-mail. Please delete all copies of this message and any attachments immediately.
> _____
>
> STATEMENT OF CONFIDENTIALITY: The information contained in this transmission including any attached documentation is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify Florio Perrucci Steinhardt Cappelli Tipton & Taylor LLC immediately by replying to this e-mail. Please delete all copies of this message and any attachments immediately.
>
> <image001.png>
> <Complete Set of Settlement Documents Re. Sanders
> (00750575xBA998).pdf> <SKM_C754e19111809180.pdf>

STATEMENT OF CONFIDENTIALITY: The information contained in this transmission including any attached documentation is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify Florio Perrucci Steinhardt Cappelli Tipton & Taylor LLC immediately by replying to this e-mail. Please delete all copies of this message and any attachments immediately.

SETTLEMENT AGREEMENT AND GENERAL RELEASE
BETWEEN THE PATERSON BOARD OF EDUCATION AND TREVOR SANDERS

Trevor Sanders v. State-Operated School District of the City of Paterson, Passaic County
OAL Dkt. No. EDU 04413-2018N; Agency Ref. No. 51-3/18

This **SETTLEMENT AGREEMENT and GENERAL RELEASE** ("Agreement") is entered into this 10 day of July, 2019, by and between Petitioner, Trevor Sanders ("Petitioner" and "Sanders") and Respondent, Paterson Board of Education (the "Board"), referred to collectively herein as the "Parties."

RECITALS

WHEREAS, on or about March 6, 2018, Petitioner filed a petition with the Commissioner of Education, captioned: Trevor Sanders v. State-Operated School District of the City of Paterson, Passaic County, OAL Dkt. No. EDU 04413-2018N, Agency Ref. No. 51-3/18 ("Petition"), seeking reinstatement to his teaching position in the Paterson School District (the "District"), back pay, and attorney's fees; and;

WHEREAS, the Parties have reached a settlement relating to the requested relief in the Petition; and

WHEREAS, the Parties intend by this Agreement to fully and finally resolve all outstanding matters:

TERMS AND CONDITIONS

NOW THEREFORE, intending to be legally bound hereby and in consideration of the mutual covenants, conditions, obligations, and promises contained herein, the parties agree as follows:

1. On or before July 28, 2019, the Board will pay Sanders a gross amount of $337,816.00, minus usual and customary withholdings, including FICA, State and Federal taxes,

union membership fee contributions, pensions contributions, credit for unemployment benefits, and other legally required deductions, for the time period between the date of Petitioner's indictment/suspension without through to the conclusion of the 2018-2019 school year.

2. On or before July 28, 2019, the Board will pay $169,000.00 for Petitioner's legal costs and fees to Ricci and Fava, LLC, 16 Furler Street, 2nd Floor, Totowa, New Jersey 07512.

3. The Board is not liable for any payments owed by Sanders to the New Jersey Division of Pensions and Benefits (the "Division") for any pension loan and/or purchased credit from the Teachers' Pension and Annuity Fund ("TPAF"), including the outstanding balance of $48,219.29 Petitioner owes to the Division as a member of TPAF. It is mutually agreed upon and understood that Petitioner will make the $48,219.29 payment to the Division and/or TPAF from the net proceeds of the Board's $337,816.00 gross payment to Sanders. It is further understood and agreed that upon receipt of payment set forth in Paragraph 1, Petitioner relinquishes and relieves the Board of any and all liability relating to the $48,219.29 owed to the Division. This provision is contingent upon the Board's payment to Sanders, as set forth in Paragraph 1. If the Board fails to make such payment by July 28, 2019, both Parties reserve the right to bring/defend any and all claims relating to Petitioner's payment of $48,219.29 to the Division and/or TPAF.

4. Immediately upon receipt of the payment set forth in Paragraphs 1 and 2, and as an express condition of this Agreement, Sanders will submit an irrevocable letter of resignation from his position in the District to the Board and seek retirement from TPAF.

5. Petitioner agrees to withdraw the above-captioned matter with prejudice, and it is understood by the parties that Petitioner's withdrawal of the Petition does not constitute an admission of liability or wrongdoing by Sanders in connection with the above-captioned matter.

6. Petitioner further agrees to not oppose the dismissal of the criminal charges he filed against the Board members and/or District administrators bearing Docket Nos. S-2019 002289, S-2019 002909, S-2019 002910, S-2019 002911, S-2019 002912, S-2019 002913, S-2019 002914, and S-2019 002915.

7. Upon the fulfillment by the Board of the terms and conditions of the Agreement, Sanders, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Federal Family and Medical Leave Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the Employer-Employee Relations Act; any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel,

defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim.

8. In consideration of Petitioner's release of the Board, and the other good, valuable and sufficient consideration recited herein, upon the effective date of Sanders' resignation, the Board releases and gives up any and all claims known and unknown and rights including disciplinary charges and other agency referrals which it may presently have and be aware of against Sanders. This General Release applies to claims resulting from anything which has happened up to the effective date of the agreement arising from or related to the Sanders' employment with the Board. Subject to the fulfillment of the terms of this Agreement, the Board will take no further action with respect to Sanders' separation from employment.

9. It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Board

10. This Agreement does not in any way constitute an admission of liability or wrongdoing by the Board concerning the allegations raised in the above-captioned litigation.

11. This Agreement shall bind the parties and their respective heirs, successors, assigns, officers, employees, officials, and agents.

12. Both Parties represent that this Agreement has been voluntarily executed by the persons with the legal authority to do so. This Agreement must be formally approved by the Board as this Agreement will be deemed null and void without said approval. All reasonable efforts will be made to timely obtain approval from the Board.

13. Should any part of this Agreement be invalidated by a court of competent jurisdiction, that part shall be severed and the balance of the Agreement shall remain in full force and effect.

14. This Agreement may be signed in counterparts and shall be binding as if all Parties executed the original thereof. A facsimile or electronically-transmitted signature shall have the same effect as an original signature.

15. The Parties hereto acknowledge that this Agreement constitutes a full, final, and complete settlement of their differences and supersedes and replaces any and all other written or oral exchanges, agreements, understandings, arrangements, or negotiations between or among them relating to the subject matter hereof, and affirmatively state that there are no other prior or contemporaneous agreements, exchanges, representations, arrangements, or understandings, written or oral, between or among them relating to the subject matter hereof other than that as set forth herein, and that this Agreement contains the sole and entire Agreement between them with respect to the subject matter hereof.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date shown below.

Trevor Sanders — Date: 7/16/2019

Ronald J. Ricci, Esq. — Date: 7/16/19

Paterson Board of Education — Date: 7/24/19

RER

Board Attorney — Date: 7/25/19

THIS DOCUMENT HAS MICROPRINT LETTERING AND IS PRINTED IN TWO COLORS BLUE AND BURGUNDY - MISSING A FEATURE INDICATES A COPY

P020-01O
Relyco Sales, Inc. (800) 777-7359

THE PATERSON PUBLIC SCHOOLS
90 DELAWARE AVENUE
PATERSON, NEW JERSEY 07503

PAYROLL ACCOUNT

TD Bank
America's Most Convenient Bank®

55-136
312

NO. 0001011327

Date	Check Amount
JUL-24-2019	$23,545.29

PAY Twenty-Three Thousand Five Hundred Forty-Five Dollars and Twenty-Nine Cents

VOID AFTER 90 DAYS

TO THE ORDER OF TREVOR SANDERS
2821 WEST BANGS WAY
NEPTUNE, NJ 07753

⑈0001011327⑈ ⑆031201360⑆ 4308903057⑈

15-16

REMOVE DOCUMENT ALONG THIS PERFORATION

Employee Name	Employee ID Number	Check Date	Period End Date	Check Number
TREVOR SANDERS	104903	JUL-24-2019	JUL-24-2019	0001011327

EARNINGS

Description	Hours	Rate	Current	Y-T-D
JUDGEMENTS	0.00	0.00	49,065.00	49,065.00
TOTAL EARNINGS			49,065.00	49,065.00
NET			23,545.29	23,545.29
GROUP TERM LIFE			1,144.02	1,144.02
AUTO IMPUTED			0.00	0.00
BENEFITS IMPUTED			0.00	0.00

MARITAL STATUS MARRIED
FEDERAL EXEMPTIONS 2 EXTRA FEDERAL TAX 0.00
STATE EXEMPTIONS 2 EXTRA STATE TAX 0.00
MESSAGE

DEDUCTIONS

Description	Current	Y-T-D	Balance
PENS TPAF	3,463.99	3,463.99	
CONT. INS. TPAF	196.26	196.26	
FEDERAL	13,828.96	13,828.96	
FICA	3,112.96	3,112.96	
MEDICARE	728.03	728.03	
STATE - NJ	4,015.79	4,015.79	
SUI/FLI	173.72	173.72	
Total Deductions	25,519.71	25,519.71	

SICK DAYS			VACATION DAYS			PERSONAL DAYS			STORM DAYS			Sick, Vacation, Personal, Storm Posted THRU
Accumulated Less Buy-Back	Used	Balance	Accumulated Less Buy-Back	Used	Balance	Accumulated	Used	Balance	Accumulated	Used	Balance	
92.0	0.0	92.0	0.0	0.0	0.0	5.0	0.0	5.0	0.0	0.0	0.0	JUL-23-2019

PAY312B - HAND

THE PATERSON PUBLIC SCHOOLS - 90 DELAWARE AVENUE PATERSON, NEW JERSEY 07503

* 51980
B
A

THIS DOCUMENT HAS MICROPRINT LETTERING AND IS PRINTED IN TWO COLORS BLUE AND BURGUNDY - MISSING A FEATURE INDICATES A COPY

P020-01Q

Relyco Sales, Inc. (800) 777-7359

THE PATERSON PUBLIC SCHOOLS
90 DELAWARE AVENUE
PATERSON, NEW JERSEY 07503

PAYROLL ACCOUNT

TD Bank
America's Most Convenient Bank®

55-136
312

NO. 0001011328

Date	Check Amount
JUL-26-2019	$43,022.37

PAY Forty-Three Thousand Twenty-Two Dollars and Thirty-Seven Cents

VOID AFTER 90 DAYS

TO THE ORDER OF TREVOR SANDERS
2821 WEST BANGS WAY
NEPTUNE, NJ 07753

⑈0001011328⑈ ⑆031201360⑆ 4308903057⑈

REMOVE DOCUMENT ALONG THIS PERFORATION

Employee Name	Employee ID Number	Check Date	Period End Date	Check Number
TREVOR SANDERS	104903	JUL-26-2019	JUN-30-2017	0001011328

EARNINGS

Description	Hours	Rate	Current	Y-T-D
JUDGEMENTS	0.00	0.00	95,942.00	*********
TOTAL EARNINGS			95,942.00	145,007.00
NET			43,022.37	66,567.66
GROUP TERM LIFE			2,255.94	3,399.96
AUTO IMPUTED			0.00	0.00
BENEFITS IMPUTED			0.00	0.00

MARITAL STATUS MARRIED
FEDERAL EXEMPTIONS 2 EXTRA FEDERAL TAX 0.00
STATE EXEMPTIONS 2 EXTRA STATE TAX 0.00
MESSAGE

DEDUCTIONS

Description	Current	Y-T-D	Balance
PENS TPAF	6,907.82	10,371.81	
CONT. INS. TPAF	383.77	580.03	
FEDERAL	30,310.64	44,139.60	
FICA	5,126.84	8,239.80	
MEDICARE	1,423.87	2,151.90	
STATE - NJ	8,766.69	12,782.48	
SUI/FLI	0.00	173.72	
Total Deductions	52,919.63	78,439.34	

SICK DAYS			VACATION DAYS			PERSONAL DAYS			STORM DAYS			Sick, Vacation, Personal, Storm Posted THRU
Accumulated Less Buy-Back	Used	Balance	Accumulated Less Buy-Back	Used	Balance	Accumulated	Used	Balance	Accumulated	Used	Balance	
92.0	0.0	92.0	0.0	0.0	0.0	5.0	0.0	5.0	0.0	0.0	0.0	JUL-23-2019

PAY312B - HAND THE PATERSON PUBLIC SCHOOLS - 90 DELAWARE AVENUE PATERSON, NEW JERSEY 07503

51980

THIS DOCUMENT HAS MICROPRINT LETTERING AND IS PRINTED IN TWO COLORS BLUE AND BURGUNDY - MISSING A FEATURE INDICATES A COPY

P020-01C
Relyco Sales, Inc. (800) 777-7359

THE PATERSON PUBLIC SCHOOLS
90 DELAWARE AVENUE
PATERSON, NEW JERSEY 07503

PAYROLL ACCOUNT

TD Bank
America's Most Convenient Bank®

55-136
312

NO. 0001011329

Date	Check Amount
JUL-26-2019	$47,645.15

PAY Forty-Seven Thousand Six Hundred Forty-Five Dollars and Fifteen Cents

VOID AFTER 90 DAYS

TO THE ORDER OF TREVOR SANDERS
2821 WEST BANGS WAY
NEPTUNE, NJ 07753

⑈0001011329⑈ ⑆031201360⑆ 4308903057⑈

REMOVE DOCUMENT ALONG THIS PERFORATION

Employee Name	Employee ID Number	Check Date	Period End Date	Check Number
TREVOR SANDERS	104903	JUL-26-2019	JUN-30-2018	0001011329

EARNINGS

Description	Hours	Rate	Current	Y-T-D
JUDGEMENTS	0.00	0.00	95,942.00	*********
TOTAL EARNINGS			95,942.00	240,949.00
NET			47,645.15	114,212.81
GROUP TERM LIFE			2,255.94	5,655.90
AUTO IMPUTED			0.00	0.00
BENEFITS IMPUTED			0.00	0.00

MARITAL STATUS MARRIED
FEDERAL EXEMPTIONS 2 EXTRA FEDERAL TAX 0.00
STATE EXEMPTIONS 2 EXTRA STATE TAX 0.00
MESSAGE

DEDUCTIONS

Description	Current	Y-T-D	Balance
PENS TPAF	7,042.14	17,413.95	
CONT. INS. TPAF	383.77	963.80	
FEDERAL	30,260.94	74,400.54	
FICA	0.00	8,239.80	
MEDICARE	1,423.87	3,575.77	
MEDICARE (ADDITIONAL)	419.44	419.44	
STATE - NJ	8,766.69	21,549.17	
SUI/FLI	0.00	173.72	
Total Deductions	48,296.85	*********	

SICK DAYS			VACATION DAYS			PERSONAL DAYS			STORM DAYS			Sick, Vacation, Personal, Storm Posted THRU
Accumulated Less Buy-Back	Used	Balance	Accumulated Less Buy-Back	Used	Balance	Accumulated	Used	Balance	Accumulated	Used	Balance	
92.0	0.0	92.0	0.0	0.0	0.0	5.0	0.0	5.0	0.0	0.0	0.0	JUL-23-2019

PAY312B - HAND THE PATERSON PUBLIC SCHOOLS - 90 DELAWARE AVENUE PATERSON, NEW JERSEY 07503

* 51980

THIS DOCUMENT HAS MICROPRINT LETTERING AND IS PRINTED IN TWO COLORS BLUE AND BURGUNDY - MISSING A FEATURE INDICATES A COPY

P020-01Q
Relyco Sales, Inc. (800) 777-7359

THE PATERSON PUBLIC SCHOOLS
90 DELAWARE AVENUE
PATERSON, NEW JERSEY 07503

PAYROLL ACCOUNT

TD Bank
America's Most Convenient Bank®

55-136
312

NO. 0001011330

Date	Check Amount
JUL-26-2019	$47,495.32

PAY Forty-Seven Thousand Four Hundred Ninety-Five Dollars and Thirty-Two Cents

VOID AFTER 90 DAYS

TO THE ORDER OF
TREVOR SANDERS
2821 WEST BANGS WAY
NEPTUNE, NJ 07753

⑈0001011330⑈ ⑆031201360⑆ 4308903057⑈

REMOVE DOCUMENT ALONG THIS PERFORATION

Employee Name	Employee ID Number	Check Date	Period End Date	Check Number
TREVOR SANDERS	104903	JUL-26-2019	JUN-30-2019	0001011330

EARNINGS

Description	Hours	Rate	Current	Y-T-D
JUDGEMENTS	0.00	0.00	96,867.00	*********
TOTAL EARNINGS			96,867.00	337,816.00
NET			47,495.32	161,708.13
GROUP TERM LIFE			2,277.88	7,933.78
AUTO IMPUTED			0.00	0.00
BENEFITS IMPUTED			0.00	0.00

MARITAL STATUS MARRIED
FEDERAL EXEMPTIONS 2 EXTRA FEDERAL TAX 0.00
STATE EXEMPTIONS 2 EXTRA STATE TAX 0.00
MESSAGE

DEDUCTIONS

Description	Current	Y-T-D	Balance
PENS TPAF	7,265.03	24,678.98	
CONT. INS. TPAF	387.47	1,351.27	
FEDERAL	30,528.84	*********	
FICA	0.00	8,239.80	
MEDICARE	1,437.60	5,013.37	
MEDICARE (ADDITIONAL)	892.30	1,311.74	
STATE - NJ	8,860.44	30,409.61	
SUI/FLI	0.00	173.72	
Total Deductions	49,371.68	*********	

SICK DAYS			VACATION DAYS			PERSONAL DAYS			STORM DAYS			Sick, Vacation, Personal, Storm Posted THRU
Accumulated Less Buy-Back	Used	Balance	Accumulated Less Buy-Back	Used	Balance	Accumulated	Used	Balance	Accumulated	Used	Balance	
92.0	0.0	92.0	0.0	0.0	0.0	5.0	0.0	5.0	0.0	0.0	0.0	JUL-23-2019

PAY312B - HAND THE PATERSON PUBLIC SCHOOLS - 90 DELAWARE AVENUE PATERSON, NEW JERSEY 07503

* 51980

B
A

THIS DOCUMENT HAS MICROPRINT LETTERING AND IS PRINTED IN TWO COLORS BLUE AND BURGUNDY - MISSING A FEATURE INDICATES A COPY

P020-01C
Relyco Sales, Inc. (800) 777-7359

THE PATERSON PUBLIC SCHOOLS
90 DELAWARE AVENUE
PATERSON, NEW JERSEY 07503

PAYROLL ACCOUNT

TD Bank
America's Most Convenient Bank®

55-136
312

NO. 0001011331

Date	Check Amount
JUL-26-2019	$797.32

PAY Seven Hundred Ninety-Seven Dollars and Thirty-Two Cents

VOID AFTER 90 DAYS

TO THE ORDER OF TREVOR SANDERS
2821 WEST BANGS WAY
NEPTUNE, NJ 07753

⑈0001011331⑈ ⑆031201360⑆ 4308903057⑈

REMOVE DOCUMENT ALONG THIS PERFORATION

Employee Name	Employee ID Number	Check Date	Period End Date	Check Number
TREVOR SANDERS	104903	JUL-26-2019	JUN-30-2016	0001011331

EARNINGS

Description	Hours	Rate	Current	Y-T-D
JUDGEMENTS			0.00	*********
TOTAL EARNINGS			0.00	337,816.00
NET			797.32	162,505.45
GROUP TERM LIFE			0.00	7,933.78
AUTO IMPUTED			0.00	0.00
BENEFITS IMPUTED			0.00	0.00

MARITAL STATUS MARRIED
FEDERAL EXEMPTIONS 2 EXTRA FEDERAL TAX 0.00
STATE EXEMPTIONS 2 EXTRA STATE TAX 0.00
MESSAGE

DEDUCTIONS

Description	Current	Y-T-D	Balance
PENS TPAF	0.00	24,678.98	
CONT. INS. TPAF	0.00	1,351.27	
PENSION REFUND TPAF	-754.57	-754.57	
CONT. INS. REFUND TPAF	-42.75	-42.75	
FEDERAL	0.00	*********	
FICA	0.00	8,239.80	
MEDICARE	0.00	5,013.37	
MEDICARE (ADDITIONAL)	0.00	1,311.74	
STATE - NJ	0.00	30,409.61	
SUI/FLI	0.00	173.72	
Total Deductions	-797.32	*********	

SICK DAYS			VACATION DAYS			PERSONAL DAYS			STORM DAYS			Sick, Vacation, Personal, Storm Posted THRU
Accumulated Less Buy-Back	Used	Balance	Accumulated Less Buy-Back	Used	Balance	Accumulated	Used	Balance	Accumulated	Used	Balance	
0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	JUL-23-2019

PAY312B - HAND THE PATERSON PUBLIC SCHOOLS - 90 DELAWARE AVENUE PATERSON, NEW JERSEY 07503

* 51980
B
A

THE PATERSON PUBLIC SCHOOLS
90 DELAWARE AVENUE
PATERSON, NEW JERSEY 07503
CURRENT ACCOUNT

TD Bank
America's Most Convenient Bank®

55-136
312

Check Date	Check Number	Check Amount
JUL-25-2019	0000218540	$169,000.00

PAY One Hundred Sixty-Nine Thousand Dollars and No Cents

VOID AFTER NINETY DAYS

TO THE ORDER OF
VENDOR NUMBER : 4002952
RICCI & FAVA, LLC
16 FURLER STREET
2ND FLOOR
TOTOWA, NJ 07512

Eileen Shafer
Richard L. Mongiello
Margaret L. Keane

⑈0000218540⑈ ⑆031201360⑆ 0700902207⑈

BUD312N - CHECK

THE PATERSON PUBLIC SCHOOLS - 90 DELAWARE AVENUE PATERSON, NEW JERSEY 07503 **CHECK NUMBER : 0000218540**

REMITTANCE ADVICE

DATE	PO NO. / REF. NO.	INVOICE / NOTES	PAYMENT AMOUNT
JUL-25-2019	2001762	Settlement of Legal Fees for Trevor Sanders OAL DKT. NO.EDU 04413-2018N: AGENCY REF. NO. 51-3/18	169,000.00

VENDOR NUMBER : 4002952 **TOTAL CHECK AMOUNT : $169,000.00**

MGL PRINTING SOLUTIONS (908) 665-1999 P020-(

COPY 1 PAGE 1 OF 1
JUL-25-2019 11:28:01 AM

PURCHASE ORDER
Paterson Public Schools

Division Of Business Services
Department Of Purchasing
90 Delaware Avenue
Paterson, New Jersey 07503

2001762
PURCHASE ORDER NO.
THIS NUMBER MUST APPEAR ON ALL INVOICES, PACKAGES AND CORRESPONDENCE

TO: RICCI & FAVA, LLC

16 FURLER STREET
2ND FLOOR
TOTOWA, NJ
07512

SHIP TO: LEGAL DEPARTMENT
90 DELAWARE AVENUE
3RD FLOOR
PATERSON, NJ
07503

CYNTHIA BENJAMIN
973 321-0640

DATE: JUL. 25, 2019 APPROVAL METHOD: CONTRACT 18A:18A-5a(1) PROFESSIONAL SERVICES REQ: 2191

LINE	QUANTITY	DESCRIPTION	UNIT PRICE	AMOUNT
1	1	Legal fees to be paid by the Boad Of Education	169,000.00	169,000.00
2		to Ricci and Fava, LLC		
3				
4		OAL-Dkt. No. EDU 04413-2018N Agency Ref.		
5		Agency Ref. No. 51-3/18		
6				
7				
8				
9		NOT TO EXCEED $169,000.00		
10				
11				
12				
13				
14				
15				
16				
			TOTAL	169,000.00

ITEM	ACCOUNT	AMOUNT	ITEM	ACCOUNT	AMOUNT
2191	11-000-230-820-605-000-0000-000	169,000.00			
				DISTRIBUTION TOTAL	169,000.00

*******INVOICES MUST ITEMIZE ALL CLAIMS BY COMPONENT PRICING*******

The vendor will honor all of the terms and pricing stated on this purchase order. Any term or pricing that is inconsistent with a contract between the Board of Education and the vendor the terms of pricing policies of the vendor is the responsibility of the vendor. The maximum obligation of the Paterson Board of Education to the vendor for the cost of goods and the delivery of or the performance of services to the district will not exceed the amounts included on this purchase order.

PURCHASING AUTHORITY
Robert L. Mathes
PURCHASING AUTHORITY

PURCHASE ORDER MUST BE SIGNED TO BE VALID

INSTRUCTIONS TO VENDOR

GOODS AND/OR SERVICES IN RELATION TO THIS PURCHASE ORDER MUST BE RECEIVED WITHIN SIX (6) MONTHS.
VENDOR COMPLETE THIS INFORMATION AND RETURN VOUCHER.
INCORPORATED -- YES/NO NON-INCORPORATED -- YES/NO
NO PAYMENTS MADE WITHOUT TAX INFORMATION.

VENDOR COPY-RETAIN FOR YOUR RECORDS

PATERSON PUBLIC SCHOOLS

Office of the Superintendent of Schools
90 Delaware Avenue, Paterson, NJ 07503
Office: (973) 321-0980 Fax: (973) 321-0470

Ms. Eileen F. Shafer
Superintendent of Schools

CERTIFICATION TO APPROVE SETTLEMENT AGREEMENT AND GENERAL RELEASE

I, Eileen F. Shafer, M.Ed., Superintendent of Schools of the Paterson Public School District, hereby certify that attached hereto is a true copy of the resolution adopted by the Board of Education on Wednesday, July 24, 2019, to approve the Settlement Agreement and General Release in connection with the Petition of Appeal filed by Trevor Sanders v. State-Operated School District of the City of Paterson, Passaic County OAL Dkt. No. EDU 04413-2018N; Agency Ref. No. 51-3/18 and the assent to Trevor Sanders' irrevocable resignation effective at the end of the day on July 31, 2019.

IN WITNESS WHEREOF, I have hereunto set my hand as of this 24th day of July, 2019.

(seal)

Eileen F. Shafer, M.Ed.
Superintendent of Schools

PATERSON PUBLIC SCHOOL DISTRICT
RESOLUTION FORM

1. All Board resolutions must clearly state how that program/initiative relates to or is specifically connected to the Priorities and Goals contained in the Strategic Plan.
2. This resolution must be in the Superintendent's office according to cutoff date before the meeting of the Board of Education.

Recommendation/Resolution:

PATERSON BOARD OF EDUCATION
RESOLUTION

WHEREAS, the Paterson Board of Education ("Board") and employee T.S. have negotiated a Settlement Agreement and General Release ("Agreement") (collectively "Parties") in connection with the Petition of Appeal filed by T.S. before the Commissioner of Education, OAL Dkt. No. EDU 04413-2018N; Agency Ref. No. 51-3/18; and

WHEREAS, the Parties have agreed, by way of this Agreement, to resolve the above-referenced litigation and the pending municipal matters referenced in the Agreement; and

WHEREAS, the Board has reviewed the Agreement and determined that it is in its best interest for cost efficiency to settle this matter without further litigation;

BE IT RESOLVED that the Board hereby approves the attached Agreement, a copy of which will be kept on file by the Board; and

BE IT FURTHER RESOLVED that the Board authorizes the settlement of $337,816.00 minus usual and customary withholdings, including FICA, State and Federal taxes, union membership fee contributions, credit for unemployment benefits, and other legally required deductions, for the time period between the date of petitioner's indictment/suspension without through to the conclusion of the 2018-2019 school year, and the Board will pay $169,000.00 for Petitioner's legal cost and fees to Ricci and Fava, LLC, the sum as set forth in the Agreement and assents to T.S.'s irrevocable resignation effective at the end of the day on July 31, 2019; and

BE IT FURTHER RESOLVED that the Board authorizes the Board President and the Business Administrator/Board Secretary to execute the Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Agreement and carry out this action of the Board.

APPROVALS REQUIRED

1. Submitted by Mr. Luis Rojas, Assistant Superintendent (Name, Title) — Date 7/24/19
2. Approval by Divisional Administrator _____ (Superintendent, Deputy, Assistant Superintendent, or Business Administrator, etc.) — Date
3. Verification by Legal Department _____ — Date 7/24/19
4. Account No. _____

Certification of Funds – Business Administrator Richard L Matthew (Signature) — Date 7/24/19

Funds Available		Funds Not Available		Funds Not Needed		Non-Budget Item	
	X						

5. Approval by Superintendent Eileen Shafer — Date 7/24/19
6. Board Adoption Date July 24, 2019 — Resolution Number 1

Copies as follows:
White-To Board Office Green-To Deputy Yellow-To Business Administrator Pink-To #1 Gold-To #2

206-20

OAL Dkt. No. EDU 03946-18
(EDU 00430-15 and EDU 00431-15 On Remand)
Agency Dkt. No. 327-11/14 and 336-11/14

New Jersey Commissioner of Education

Final Decision

Beryl Zimmerman and Judy Comment,

Petitioners,

v.

Sussex County Educational Services Commission, Sussex County,

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 18, 2020
Date of Mailing: September 21, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03946-18
AGENCY DKT. NO. 327-11/14
& 336- 11/14

BERYL ZIMMERMAN AND JUDY COMMENT,
Petitioners,
v.
SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY,
Respondent.

ON REMAND
OAL DKT. NO. EDU 00430-15
& EDU 00431-15

Richard A. Friedman, Esq. for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Brent Pohlman, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: July 20, 2020 Decided: August 6, 2020

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 9, 2018 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

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

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

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

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

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

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

August 6, 2020
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: August 6, 2020

Mailed to Parties:
sej

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF THE SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION SUSSEX COUNTY, NJ, AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Sussex County Educational Services Commission in the County of Sussex, NJ, convened in a regular meeting on June 29, 2020 7:05 p.m. at the Northern Hills Academy, in the Township of Sparta, New Jersey.

The following members of the Board of Education were present: Ms. Bilik, Ms. Figue'redo, Ms. Faye, Ms. Hoover, Ms. Carlson, Ms. Risley, Mr. Ryder, Ms. Douglas, and Mr. Moscatello

Member(s) absent: Ms. Anderson, Ms. Ross, Mr. Kuncken, Mr. Capone, Ms. Ranzan, Mr. Peek

The following resolution was offered by Ms. Carlson and seconded by Ms. Figueiredo and adopted by the Board by the following roll call vote:

> **RESOLVED**, that the Sussex County Educational Services Commission Board of Directors approves the settlement agreement and general release with Beryl Zimmerman dated June 3, 2020 in accordance with the terms and conditions therein; and
> Be it further resolved, that the Commission President is authorized to sign the settlement on behalf of the ESC.

Roll Call: Ayes : 9 Nays: 0 Abstain: 0 Absent: 6

I, Erin Siipola, Secretary of the Board of the Sussex County Educational Services Commission, 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 said commission was duly called and held on June 29, 2020 and has been compared by me with the original minutes as officially recorded in my office in the minute book of said Board, 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 this 7th day of June, 2020.

Erin Siipola, Secretary of the Board

METHFESSEL & WERBEL
A Professional Corporation

JOEL N. WERBEL>
JOHN METHFESSEL, JR.>
FREDRIC PAUL GALLIN*+^
STEPHEN R. KATZMAN#
WILLIAM S. BLOOM>*
ERIC L. HARRISON*+
MATTHEW A. WERBEL>
LORI BROWN STERNBACK*+
I. BLAKELEY JOHNSTONE,III+*
GINA M. STANZIALE>
PAUL J. ENDLER JR.>

Of Counsel
MARC DEMBLING*+
ED THORNTON>

Retired
JOHN METHFESSEL, SR.>
(1935-2017)
DON CROWLEY*+

Counsel
CHRISTIAN R. BAILLIE+
SARAH K. DELAHANT+
SHAJI M. EAPEN+
JAMES FOXEN^
GERALD KAPLAN>
JARED P. KINGSLEY*+
JOHN R. KNODEL*
LESLIE A. KOCH+
CHARLES T. MCCOOK, JR.*>
MARC G. MUCCIOLO>
RICHARD A. NELKE~
STEVEN K. PARNESS+
RAINA M. PITTS^
BRENT R. POHLMAN+
AMANDA J. SAWYER^
JARED S. SCHURE>
SHIFRA TARICA+

Associates
EDWARD D. DEMBLING>
JASON D. DOMINGUEZ+
NATALIE DONIS+
MICHAEL R. EATROFF>
DAVID INCLE, JR.>
FRANK J. KEENAN+^
SCOTT KETTERER>

Associates, Cont'd
ALLISON M. KOENKE>
OLIVIA R. LICATA+
ASHLEY E. MALANDRE^
ANTHONY J. MANCUSO>
JAMES V. MAZEWSKI+
CHRISTEN E. MCCULLOUGH^
DIAA J. MUSLEH+
KAJAL J. PATEL>
NABILA SAEED^
TIFFANY D. TAGARELLI>
STEVEN A. UNTERBURGER+
LEVI E. UPDYKE+^

* Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
+Member of NY & NJ Bar
^Member of PA & NJ Bar
>Member of NJ Bar only
#Member of NJ & LA Bar
<Member of NJ & DC Bar
≥Member of NJ, PA & DC Bar
~Member of NY, NJ & DC Bar

Please reply to New Jersey

July 17, 2020

VIA EMAIL: Ellen.Bass@oal.nj.gov
Hon. Ellen S. Bass, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: **ZIMMERMAN, BERYL VS. SUSSEX COUNTY EDUCATIONAL SERVICES**
Our File No. : 80181 ELH
Docket No. : 327-11/14, 336 11/14/EDU 03946-2018N

Dear Judge Bass:

Enclosed please find the fully executed settlement agreements for the above matter. We request that Your Honor confirm and approve the settlement. Thank you for your assistance in bringing this matter to a resolution.

Respectfully submitted,

METHFESSEL & WERBEL, ESQS.

Brent R. Pohlman
pohlman@methwerb.com
Ext. 182

BRP:as/hn/Encl.
Executed settlement agreement

cc: VIA EMAIL: christopher.porrino@law.njoag.gov
Christopher S. Porrino, Attorney General
Office of the Attorney General of New Jersey
124 Halsey Street, 5th Floor
PO Box 45029
Newark, NJ 07101

VIA EMAIL: rfriedman@zazzali-law.com
Richard A. Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 W. State Street
Trenton, NJ 08608

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, Petitioner Beryl Zimmerman ("Petitioner") was employed by Respondent Sussex County Educational Services Commission, Sussex County ("Respondent") as a part-time, non-public teaching staff member since October 2002, and in that capacity acquired certain tenure and seniority rights pursuant to state law; and

WHEREAS, Petitioner's hours fluctuated throughout her employment with Respondent; and

WHEREAS, Petitioner alleges that her tenure and seniority rights were violated by the reduction in her weekly hours assigned at the outset of the 2014-2015 school year, and that Petitioner sought to have her hours reinstated to the level of hours worked during the 2013-2014 school year; and

WHEREAS, the Petitioner and Respondent (collectively referred to herein as "Parties") dispute as to whether working fewer hours triggers tenure and seniority protections; and

WHEREAS, Petitioner filed a Petitioner of Appeal on November 11, 2014, alleging violation of her tenure rights, which was subsequently transmitted to the New Jersey Office of Administrative Law ("OAL"); and

WHEREAS, on May 19, 2015, Petitioner's case was consolidated with the Petition of Appeal filed by Judy Comment, another employee of Respondent; and

WHEREAS, on or about July 11, 2016, the Administrative Law Judge ("ALJ") issued an initial decision, granting summary decision to Respondents, which was transmitted to the Commission of Education, who, on October 4, 2016 adopted the findings and conclusions of the ALJ; and

WHEREAS, on November 9, 2016, Petitioners filed a timely appeal of the Commissioner's decision with the New Jersey Appellate Division, which on February 13, 2018 reversed and remanded the case; and

WHEREAS, on April 30, 2019, the New Jersey Supreme Court issued a decision revising and altering the Appellate

Division's decision and remanding the matter back to the OAL for further proceedings; and

WHEREAS, the parties have now reached an agreement to fully and finally settle any and all of Petitioner's claims against Respondent, as memorialized herein, including those not asserted in the Petition, arising out of Petitioner's employment by Respondent, as well as all other actions and claims which Petitioner has, had, or otherwise may have against Respondent from the beginning of time, through the date on which this Agreement is executed by Petitioner; and

WHEREAS, it is understood and agreed by Petitioner and Respondent, and their respective heirs, executors, administrators, officers, employees, successors, and assigns, by reason of the payment, consideration, and any other terms made on behalf of Respondent, do not admit any liability nor have they made any agreement to make any payment or to take any action not reflected in this Agreement.

NOW, IN CONSIDERATION of the payment to Petitioner, as provided for herein, and other good and valuable consideration, and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows:

1. **Non-Admission**. This Agreement is not, and shall not in any way be considered or construed as an admission of liability by Respondent of discrimination, retaliation, tortious conduct, or of any violation of any law, including all laws related to Petitioner's tenure rights; common law, or federal, state or local statute or regulation, or of any education policy, practice, contract or agreement, or of any alleged duty owed by Respondent, or of any unlawful or wrongful acts whatsoever by Respondent. Respondent specifically denies any wrongdoing of any kind.

2. **Consideration**. the Parties agree to the following good and valuable consideration:

   (a) Respondent will pay Petitioner a lump sum amount of Thirteen thousand dollars ($13,000); and

   (b) Said lump sum payment is specifically being paid to Petitioner as consideration for Petitioner waiving all claims which she raised or could have raised in her Petition, including her claims of violation of Petitioner's tenure rights. The payment herein is a business decision by Respondent, and not an admission whatsoever of any violation of Petitioner's tenure rights, which Respondent denies. The consideration paid herein is specifically not payment for any alleged lost wages, which Petitioner is hereby waiving by entering this agreement, and is specifically not for payment of Petitioner's attorney's fees, which likewise is waived by Petitioner.

3. **Dismissal of Lawsuit, and Covenant Not to Sue**. In exchange for the consideration set forth in paragraph 2, Petitioner agrees to dismiss the petition of appeal with prejudice, and agrees not to appeal from the dismissal of, re-file, revive or reopen the petition of appeal in any way.

Petitioner further agrees that neither she, nor any person, organization, agency, or other entity acting on her behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, grievance, or claim of any nature with any court, agency, or tribunal (including any action for damages, attorneys' fees, injunction, declaratory, monetary, equitable or other relief) against the Respondent, or any of its administrators or employees, based on any matter, fact or event occurring prior to the effective date of this Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

4. **Waiver of Tenure Rights/Right to Employment.** In exchange for the consideration set forth in paragraph 2, Petitioner agrees to forfeit any and all tenure and/or seniority rights she has accrued while working under Respondent's employ, and specifically waives her right to any future employment with Respondent. Should Petitioner apply for any employment position with Respondent, by entering this Agreement, Petitioner agrees that Respondent will not re-hire her, and that she waives all rights to assert any claim against Respondent for refusing or failing to rehire her for any position.

5. **General Release and Waiver of all of Petitioner's Claims.** In exchange for the consideration set forth

in paragraph 2, Petitioner fully releases and forever discharges Respondant of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, promises, charges, judgments, grievances, obligations, rights, demands, debts, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claims"), through the effective date of this Agreement, including, but not limited to, any and all Claims of harassment, discrimination, retaliation, and any and all tort Claims or contract Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state, or local laws or under the common law; violations of any federal, state, or educational practices or civil rights laws or ordinances; Claims for personal injury, failure to reinstate, wrongful conduct, or discrimination; New Jersey Department of Education regulations and related statutes; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Age Discrimination in Employment Act, as amended; the New Jersey Law Against Discrimination; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the National Labor Relations Act, as amended; the American's with Disabilities Act; Fair

Housing Act; Section 504 of the Rehabilitation Act; any and all state wage payment and collection laws; the Respondent's policies, practices, collective bargaining agreements, contracts, benefits, or understandings; any Claims arising out of any relationship, including employer/employee relationship, between or among Petitioner and Respondent predating the effective date of this Agreement; and any and all grievances or demands for mediation or arbitration, or Claims or demands under Respondent's policies and procedures; and any and all Claims asserted, or which could have been asserted, in the petition of appeal referenced above, including any Claims against any current or former agents or employees of Respondent.

Petitioner hereby specifically waives, releases, and gives up all claims and rights, as described in the preceding paragraph, whether now known or unknown, which she has or may have against Respondent, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Petitioner understands that she is waiving, releasing, and giving up all Claims and rights that she knows about and all Claims and rights that she may not know about.

6. Liens and Indemnification by Petitioner. It is further understood that as a condition of this settlement, all claims, and/or liens, past, current, and/or future arising out of this settlement or

asserted against the proceeds of this settlement are to be satisfied by Petitioner, including but not limited to any Medicare or Medicaid claims and/or liens, Child Support claims and/or liens; Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory.

7. **Prevailing Party Status**. Petitioner understands and agrees that she will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Agreement.

8. **Non-Disparagement:** The parties, including but not limited to their officers and employees, agree that they will not to disparage the other party to this Agreement. To the extent allowed by law the parties shall keep the terms of this agreement confidential. The confidentially agreement shall not apply to disclosers or conversations with Petitioner's attorneys, union employees and representatives, immediate family, and tax and financial advisors.

9. **Payment**. Payment to Petitioner is subject to Respondent's receipt of Petitioner's signed and notarized Agreement, as well as a child support search report.

Petitioners represents and warrants that neither Respondent nor its attorneys provided any advice regarding the taxability of the settlement amounts paid pursuant to this paragraph. Petitioner acknowledges and agrees that Petitioner is solely responsible for payment of any and all federal, state, and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of execution of this Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Should the Respondent suffer any damages as a result of the actions of Petitioner, Petitioner agrees to make Respondent whole for said damages.

10. **Attorney's Fees.** Each party shall be fully responsible for the payment of its own attorneys' fees and related costs in this matter through the date of each party's execution of this Agreement.

11. **Effective Date.** The effective date of this Agreement shall be the day following the date upon which the signed Agreement is received by Respondent's attorneys, Methfessel & Werbel, P.C, and ratified by Respondent's Board of Education.

12. **Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any

provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement or may be modified as necessary.

13. **Child Support Search.** Petitioner represents that prior to the execution of this Agreement she will have, through counsel, provided Respondents, through their counsel, with a certification and child support judgment search compliant with N.J.S.A. 2A:17-56.23b and agrees that the settlement proceeds described in this Agreement shall be paid in accordance with N.J.S.A. 2A:17-56.23b and/or other applicable law.

14. **Entire Agreement.** This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

15. **Signatures.** This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed by and among the Parties, ratified by Respondent's Board of Education, and subject to Respondent's receipt of Petitioner's signed and notarized Agreement, and a completed child support search report.

16. **Headings.** The headings contained in this Agreement are for convenience and reference purposes

only and shall not be deemed to be a part of the Agreement or to offer the meaning or interpretation of this Agreement.

17. **Counterparts.** This Agreement may be executed in counterparts, including by fax, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

18. **Drafting:** The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

BERYL ZIMMERMAN FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT SHE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT SHE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF HER ATTORNEY, AND THAT SHE MAKES THIS RELEASE KNOWLINGLY AND VOLUNTARILY.

BERYL ZIMMERMAN ACKNOWLEDGES THAT SHE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH HER ABILITY TO READ AND UNDERSTAND THE MEANING OF THIS RELEASE OR ITS TERMS.

BERYL ZIMMERMAN FURTHER REPRESENTS THAT IN SIGNING THIS RELEASE, SHE DOES NOT RELY ON ANY PROMISES OR

REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

BERYL ZIMMERMAN FURTHER WARRANTS, REPRESENTS, AND AGREES THAT IN SIGNING THE RELEASE, SHE DOES SO WITH FULL KNOWLEDGE OF ANY AND ALL RIGHTS WHICH SHE MAY HAVE WITH RESPECT TO RESPONDENT AND THE LAWSUIT.

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

By: Beryl Zimmerman
BERYL ZIMMERMAN

Dated: 6/3/2020

By:
SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY

Dated: 6-29-20

Andy Lyman
Superintendent
7/1/2020

By:
BOARD PRESIDENT

Dated:

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF THE SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION SUSSEX COUNTY, NJ, AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Sussex County Educational Services Commission in the County of Sussex, NJ, convened in a regular meeting on June 29, 2020 7:05 p.m. at the Northern Hills Academy, in the Township of Sparta, New Jersey.

The following members of the Board of Education were present: Ms. Bilik, Ms. Figueiredo, Ms. Faye, Ms. Hoover, Ms. Carlson, Ms. Risley, Mr. Ryder, Ms. Douglas, and Mr. Moscatello

Member(s) absent: Ms. Anderson, Ms. Ross, Mr. Kuncken, Mr. Capone, Ms. Ranzan, Mr. Peek

The following resolution was offered by Ms. Carlson and seconded by Ms. Figueiredo and adopted by the Board by the following roll call vote:

> **RESOLVED**, that the Sussex County Educational Services Commission Board of Directors approves the settlement agreement and general release with Judy Comment dated June 13, 2020 in accordance with the terms and conditions therein; and
> Be it further resolved, that the Commission President is authorized to sign the settlement on behalf of the ESC.

Roll Call: Ayes : 9 Nays: 0 Abstain: 0 . Absent: 6

I, Erin Siipola, Secretary of the Board of the Sussex County Educational Services Commission, 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 said commission was duly called and held on June 29, 2020 and has been compared by me with the original minutes as officially recorded in my office in the minute book of said Board, 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 this 7th day of June, 2020.

Erin Siipola

Erin Siipola, Secretary of the Board

METHFESSEL & WERBEL
A Professional Corporation

JOEL N. WERBEL>
JOHN METHFESSEL, JR.>
FREDRIC PAUL GALLIN*+^
STEPHEN R. KATZMAN#
WILLIAM S. BLOOM>*
ERIC L. HARRISON*+
MATTHEW A. WERBEL>
LORI BROWN STERNBACK*+
I. BLAKELEY JOHNSTONE, III+*
GINA M. STANZIALE>
PAUL J. ENDLER JR.>

Of Counsel
MARC DEMBLING*+
ED THORNTON>

Retired
JOHN METHFESSEL, SR.>
(1935-2017)
DON CROWLEY*+

Counsel
CHRISTIAN R. BAILLIE+
SARAH K. DELAHANT+
SHAJI M. EAPEN+
JAMES FOXEN^
GERALD KAPLAN>
JARED P. KINGSLEY*+
JOHN R. KNODEL*
LESLIE A. KOCH+
CHARLES T. MCCOOK, JR *>
MARC G. MUCCIOLO>
RICHARD A. NELKE-
STEVEN K. PARNESS+
RAINA M. PITTS^
BRENT R. POHLMAN+
AMANDA J. SAWYER^
JARED S. SCHURE>
SHIFRA TARICA+

Associates
EDWARD D. DEMBLING>
JASON D. DOMINGUEZ+
NATALIE DONIS+
MICHAEL R. EATROFF>
DAVID INCLE, JR.>
FRANK J. KEENAN+^
SCOTT KETTERER>

Associates, Cont'd
ALLISON M. KOENKE>
OLIVIA R. LICATA+
ASHLEY E. MALANDRE^
ANTHONY J. MANCUSO>
JAMES V. MAZEWSKI+
CHRISTEN E. MCCULLOUGH^
DIAA J. MUSLEH+
KAJAL J. PATEL>
NABILA SAEED^
TIFFANY D. TAGARELLI>
STEVEN A. UNTERBURGER+
LEVI E. UPDYKE+^

* Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
+Member of NY & NJ Bar
^Member of PA & NJ Bar
>Member of NJ Bar only
#Member of NJ & LA Bar
<Member of NJ & DC Bar
≥Member of NJ, PA & DC Bar
~Member of NY, NJ & DC Bar

Please reply to New Jersey

July 17, 2020

VIA EMAIL: Ellen.Bass@oal.nj.gov
Hon. Ellen S. Bass, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: **COMMENT, JUDY VS. SUSSEX COUNTY EDUCATIONAL SERVICES**
Our File No. : 80182 ELH
Docket No. : 327-11/14 336-11/14/EDU 03946-18N

Dear Judge Bass:

Enclosed please find the fully executed settlement agreements for the above matter. We request that Your Honor confirm and approve the settlement. Thank you for your assistance in bringing this matter to a resolution.

Respectfully submitted,

METHFESSEL & WERBEL, ESQS.

Brent R. Pohlman
pohlman@methwerb.com
Ext. 182

BRP:as/hn/Encl.
Executed settlement agreement

cc: VIA EMAIL: afree29212@cs.com
Richard L. Freedman, Esq.
Law Offices Richard L.
Freedman, P.A.
501 White Horse Pike
Collingswood, NJ 08107

SETTLEMENT AGREEMENT AND GENERAL RELEASE

WHEREAS, Petitioner Judy Comment ("Petitioner") was employed by Respondent Sussex county Educational Services Commission, Sussex County ("Respondent") as a part-time, non-public teaching staff member since November 1997, and in that capacity acquired certain tenure and seniority rights pursuant to state law; and

WHEREAS, Petitioner's hours fluctuated throughout her employment with Respondent; and

WHEREAS, Petitioner alleges that her tenure and seniority rights were violated by the reduction in her weekly hours assigned at the outset of the 2014-2015 school year, and that Petitioner sought to have her hours reinstated to the level of hours worked during the 2013-2014 school year; and

WHEREAS, the Petitioner and Respondent (collectively referred to herein as "Parties") dispute as to whether working fewer hours triggers tenure and seniority protections; and

WHEREAS, Petitioner filed a Petitioner of Appeal on November 11, 2014, alleging violation of her tenure rights, which was subsequently transmitted to the New Jersey Office of Administrative Law ("OAL"); and

WHEREAS, on May 19, 2015, Petitioner's case was consolidated with the Petition of Appeal filed by Beryl Zimmerman, another employee of Respondent; and

WHEREAS, on or about July 11, 2016, the Administrative Law Judge ("ALJ") issued an initial decision, granting summary decision to Respondents, which was transmitted to the Commission of Education, who, on October4, 2016 adopted the findings and conclusions of the ALJ; and

WHEREAS, on November 9, 2016, Petitioners filed a timely appeal of the Commissioner's decision with the New Jersey Appellate Division, which on February 13, 2018 reversed and remanded the case; and

WHEREAS, on April 30, 2019, the New Jersey Supreme Court issued a decision revising and altering the Appellate Division's decision and remanding the matter back to the OAL for further proceedings; and

WHEREAS, the parties have now reached an agreement to fully and finally settle any and all of Petitioner's claims against Respondent, as memorialized herein, including those not asserted in the Petition, arising out of Petitioner's employment by Respondent, as well as all other actions and claims which Petitioner has, had, or otherwise may have against Respondent from the beginning of time, through the date on which this Agreement is executed by Petitioner; and

WHEREAS, it is understood and agreed by Petitioner and Respondent, and their respective heirs, executors, administrators, officers, employees, successors, and assigns, by reason of the payment, consideration, and any other terms made on behalf of Respondent, do not admit any liability nor have they made any agreement to make any payment or to take any action not reflected in this Agreement.

NOW, IN CONSIDERATION of the payment to Petitioner, as provided for herein, and other good and valuable consideration, and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows:

1. **Non-Admission**. This Agreement is not, and shall not in any way be considered or construed as an admission of liability by Respondent of discrimination, retaliation, tortious conduct, or of any violation of any law, including all laws related to Petitioner's tenure rights; common law, or federal, state or local statute or regulation, or of any education policy, practice, contract or agreement, or of any alleged duty owed by Respondent, or of any unlawful or

wrongful acts whatsoever by Respondent. Respondent specifically denies any wrongdoing of any kind.

2. **Consideration**. the Parties agree to the following good and valuable consideration:

   (a) Respondent will pay Petitioner a lump sum amount of Twenty thousand dollars ($20,000); and

   (b) Said lump sum payment is specifically being paid to Petitioner as consideration for Petitioner waiving all claims which she raised or could have raised in her Petition, including her claims of violation of Petitioner's tenure rights. The payment herein is a business decision by Respondent, and not an admission whatsoever of any violation of Petitioner's tenure rights, which Respondent denies. The consideration paid herein is specifically not payment for any alleged lost wages, which Petitioner is hereby waiving by entering this agreement, and is specifically not for payment of Petitioner's attorney's fees, which likewise is waived by Petitioner.

3. **Dismissal of Lawsuit, and Covenant Not to Sue**. In exchange for the consideration set forth in paragraph 2, Petitioner agrees to dismiss the petition of appeal with prejudice, and agrees not to appeal from the

dismissal of, re-file, revive or reopen the petition of appeal in any way.

Petitioner further agrees that neither she, nor any person, organization, agency, or other entity acting on her behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, grievance, or claim of any nature with any court, agency, or tribunal (including any action for damages, attorneys' fees, injunction, declaratory, monetary, equitable or other relief) against the Respondent, or any of its administrators or employees, based on any matter, fact or event occurring prior to the effective date of this Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

4. **Waiver of Tenure Rights/Right to Employment**. In exchange for the consideration set forth in paragraph 2, Petitioner agrees to forfeit any and all tenure and/or seniority rights she has accrued while working under Respondent's employ, and specifically waives her right to any future employment with Respondent. Should Petitioner apply for any employment position with Respondent, by entering this Agreement, Petitioner agrees that Respondent will not re-hire her, and that she waives all rights to assert any claim against Respondent for refusing or failing to rehire her for any position.

5. **General Release and Waiver of all of Petitioner's Claims**. In exchange for the consideration set forth in paragraph 2, Petitioner fully releases and forever discharges Respondent of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, promises, charges, judgments, grievances, obligations, rights, demands, debts, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claims"), through the effective date of this Agreement, including, but not limited to, any and all Claims of harassment, discrimination, retaliation, and any and all tort Claims or contract Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state, or local laws or under the common law; violations of any federal, state, or educational practices or civil rights laws or ordinances; Claims for personal injury, failure to reinstate, wrongful conduct, or discrimination; New Jersey Department of Education regulations and related statutes; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Age Discrimination in Employment Act, as amended; the New Jersey Law Against Discrimination;

the Employee Retirement Income Security Act; the Fair Labor Standards Act; the National Labor Relations Act, as amended; the American's with Disabilities Act; Fair Housing Act; Section 504 of the Rehabilitation Act; any and all state wage payment and collection laws; the Respondent's policies, practices, collective bargaining agreements, contracts, benefits, or understandings; any Claims arising out of any relationship, including employer/employee relationship, between or among Petitioner and Respondent predating the effective date of this Agreement; and any and all grievances or demands for mediation or arbitration, or Claims or demands under Respondent's policies and procedures; and any and all Claims asserted, or which could have been asserted, in the petition of appeal referenced above, including any Claims against any current or former agents or employees of Respondent.

Petitioner hereby specifically waives, releases, and gives up all claims and rights, as described in the preceding paragraph, whether now known or unknown, which she has or may have against Respondent, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Petitioner understands that she is waiving, releasing, and giving up all Claims and rights that she knows about and all Claims and rights that she may not know about.

6. **Liens and Indemnification by Petitioner**. It is further understood that as a condition of this settlement, all claims, and/or liens, past, current, and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Petitioner, including but not limited to any Medicare or Medicaid claims and/or liens, Child Support claims and/or liens; Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory.

7. **Prevailing Party Status**. Petitioner understands and agrees that she will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Agreement.

8. **Non-Disparagement:** The parties, including but not limited to their officers and employees, agree that they will not disparage the other party to this Agreement. To the extent allowed by law the parties shall keep the terms of this agreement confidential. The confidentially agreement shall not apply to disclosers or conversations with Petitioner's attorneys, union representatives, immediate family, and tax and financial advisors.

9. **Payment**. Payment to Petitioner is subject to Respondent's receipt of Petitioner's signed and notarized Agreement, as well as a child support search report.

Petitioner represents and warrants that neither Respondent nor its attorneys provided any advice regarding the taxability of the settlement amounts paid pursuant to this paragraph. Petitioner acknowledges and agrees that Petitioner is solely responsible for payment of any and all federal, state, and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of execution of this Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. In the event the respondent suffers any damages as a result the actions of the Petitioner, Petitioner shall make Respondent whole.

10. **Attorney's Fees.** Each party shall be fully responsible for the payment of its own attorneys' fees and related costs in this matter through the date of each party's execution of this Agreement.

11. **Effective Date**. The effective date of this Agreement shall be the day following the date upon which the signed Agreement is received by Respondent's attorneys, Methfessel & Werbel, P.C, and ratified by Respondent's Board of Education.

12. **Applicable Law**. This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement or may be modified as necessary.

13. **Child Support Search.** Petitioner represents that prior to the execution of this Agreement she will have, through counsel, provided Respondents, through their counsel, with a certification and child support judgment search compliant with N.J.S.A. 2A:17-56.23b and agrees that the settlement proceeds described in this Agreement shall be paid in accordance with N.J.S.A. 2A:17-56.23b and/or other applicable law.

14. **Entire Agreement**. This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

15. **Signatures**. This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed by and among the Parties, ratified by Respondent's Board of Education, and subject to Respondent's receipt of Petitioner's signed and notarized

Agreement, and a completed child support search report.

16. **Headings.** The headings contained in this Agreement are for convenience and reference purposes only and shall not be deemed to be a part of the Agreement or to offer the meaning or interpretation of this Agreement.

17. **Counterparts.** This Agreement may be executed in counterparts, including by fax, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

18. **Drafting:** The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

JUDY COMMENT FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT SHE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT SHE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF HER ATTORNEY, AND THAT SHE MAKES THIS RELEASE KNOWLINGLY AND VOLUNTARILY.

JUDY COMMENT ACKNOWLEDGES THAT SHE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH

HAS INTERFERED WITH HER ABILITY TO READ AND UNDERSTAND THE MEANING OF THIS RELEASE OR ITS TERMS.

JUDY COMMENT FURTHER REPRESENTS THAT IN SIGNING THIS RELEASE, SHE DOES NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

JUDY COMMENT FURTHER WARRANTS, REPRESENTS, AND AGREES THAT IN SIGNING THE RELEASE, SHE DOES SO WITH FULL KNOWLEDGE OF ANY AND ALL RIGHTS WHICH SHE MAY HAVE WITH RESPECT TO RESPONDENT AND THE LAWSUIT.

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

By: Judy Comment
JUDY COMMENT

Dated: June 13, 2020

By: Linda Ramsey
SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY

Dated: 6-29-20

Andy Roman
7/1/2020
Superintendent

By: _____
BOARD PRESIDENT

Dated: _____

207-20

OAL Dkt. No. EDU 09884-10
Agency Dkt. No. 293-8/10

New Jersey Commissioner of Education

Final Decision

Monmouth-Ocean Educational Services Association, et al.,

Petitioner,

v.

Monmouth-Ocean Educational Services Commission, Monmouth County,

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 21, 2020
Date of Mailing: September 25, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09884-10
AGENCY DKT. NO. 293-8/10

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION, ET AL,
Petitioner,
v.
MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY,
Respondent.

Keith Waldman, Esq. for petitioner (Selikoff and Cohen, attorneys)

Richard Friedman, Esq., co-counsel for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Viola Lordi, Esq., for respondent (Wilentz, Goldman,, and Spitzer, attorneys)

Record Closed: August 6, 2020 Decided: August 12, 2020

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 14, 2010 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

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

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

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

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

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

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

August 12, 2020
DATE

abstained by Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 8/13/2020

Mailed to Parties: 8/13/2020

/mel

SELIKOFF & COHEN, P.A.
700 East Gate Drive, Suite 302
Mt. Laurel, NJ 08054-3823
(856) 778-6055
Fax: (856) 778-6056
Keith Waldman, Esq. (020921988)
kwaldman@selikoffcohen.com
Hope F. Wechsler, Esq. (231332017)
hwechsler@selikoffcohen.com

Co-Counsel for Petitioners Monmouth-Ocean Educational Services Association

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey
(609) 392-8172
Fax: (609) 392-8933
Richard A. Friedman, Esq. (011211978)
rfriedman@zazzalilaw.com
Raymond M. Baldino, Esq. (073952013)
rbaldino@zazzali-law.com

Co-Counsel for Petitioners Monmouth-Ocean Educational Services Association

WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Suite 900, Box 10
Woodbridge, NJ 07095-0958
(732) 636-8000
Fax: (732) 726-6007
Viola S. Lorde, Esq. (004901985)
vlorde@wilentz.com
Tracy A. Armstrong, Esq. (034721991)
tarmstrong@wilentz.com
Ashley E. Morin, Esq. (114582014)
amorin@wilentz.com

Counsel for Respondent Monmouth-Ocean Educational Services Commission

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION *et al.*,

Petitioners,

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 09883-10
Agency No. 393-8/10

JOINT MOTION AND STIPULATION FOR APPROVAL OF SETTLEMENT AGREEMENT PURSUANT TO N.J.A.C. 1:1-19.1

PLEASE TAKE NOTICE that Petitioners Monmouth-Ocean Educational Services Association and 13 individually-named petitioners (collectively, Petitioners), by and through their attorneys, Schkolf & Cohen, P.A., and Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., and Respondent Monmouth-Ocean Educational Services Commission (MOESC), by and through its attorneys, Wilentz, Goldman & Spitzer, P.A., jointly hereby do move for an Initial Decision and Order approving settlement of the above-captioned matter pursuant to N.J.A.C. 1:1-19.1.

The basis for this Joint Motion and Stipulation is that the parties have reached and fully executed a Settlement Agreement to fully and finally resolve Petitioners' Petition of Appeal (OAL Docket No. EDU 9884-10, Agency Ref. No. 293-8/10), which has been pending before the Office of Administrative Law (OAL) since 2010. A true and correct copy of the fully-executed Settlement Agreement is attached hereto, including a payment schedule (***Exhibit A***) along with a certified resolution from MOESC's Board of Directors approving the settlement and authorizing execution thereof (***Exhibit B***).

The parties reached the Settlement Agreement after prior unsuccessful settlement discussions; the production and exchange of approximately 37,500 documents in discovery; the issuance and exchange of experts' reports; the scheduling, continuance and cancellation of multiple hearing dates; and approximately six months of good faith negotiations between the parties that included a December 16, 2019 settlement conference before the Hon. Joseph F. Martone, A.L.J. (Retired, on recall) upon referral by the Hon. Patricia M. Kerins, A.L.J.

The parties respectfully request that the Office of Administrative Law approve the attached Settlement Agreement because it fully and finally resolves Petitioners' Petition of Appeal to the mutual benefit of the parties and promotes the public interest by avoiding the cost of protracted litigation. In order to expedite approval of the settlement, the parties

further agree to waive all exceptions pursuant to N.J.A.C. 1:1-18.4(e). As part of Petitioners' release of claims against MOESC, upon the issuance of a final agency decision approving the settlement, Petitioners will additionally withdraw a related unfair practice charge pending before the New Jersey Public Employment Relations Commission (PERC Docket No. CO-2011-117).

By and through their counsel, the parties stipulate that they have knowingly, freely, and voluntarily consented to the attached Settlement Agreement, that the Settlement Agreement fully disposes of all issues in controversy and is consistent with the law, and that the Settlement Agreement fulfills all of the requirements of N.J.A.C. 1:1-19.1 accordingly.

WHEREFORE, the parties request that the Office of Administrative Law issue an Initial Decision and Order (Settlement):

(a) Finding that the parties have voluntarily agreed to the settlement, as evidenced by the attached Settlement Agreement, and that the parties' settlement fully disposes of all issues in controversy and is consistent with the law;

(b) Approving the settlement pursuant to N.J.A.C. 1:1-19.1; and

(c) Ordering that the parties comply with the settlement terms and that these proceedings be concluded.

A proposed form of Order is attached.

SEIKOFF & COHEN, P.A.

By: _____

Dated: 08-06-2020

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN, P.C.

By: Richard D. Friedman (PW)

Dated: 08-06-2020

WILENTZ, GOLDMAN & SPITZER, P.A.

By: _____

Dated:

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This is a Settlement Agreement and General Release (hereinafter Agreement) between Monmouth-Ocean Educational Services Commission (hereinafter sometimes MOESC), with an address of 900 Hope Road, Tinton Falls, New Jersey 07712 and Monmouth-Ocean Educational Services Association (MOESA), with an address of c/o NJEA Region 9, 1345 Campus Parkway, Suite A9, Wall Township, New Jersey 07753, and Cara Ahmed, with an address of 1103 Lighthouse Lane, Toms River, NJ 08753, Sujata Bhagavathula, with an address of 8 Donlonton Circle, Chesterfield, NJ 08515, Susan Bonsper, with an address of 1137 Harding Place, Point Pleasant Boro, NJ 08742, Leigh Busco, with an address of 985 Shadow Oaks Drive, Toms River, NJ 08753, Josephine Colicelli, with an address of 933 Birch Drive, Brielle, NJ 08730, Caryl Comeforo, with an address of 14651 Topsail Drive, Naples, FL 34114, Nisha Diddi, with an address of 38 South Beers Street, Holmdel, NJ 07333, Ileen Fishman, with an address of 2 Tracy Drive, Manalapan, NJ 07726, Shari Lieboff, with an address of 15 Sami Court, Manalapan, NJ 07726, Sarah Liebster, with an address of 143 St. Nicholas Avenue, Lakewood, NJ 08701, Jay A. Medlin o/b/o the Estate of Mariana Pedro-Medlin, with an address of 53 Clover Hill Road, Colts Neck, NJ 07722, Karyn Tessler, with an address of 37 Canadian Woods Road, Marlboro, NJ 07746, Karen Ullmann, with an address of 21 Beechwood Drive, Shrewsbury, NJ 07702, (collectively Petitioners and sometimes individually-named Petitioners) (MOESC and Petitioners are sometimes collectively referred to as the Parties or severally as a Party).

RECITALS:

WHEREAS, Petitioners have made claims against MOESC in a Petition of Appeal (Petition) in the matter entitled *Monmouth-Ocean Educational Services Association et al. v. Monmouth-Ocean Educational Services Commission*, New Jersey Department of Education, Agency Reference No. 293-8/10, New Jersey Office of Administrative Law Docket No. EDU 09884-10, dated August 4, 2010 (Litigation); and

WHEREAS, MOESC filed an Answer, denied Petitioners' allegations and asserted affirmative defenses to the Petition;

WHEREAS, MOESC and Petitioners, without conceding liability, and after an opportunity to consider and to confer with counsel of their choice, have reached a voluntary agreement and with a full understanding of the terms of this Agreement, desire to memorialize their agreement herein; and

WHEREAS, as the product of the settlement memorialized by this agreement, the individually-named Petitioners will continue to no longer be employed by MOESC.

THEREFORE, in consideration of the mutual covenants contained herein and as set forth in further detail herein, the parties agree as follows:

Recitals. The Recitals set forth above are true and correct and are incorporated herein by reference.

Payment by MOESC. In full and final settlement of this matter, MOESC will pay to the Petitioners the sum of Eight-Hundred Fifty-Five Thousand Dollars ($855,000.00) as set forth

below in this section entitled "Payment by MOESC," in full and final settlement of any and all claims Petitioners raised or could have raised in their Petition in this Litigation.

Following approval of this Agreement by the MOESC Board of Directors, and the Administrative Law Judge presiding over the Litigation, and the Commissioner of Education, (Commissioner) payment will be made by MOESC to Petitioners as follows:

- The first payment of Two Hundred Eighty-Five Thousand ($285,000) Dollars will be made by April 30, 2020 or approval by the Commissioner, whichever comes later;

- The second payment of Two Hundred Eighty-Five Thousand ($285,000) Dollars will be made by April 30, 2021; and

- The third and final payment of Two Hundred Eighty-Five Thousand ($285,000) Dollars will be made by December 31, 2021.

All payments made by MOESC pursuant to this Agreement shall be paid to the individually-named Petitioners in accordance with the attached Exhibit A and sent to the addresses listed above. **EACH INDIVIDUALLY-NAMED PETITIONER WILL IMMEDIATELY NOTIFY MOESC IN WRITING OF ANY CHANGE OF ADDRESS.** Notification shall be made by electronic mail addressed to MOESC business administrator as listed on MOESC's website.

The Parties acknowledge that payments made, pursuant to this Agreement, through a 1099 are for surrender of tenure rights and those made through a W-2 are for full back pay less mitigation.

For each individually-named Petitioner reflected on Exhibit A as having received full back pay less mitigation, MOESC will issue a IRS form W-2. MOESC will deduct as pre-tax dollars, the pension amount required by the Division of Pensions and Teachers' Pension and Annuity Fund, for both the employer and the employee, from the payments made to each such individually-named Petitioner and will promptly submit that pension contribution to the New Jersey Division of Pensions and Benefits (Division of Pensions). Each such individually-named Petitioner will then have the opportunity to apply to the Division of Pensions for pension credit and/or reopening of pension account and/or modification of pension amount. Neither MOESC, MOESA, legal counsel nor anyone else has made any representation or guaranty that the Division of Pensions will confer pension credit and/or reopening of pension account and/or modification of pension amount. The Parties understand and acknowledge that only the Division of Pensions can permit such credit, reopener or modification to be made. MOESC agrees to cooperate with the application(s) and to promptly submit any required information to the Division of Pensions and Teachers' Pension and Annuity Fund. In the event that any application is not successful and the Division of Pensions returns the employer and the employee pension contribution for that individually-named Petitioner to MOESC, MOESC will promptly return both contributions to the individually-named Petitioner so affected.

Total Consideration. Petitioners acknowledge that the consideration referred to above is the total consideration they will receive from MOESC and that the parties disagree regarding the

amount due, however, in an effort to resolve this matter, the Petitioners acknowledge that the amount they each receive is consideration for the release and other provisions in this Agreement. The Petitioners acknowledge they are not entitled to nor will they receive any additional payments of any kind from MOESC, including, but not limited to, payments under any contract, pension plan, policy or practice, retirement plan, policy or practice, vacation plan, policy, or practice, severance plan, policy or practice, or payment for bonuses or deferred compensation.

Tax Indemnification. MOESC makes no representations as to the tax consequences of the payments referred to herein and shall assume no responsibility for any tax liability attributed to Petitioners. Petitioners agree to pay any and all taxes, interest, and penalties, if any, found to be owed from the payments made pursuant to this Agreement where such liability is attributable to Petitioners. Petitioners agree to accept full, complete, sole and entire responsibility for their own tax liability. MOESC will be responsible for any liability regarding FICA or other required employer payments should they be assessed against MOESC. Petitioners understand and agree that they are not relying on MOESC, MOESC's counsel or their own counsel for advice regarding the taxability of any amount paid to them under this Agreement.

Medicare Indemnification. Petitioners certify that, as of the date of this Agreement, Petitioners have not received any payment from Medicare. By entering into this Agreement, Petitioners agree to indemnify and hold harmless MOESC, MOESC's counsel and their counsel on this matter in connection with any liabilities or penalties should they be assessed as a result of failure to properly or fully reimburse Medicare and for attorneys' fees and costs associated with defending any enforcement or related action and/or an action to enforce this provision of the Agreement. Petitioners acknowledge that MOESC has relied upon this representation in determining to make the settlement payments hereunder.

Pension Indemnification. Petitioners agree to accept full, complete, sole and entire responsibility for any pension liability, interest or penalty. Petitioners understand and agree that they are not relying on MOESC and MOESC's counsel for advice regarding the pension obligation. Petitioners agree to hold MOESC andMOESC's counsel harmless from and indemnify them for the payment of pension contribution, interest and penalties and those items only that may be asserted against them by any government agency at any time as a result of the aforementioned payment.

Petitioners' Release. Except for claims relating to the enforcement of this Agreement, Petitioners hereby release and forever discharge MOESC and its former and current representatives, employees, officers, directors, trustees, attorneys, agents, successors and assigns, heirs, beneficiaries, executors, and administrators (Releasees) from any and all manner of action and actions, cause and causes of action, suits, claims, grievances, debts, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known or unknown, suspected or unsuspected, vested or contingent, which Petitioners ever had or now have against Releasees arising out of Petitioners' employment relationship with MOESC, or any other relationship Petitioners had with MOESC, or for any other reasons which were asserted or could have been asserted by Petitioners under any state or federal statute, constitution, ordinance, contract or the common law, including, but not limited to, all claims under the following (including any amendments to same): N.J.S.A.

18A:28-1 *et seq.* (Tenure); N.J.S.A. 18A:66-1 *et seq.* (Pensions and Annuities); New Jersey Public Law 2011, chapter 78 (Chapter 78); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 6, et seq. (ADEA); the Older Workers Benefit Protection Act, 29 U.S.C. 621 et seq. (OWBPA) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (Title VII); the Reconstruction Era Civil Rights Act, 42 U.S.C. § 1981, § 1983, et seq. (Civil Rights Act); the Civil Rights Act of 1991, 42 U.S.C. §. 1981a, et seq. (CRA of 1991); the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. § 1161, et seq. (COBRA); the Genetic Information Nondiscrimination Act of 2008, 29 U.S.C. § 1635, et seq. (GINA); the Employee Polygraph Protection Act, 20 U.SC. § 2001, et seq. (EPPA); the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*, (ADA); the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq. (FMLA); the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (FLSA); the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* (ERISA); the Equal Pay Act, 29 U.S.C. § 201, *et seq.* (EPA); the Rehabilitation Act 29 U.S.C. § 701, et seq. (RA); the Pregnancy Discrimination Act, 42 U.S.C. § 2000, et seq. (PDA); the Whistleblower Protection Statutes, 10 U.S.C. § 2409, 12 U.S.C. § 1831j, 31 U.S.C. § 5328, 41 U.S.C. § 265, (collectively, WPS); the New Jersey Civil Rights Act, N.J.S.A, 10:6-1, et seq.; the New Jersey Law Against Discrimination, N.J.S.A.. 10:5-1, *et seq.* (LAD); the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, *et seq.* (FLA); New Jersey Family Leave Insurance Act (FLI), N.J.S.A. 43:21-25, *et seq.*; New Jersey Conscientious Petitioner Protection Act, N.J.S.A. 34:19-1, *et seq.* (CEPA); Security and Financial Empowerment Act, N.J.S.A. 3411C-1 *et seq.* (SAFE); New Jersey Worker Freedom from Intimidation Act, N.J.S.A. 34:19-9 *et seq.*; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a *et seq.* (WHL); the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, et seq. (DWL); the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq. (WPL); the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C.A. 4301, *et seq.* (USERRA); the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.* (WARN); the Diane B. Allen Equal Pay Act, N.J.S.A. 10:5-12 *et seq.*; the New Jersey Earned Sick Leave Act, N.J.S.A. 34:11D-2; N.J.S.A. 34:15-39.1 (Unlawful discharge of, or discrimination against, employee claiming compensation benefits; penalty); or any other federal, state or local statute prohibiting discrimination on any basis, including without limitation, race, color, religious creed, national origin, ancestry, gender, age, handicap or disability, mental illness, retaliation, sexual harassment, sexual orientation, gender identity, transgender status, veterans status, and genetic information, and any other federal, state or local employment law, regulation or other requirement governing the payment of wages, and pursuant to any other federal, state, or local statutes, laws, rules and regulations pertaining to the employment, as well as any and all claims under contract or common law tort, including without limitation, wrongful termination, defamation, intentional or negligent infliction of emotional distress, intentional or negligent interference with contract, fraud, misrepresentation and personal injury, promissory estoppel, detrimental reliance, breach of covenant of good faith and fair dealing, negligent retention, breach of public policy or for benefits (except vested benefits), and for breach of any written or oral contract, agreement or understanding, express or implied, and any claim for attorneys' fees or costs.

Additionally, Petitioners waive any and all tenure, seniority and recall rights they have or may have in connection with their employment by MOESC, and any other rights they have or may have arising from their tenure and seniority as employees of MOESC, including, but not limited to, the right to placement on any preferred eligibility list and recall. Petitioners waive any claims they have or may have against MOESC as to pension contributions or entitlement or

health benefits including, but not limited to, medical, dental, vision, they have or may have against MOESC.

Petitioners also waive any unfair labor practice charges or claims they had or may have against MOESC and agree to withdraw the pending unfair labor practice charge pending before the New Jersey Public Employment Relations Commission (NJPERC) entitled *Monmouth-Ocean Educational Services Commission and Monmouth-Ocean Educational Services Association* and docketed by NJPERC as CO-2011-117.

Petitioners further waive any right to payment for accumulated unused sick, personal, or vacation leave time, and waive the right to any payment for health insurance or related costs or expenses.

If any claim is not subject to release, to the extent permitted by law, Petitioners waive any right or ability to be a class or collective action representative or to otherwise participate in any putative or certified class, collective or multi-party action or proceeding, including arbitration, based on such a claim in which MOESC or any other Releasee identified in this Agreement is a Party.

Nothing in this Agreement shall be construed to affect the Equal Employment Opportunity Commission's, the New Jersey Department of Labor and Workforce Development's, or any similar state or local commission's or agency's (collectively, EEOC/NJDOL) independent right and responsibility to enforce the law. Petitioners understand and acknowledge, however, that while the Agreement does not impinge on their right to file a charge or participate in an investigation or proceeding conducted by EEOC/NJDOL, this Agreement does bar any claim they might have to receive monetary damages in connection with any EEOC/NJDOL proceeding concerning matters covered by this Agreement.

Nothing in this Agreement shall be construed to affect any issues/claims that may arise from any subsequent agreements entered into by the parties.

Subsequent Information. The Parties expressly understand and acknowledge that it is possible that unknown losses or claims exist, claims for offset to claimed damages or earnings in mitigation exist, or that present losses may have been over- or underestimated in an amount or severity. Each Party expressly accepts and assumes the risk of such unknown, over- or underestimated losses or claims and acknowledges and agrees that the settlement is in full resolution of any and all such claims. Petitioners acknowledge that none of the benefits given to them pursuant to this Agreement have been assigned or are subject to alienation (*i.e.*, personal bankruptcy). This Release specifically excludes: (a) claims, if any, arising under the New Jersey Workers' Compensation Act which are unrelated to the Action and which may arise after execution of this Agreement; (b) claims that Petitioners cannot release or waive by law; and (c) claims, if any, arising from the breach of this Agreement. Petitioners certify that they are unaware of a factual basis for any such claims at this time.

Non-Admission of Liability; Attorney's Fees. The execution of this Agreement and the settlement made hereunder shall not be construed as an admission of liability by any Party in the litigation, such liability being expressly denied. Nor is this document admissible as evidence in

any proceeding other than for enforcement of the provisions of this Agreement. Each Party is responsible for their own respective attorneys' fees.

Proprietary Information. Petitioners specifically acknowledge that any information regarding students they may have received in their employment by MOESC is protected by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, the Individuals with Disabilities Education Act, 20 U.S. C. § 1400 *et seq.*, and N.J.S.A. 18A:36-19 (Pupil Records) and all implementing federal and state regulations.

Petitioners understand and agree that any work product that Petitioners produced while an employee at MOESC on MOESC time and compensated by MOESC is work for hire and is the property of MOESC.

Non-Disparagement, No Rehire. In further consideration of MOESC's willingness to pay the settlement amount provided for above and Petitioners' willingness to settle their claims:

Petitioners and the Board of MOESC agree that they will not make any critical, disparaging or defamatory statements in any manner about each other or any of their related entities, whether verbal or written. This includes, but is not limited to, electronic mail, internet and social media postings and/or any other method of communication. If an individual affiliated with, currently, or in the past, makes a critical, disparaging or defamatory comment about a Petitioner, the Petitioner may respond to same but may not respond with critical, disparaging or defamatory comments about MOESC or its Board. By executing this Agreement, the Parties acknowledge this is a material provision of this Agreement.

Petitioners agree, from the date of signing this Agreement going forward, not to allege that the ending of their employment relationship with MOESC suggests any violation of law.

Petitioners agree that they will not apply for, seek, or accept employment or any other remunerative relationship with MOESC or any of its affiliates such as they exist as of the date of this agreement. For purposes of this Agreement, the term "affiliate" is as defined by the United States Bankruptcy Code, 11 U.S.C.A. § 101. This provision does not apply to any entity with which MOESC contracts now or in the future to provide services or to any entity with which MOESC may merge or by whom MOESC may be acquired after the date of this Agreement for which a Petitioner is currently providing services or is providing services at the time of the merger.

Petitioners further agree that they will not contact any employees of MOESC, while those employees are at work, except the Human Resources Manager.

Participation in Other Cases. To the extent permitted by applicable law, Petitioners covenant and agree never to commence or prosecute, or assist in the commencement or prosecution of, or in any way to cause, permit or advise to be commenced, or prosecuted against MOESC, any action or proceeding or to assert against MOESC in any action or proceeding, any demands, causes of action, obligations, damages, or liabilities of any nature whatsoever, whether or not now known, suspected, or claimed which Petitioners ever had, now have, or hereafter have, or claim to have, against, MOESC, by reason of any act, transaction, practice, conduct, or omission of MOESC that occurred prior to the date of this Agreement. Should any private party

or governmental agency request of Petitioners to provide information regarding MOESC, Petitioners shall immediately advise MOESC in writing by electronic mail addressed to MOESC business administrator as listed on MOESC's website and MOESC shall have the opportunity to apply to a court of competent jurisdiction to quash any subpoena or governmentally-issued information request. This provision does not apply to any request for information as part of a confidential law enforcement investigation. Provided that MOESC has notice and an opportunity to apply to quash a subpoena or governmentally-issued information request (whether or not MOESC makes such an application), nothing in this Agreement shall be construed to prevent Petitioners from complying with a duly-issued subpoena or governmental request. Moreover, if such action continues, Petitioners acknowledge that as a consideration for receipt of money paid pursuant to this Agreement, Petitioners waive *i.e.*, surrender their right to, any monetary benefit from such action.

Petitioners further agree that they will not solicit or encourage any former or future employee of MOESC to pursue claims against MOESC. Nothing in this Agreement shall be construed to prevent Petitioners from complying with a duly-issued subpoena or governmental request.

Return of Company Property. All MOESC property has been returned by the Petitioners. Consistent with the Confidentiality Agreement between the Parties dated August 18, 2014, within 120 days of the Commissioner's adoption of the settlement memorialized by this Agreement, Petitioners' counsel and retained expert witnesses will certify that they have destroyed all digital and hard copies of documents subject to the Confidentiality Agreement.

Petitioners' Affirmations and Cooperation. Petitioners further affirm that, with the exception of the payments provided for in this Agreement, Petitioners have been paid and/or have received all compensation, wages, bonuses, commissions, and/or benefits which are due and payable as of the date Petitioners sign this Agreement.

Petitioners affirm that Petitioners have been granted any leave to which Petitioners were entitled under federal, state or local leave or disability accommodation laws. Petitioners furthermore affirm that Petitioners have no known workplace injuries or occupational diseases.

Petitioners affirm that all of MOESC's decisions regarding Petitioners' pay and benefits throughout Petitioners' employment were not discriminatory based on age, disability, race, color, gender, religion, national origin or any other classification protected by law.

Petitioners agree to cooperate with MOESC in concluding any business or legal matters relating to their employment, including, but not limited to, MOESC's being expressly permitted to call upon and request information from Petitioners that pertains to the business in regards to location of files, letters and documents within the office, provided such cooperation and assistance shall not unreasonably interfere with any subsequent employment obtained by Petitioners. Petitioners' obligation to cooperate expires on December 31, 2021. Any and all such requests to the Petitioners will be made by the Human Resources Manager in writing.

Remedies. Each Party acknowledges and agrees that any breach of any of the covenants contained in the "Proprietary Information," "Non-Disparagement, Indemnity, No Rehire," and

"Petitioners' Affirmations and Cooperation" sections of this Agreement would constitute material breach of this Agreement that may cause the other Party irreparable harm and will entitle the other Party to all remedies provided by law, including injunctive relief. In the event of such application the defending Party agrees to waive any bond that may otherwise be required for injunctive relief to issue. Further, if any Party, their attorney or any of their representatives breach any of the above-noted provisions, the other Party shall be entitled to seek any and all monetary damages caused by the breach. Each Party's obligations (including MOESC's payment obligations), release, and waiver under this Agreement shall remain in full force and effect and supported by consideration. The foregoing provision supplements and does not limit any remedies available to the moving Party in accordance with law.

Governing Law. This Agreement is entered into in the State of New Jersey and shall be construed and interpreted in accordance with its laws.

Notices. All notices, requests, demands and other communications provided for by this Agreement shall be in writing and shall be deemed to have been governed at the time when mailed by Federal Express or overnight delivery, return receipt requested, and addressed to the address of the respective party stated above or to such changed address as such party may have fixed by like notice similarly given.

Integrated Agreement. This Agreement constitutes and contains the entire agreement and understanding between Petitioners and MOESC concerning the subject matters addressed herein and supersedes and replaces all prior negotiations and all agreements proposed or otherwise, whether written or oral, concerning the subject matter hereof. This is an integrated document. The Parties agree that should any provision of this Agreement require interpretation or construction that all parties have participated in the drafting of this document and no presumption regarding construing the document against one party shall apply.

Severability; Agreement Not Construed Against the Drafter; Fees. In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, the Parties will make reasonable efforts to reform that provision to be legal, valid, and enforceable, with the goal of giving each Party the benefit of the bargain. Should the provision remain illegal, invalid, or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and the illegal, unenforceable, or invalid part, term, or provision shall be deemed not to be a part of this Agreement. The Agreement was negotiated at arms-length and shall not be construed against its drafter as each party participated equally in its drafting. Each party shall be solely responsible for their respective attorneys' fees and costs, if any.

Warranty of Capacity to Execute Agreement. Petitioners represent and warrant that no other person or entity has or has had any interest in the claims, demands, obligations or causes of action referred to in this Agreement; that they have the sole and exclusive right to receive sums specified in this Agreement; that they have not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Agreement; and that they have the mental capacity to understand and execute the terms and conditions of the Agreement. The signatory for MOESC represents and warrants that MOESC has taken formal action to authorize him/her to execute this agreement. A true copy of the

minutes or resolution from a duly-noticed meeting of MOESC's Board of Directors approving this settlement and authorizing the execution of this Agreement is attached hereto as Exhibit B.

Disclaimer Liability. Petitioners agree to indemnify and hold harmless MOESC from any and all claims or liens presently existing against the proceeds hereby by any person, entity or corporation, as well as any attorneys' fees and cost incurred in representation of MOESC in litigation concerning any claims or liens, including, but not limited to, any claims or liens for attorneys' fees and costs.

Successors-in-Interest. The Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each Party. The Parties acknowledge that the provisions of the No Rehire paragraph of this Agreement may limit this provision.

Modification. This Agreement cannot be modified except in writing signed by all Parties.

Execution in Counterparts & Facsimile or Digital Scans of Signatures. This Agreement may be executed in counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile or digital scan shall be deemed to be an original for purposes of this Agreement. Photostatic, digitally scanned and facsimile copies of such signed counterparts may be used in lieu of the originals for any purpose.

Waiver. No waiver of any breach or any term or provision of this Agreement shall be construed to be, or shall be, a waiver of any other breach of this Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

Consideration and Revocation Period. This is a legal document. Petitioners are encouraged to consult with an attorney prior to executing this Agreement. In accordance with OWBPA and ADEA, Petitioners have twenty-one (21) calendar days from delivery hereof to consider this Agreement. Petitioners may accept this Agreement before expiration of the twenty-one (21) days, in which case Petitioners shall waive the remainder of the consideration period. Petitioners have a non-waivable period of seven (7) calendar days after delivering the executed Agreement to MOESC to revoke their acceptance of the Agreement. To revoke, Petitioners must deliver timely written notice revoking their acceptance of this Agreement to the attention of MOESC at the address listed above. This Agreement shall become effective on the eighth (8th) day after delivery of this executed Agreement by the Parties, provided that Petitioners have not revoked acceptance or rescinded the Agreement (the Effective Date).

THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THIS AGREEMENT IN ITS ENTIRETY, HAD AN OPPORTUNITY TO CONSULT WITH THEIR OWN COUNSEL, UNDERSTAND ALL OF THE TERMS AND FREELY, VOLUNTARILY AND KNOWINGLY, WITHOUT DURESS OR COERCION, CONSENT TO ALL THE TERMS AND CONDITIONS CONTAINED THEREIN.

IN WITNESS WHEREOF, the Parties have executed this Agreement to be signed by their duly authorized representatives as of the effective date(s) below.

MONMOUTH-OCEAN EDUCATION SERVICES COMMISSION

ATTEST:

Kathleen Mandeville

KATHLEEN MANDEVILLE
Business Administrator/Board Secretary

Dated: 7/28/2020

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION

By: [signature]

Name: Sandra Gray

Title: Board President

Dated: 7/28/2020

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION

By: [signature]

Name: [illegible]

Title: [illegible]

Dated: [illegible]

By: _____
CARA AHMED

Dated:

By: _____
SUJATA BHAGAVATHULA

Dated:

By: _____
SUSAN BONSPER

Dated:

By: _____
LEIGH BUSCO

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION

By:_____

Name: _____

Title:_____

Dated:

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION

By: Mary C. Bates

Name: Mary C. Bates

Title: MOESA UNIT Rep

Dated: 6/11/2024

By:_____
CARA AHMED

Dated:

By:_____
SUJATA BHAGAVATHULA

Dated:

By:_____
SUSAN BONSPER

Dated:

By:_____
LEIGH BUSCO

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION

By:_____

Name: _____

Title:_____

Dated:

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION

By:_____

Name: _____

Title:_____

Dated: 4/10/2020

By:_____
CARA AHMED

Dated:

By:_____
SUJATA BHAGAVATHULA

Dated:

By:_____
SUSAN BONSPER

Dated:

By:_____
LEIGH BUSCO

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION

By: _____

Name: _____

Title: _____

Dated:

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION

By: _____

Name: _____

Title: _____

Dated:

By: _____
CARA AHMED

Dated:

By: _____
SUJATA BHAGAVATHULA

Dated: 4/15/2024

By: _____
SUSAN BONSPER

Dated:

By: _____
LEIGH BUSCO

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION

By

Name

Title

Dated

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION

By

Name

Title

Dated:

By:
CARA AHMED

Dated:

By:
SUJATA BHAGAVATHULA

Dated:

By: Susan Bonsper
SUSAN BONSPER

Dated: 4/16/2020

By:
LEIGH BUSCO

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION

By:_____

Name: _____

Title:_____

Dated:

MONMOUTH-OCEAN EDUCATIONAL SERVICES ASSOCIATION

By:_____

Name: _____

Title:_____

Dated:

By:_____
CARA AHMED

Dated:

By:_____
SUJATA BHAGAVATHULA

Dated:

By:_____
SUSAN BONSPER

Dated:

By:_____
LEIGH BUSCO

Dated: 4/10/2020

By:_____
JOSEPHINE COLICELLI

Dated:

By:_____
CARYL COMEFORO

Dated:

By:_____
NISHA DIDDI

Dated:

By:_____
ILEEN FISHMAN

Dated:

By:_____
SHARI LIEBOFF

Dated:

By:_____
SARAH LIEBSTER

Dated:

By:_____
JAY A. MEDLIN o/b/o the ESTATE OF MARIANA PEDRO-MEDLIN

Dated:

By:_____
KARYN TESSLER

Dated:

By: _____
JOSEPHINE COLICELLI

Dated: June 1, 2020

By: _____
CARYL COMEFORO

Dated:

By: _____
NISHA DIDDI

Dated:

By: _____
ILEEN FISHMAN

Dated:

By: _____
SHARI LIEBOFF

Dated:

By: _____
SARAH LIEBSTER

Dated.

By: _____
JAY A. MEDLIN o/b/o the ESTATE OF MARIANA PEDRO-MEDLIN

Dated:

By: _____
KARYN TESSLER

Dated:

By:_____
JOSEPHINE COLICELLI

Dated:

By:_____
CARYL COMEFORO

Dated:

By:_____
NISHA DIDDI

Dated:

By:_____
ILEEN FISHMAN

Dated:

By:_____
SHARI LIEBOFF

Dated

By:_____
SARAH LIEBSTER

Dated:

By:_____
JAY A. MEDLIN o/b o the ESTATE OF MARIANA PEDRO-MEDLIN

Dated:

By:_____
KARYN TESSLER

Dated:

By: _____
JOSEPHINE COCCIOLI

Dated:

By: _____
CARYL COMBS-RO

Date:
By: Nisha Didi
NISHA DIDDI

Dated May 30, 2020

By: _____
ELLEN FISEMAN

Dated:

By: _____
STARLET GROCE

Dated:

By: _____
SARAH HEBSTER

Dated:

By: _____
JAY A. MEDEIN o/b/o the ESTATE OF MARIANA
PEDRO-MEDEIN

Dated:

By: _____
KARYN TESSIER

Dated:

By:_____
JOSEPHINE COLICELLI

Dated:

By:_____
CARYL COMEFORO

Dated:

By:_____
NISHA DIDDI

Dated: 4/13/20

By:_____
ILEEN FISHMAN

Dated:

By:_____
SHARI LIEBOFF

Dated:

By:_____
SARAH LIEBSTER

Dated:

By:_____
JAY A. MEDLIN o/b/o the ESTATE OF MARIANA PEDRO-MEDLIN

Dated:

By:_____
KARYN TESSLER

EXHIBIT A

Name	Total Amount	Due on Approval by the Commissioner	Due by April 30, 2021	Due by December 31, 2021	1099 or W-2	Dates Covered by Back Pay	Employee Pension Contribution	Employer Pension Contribution[1]	Net W-2
Cara Ahmed	$27,691	$9,230.34	$9,230.33	$9,230.33	1099	n/a	n/a	n/a	n/a
Sujata Bhagavathula	$140,583	$46,861	$46,861	$46,861	1099	n/a	n/a	n/a	n/a
Susan Bonsper	$127,803	$42,601	$42,601	$42,601	1099	n/a	n/a	n/a	n/a
Leigh Busco	$25,561	$8,520.34	$8,520.33	$8,520.33	1099	n/a	n/a	n/a	n/a
Josephine Colicelli	$102,242	$34,080.67	$34,080.66	$34,080.66	1099	n/a	n/a	n/a	n/a
Caryl Comeforo	$27,691	$9,230.34	$9,230.33	$9,230.33	W-2	7/1/2010-6/30/2012	$1,661.46	$3,322.91	$14,284.14
Nisha Diddi	$140,583	$46,861	$46,861	$46,861	W-2	7/1/2010-04/30/2013	$10,073.65	$20,147.31	$45,823.50
Ileen Fishman	$21,300	$7,100	$7,100	$7,100	1099	n/a	n/a	n/a	n/a
Shari Lieboff	$40,471	$13,490.34	$13,490.33	$13,490.33	1099	n/a	n/a	n/a	n/a
Sarah Liebster	$70,291	$23,430.34	$23,430.33	$23,430.33	1099	n/a	n/a	n/a	n/a
Estate of Mariana Pedro-Medlin	$20,022	$6,674	$6,674	$6,674	1099	n/a	n/a	n/a	n/a
Karyn Tessler	$55,381	$18,460.34	$18,460.33	$18,460.33	1099	n/a	n/a	n/a	n/a
Karen Ullmann	$55,381	$18,460.34	$18,460.33	$18,460.33	1099	n/a	n/a	n/a	n/a
	$855,000								

[1] Employer contributions are based on estimates. MOESC will escrow the indicated amounts subject to confirmation by Division of Pensions of the actual amounts due and who is responsible for payment in the event of a successful application, as outlined in the Payment by MOESC provisions of this Agreement.

Name	Caryl Comeforo
Gross Amount	$27,691.00
1/3 Gross Amount	$9,230.33
TT EE Pension Calculation	$1,661.46
1/3 EE Pen Calc	$553.82
TT State Share Calculation	$3,322.91
1/3 State Share Calc	$1,107.64

	1/3 Settlement	1/3 EE Pension	Pen CI	1/3 State Share Pension	Fed (MO)	FICA	MEDI	SUI	FLI	NJA (MO)	Net Pay
Amt paid in 2020	$9,230.33	$553.82	$36.92	$1,107.64	$1,480.43	$572.28	$133.84	$39.23	$14.77	$530.02	$4,761.38

Amt paid 4/30/21	1/3 Settlement	1/3 EE Pension	Pen CI	1/3 State Share Pension	*Fed (MO)	*FICA	*MEDI	*SUI	*FLI	*NJA (MO)	Net Pay
Amt paid 12/31/21	$9,230.33	$553.82	$36.92	$1,107.64	$1,480.43	$572.28	$133.84	$39.23	$14.77	$530.02	$4,761.38
	$9,230.33	$553.82	$36.92	$1,107.64	$1,480.43	$572.28	$133.84	$39.23	$14.77	$530.02	$4,761.38
Total for 2021	$18,460.66	$1,107.64	$73.84	$2,215.28	$2,960.86	$1,144.56	$267.68	$78.46	$29.54	$1,060.04	$9,522.76

* Calculated based on 2020 tax rates - subject to change in 2021

Name	Nisha Didd
Gross Amount	$140,583.00
1/3 Gross Amount	$46,861.00
TT EE Pension Calculation	$10,073.65
1/3 EE Pen Calc	$3,357.88
TT State Share Calculation	$20,147.31
1/3 State Share Calc	$6,715.77

	1/3 Settlement	Fringe (GTL)	1/3 EE Pension	Pen Cl	1/3 State Share Pension	Fed (M6)	FICA	MEDI	SUI	FLI	NJB (M6)	Net Pay
Amt paid in 2020	$46,861.00	$645.97	$3,35[illegible]88	$18[illegible]44	$6,715.77	$13,737.58	$2,945.43	$688.85	$150.03	$74.98	$3,728.54	$15,274.50

Amt pa d 4/30/21	1/3 Settlement		1/3 EE Pension	Pen Cl	1/3 State Share Pension	*Fed (M6)	*FICA	*MEDI	*SUI	*FLI	*NJB (M6)	Net Pay
Amt paid 12/31/21	$46,861.00	$645.97	$3,357.88	$187.44	$6,715.77	$13,737.58	$2,945.43	$688.85	$150.03	$74.98	$3,728.54	$15,274.50
	$46,861.00	$645.97	$3,357.88	$187.44	$6,715.77	$13,737.58	$2,945.43	$688.85	$150.03	$74.98	$3,728.54	$15,274.50
Total for 2021	$93,722.00		$6,715.76	$374.88	$13,431.54	$27,475.16	$5,890.86	$1,377.70	$300.06	$149.96	$7,457.08	$30,549.00

* Calculated based on 2020 tax rates - subject to change in 2021

Exhibit B

MOESC
Monmouth-Ocean Educational Services Commission

Kathleen Mandeville
School Business Administrator

900 Hope Road, Tinton Falls, NJ 07712
732-695-7827 • fax:732-493-4515
kmandeville@moesc.org

July 8, 2020

I, Kathleen Mandeville, Board Secretary/School Business Administrator of the Monmouth Ocean Educational Services Commission, Monmouth County, New Jersey, do hereby certify that the following is a true copy of a resolution adopted by the Board at a special meeting held on July 7, 2020:

GENERAL
Motion was made by Dr. George, seconded by Ms. Gray and unanimously adopted by a roll call vote to accept motions A1. The result of the roll call vote was as follows: Mrs. Carlson, yes; Mr. Dickstein, yes; Dr. Farrell, yes; Mrs. Fuhring, yes; Dr. George, yes; Ms. Gray, yes; Mr. Isola, yes; Dr. Latwis, yes; Mr. MacConnell, yes; Mr. McCue, yes; Dr. Roselli, yes; Dr. Smith, yes; Dr. Stefankiewicz, yes.

RESOLUTION OF THE BOARD OF DIRECTORS OF THE MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION
July 7, 2020

BE IT RESOLVED by the Board of Directors of the Monmouth-Ocean Educational Services Commission (hereinafter "Board"), that the Board, having determined it to be in the best interest of the Monmouth-Ocean Educational Services Commission, hereby approves the Settlement Agreement and General Release in the matter entitled *Monmouth-Ocean Educational Services Association et al. v. Monmouth-Ocean Educational Services Commission*, New Jersey Department of Education, Agency Reference No. 293-8/10, New Jersey Office of Administrative Law Docket No. EDU 09884-10.

BE IT FURTHER RESOLVED that the Board President, and the Business Administrator/Board Secretary as the attesting witness, are authorized and directed to sign the aforementioned Settlement Agreement and General Release on behalf of the Board.

BE IT FURTHER RESOLVED that the attorneys for the Board in this matter, and the Business Administrator/Board Secretary, are authorized and directed to take all appropriate and necessary steps to obtain the approval of the Administrative Law Judge presiding in the matter and the approval of the Commissioner of Education with respect to the aforementioned settlement approved by the Board.

Kathleen Mandeville
KATHLEEN MANDEVILLE
School Business Administrator/Board Secretary

13 Ayes
0 Nayes
2 Absent

208-20

OAL Dkt. No. EDU 08651-19
Agency Dkt. No. 109-5/19

New Jersey Commissioner of Education

Final Decision

A.R., on behalf of minor child, A.H.,

Petitioner,

v.

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

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 21, 2020
Date of Mailing: September 25, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 08651-19
AGENCY DKT. NO. 109-5/19

A.R. ON BEHALF OF MINOR CHILD, A.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER TOWNSHIP,

Respondent.

A.R., petitioner, pro se

Albert K. Marmero, Esq., for respondent (Grace Marmero & Associates, LLP, attorneys)

Record closed: July 23, 2020 Decided: August 13, 2020

BEFORE **ELAINE B. FRICK**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on June 25, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties advised this tribunal that they agreed to a settlement of all issues in dispute and entered into a "Settlement and General Mutual Release Agreement" (J-1) which has been fully executed and attached and incorporated herein.

I have reviewed the record and the terms of the settlement and heard testimony from petitioner and respondent's counsel on July 23, 2020. I **FIND** as followings:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as confirmed upon the record on July 23, 2020. (J-1) Respondent's counsel confirmed that the Board of Education approved the settlement.

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

I **CONCLUDE** that the "Settlement and General Mutual Release Agreement" meets the requirements of N.J.A.C. 1:1-19.1. Thus, I **CONCLUDE** that the settlement should be approved. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 13, 2020
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 8/19/2020

Date Mailed to Parties: 8/19/2020

/dm

Attachment

J-1
07/01/2020
EBF
rec'd 07/27/2020
EBF

SETTLEMENT AND GENERAL MUTUAL REALEASE AGREEMENT

WHEREAS, Anita Rothmiller ("A.R.") is the parent of a minor child, A.H., who following the issuance of a Final Notice of Residency Determination issued by the Board of Education for the Township of Deptford, Gloucester County (the "Board") filed an Appeal with the New Jersey Department of Education under Agency Docket Number 109-5/19, and which matter was transferred to the Office of Administrative Law under Docket Number EDU 08651-2019 S; and

WHEREAS, A.R. and the Board have agreed to a settlement of the Residency Appeal; and

WHEREAS, the Parties expressly understand and agree the terms of the settlement shall remain confidential and shall not be disclosed to any third party whatsoever, except the Parties' counsel, accountants, financial advisors, tax professionals, any federal, state or local or governmental taxing or regulatory authority, and except as required by law or order of court; and

WHEREAS, the Parties acknowledge that the settlement was agreed upon as a compromise and final settlement of all disputed claims and is not an admission of liability by any Party.

NOW, THEREFORE, in exchange for, and in consideration of, the benefits described herein, the Parties, for themselves and each of their successors, assigns, heirs, executors, administrators, affiliates, principals, shareholders, directors, officers, employees, agents and predecessors, insurers, successors and assigns do hereby RELEASE, REMISE and FOREVER DISCHARGE each other of and from the matter described herein, and specifically agree to the following:

1. A.R. shall immediately cause the instant Residency Appeal captioned above to be withdrawn with prejudice from the Department of Education and Office of Administrative Law, copying the Law Firm of Grace, Marmero & Associates, LLP, at 44 Euclid Street, Woodbury, New Jersey 08096 on said Notice; and

2. A.H., a minor child, shall remain enrolled with the Deptford Township School District until the end of the 2019-2020 School Year; and

3. The Board will not seek monetary reimbursement from A.R. for the remainder of the 2019-2020 School Year for the education costs of A.H.; and

4. Prior to the start of the 2020-2021 School Year A.R. must re-establish residency with the Board in accordance with all applicable rules and regulations by completing and filing all of the required residency forms and supporting documentation with the School District Registrar; and

5. Parties agree to confidentially of this matter; and

6. Parties agree to non-disparagement covenant for this matter;

7. This Agreement is valid and enforceable as of its signing and execution, but shall also be prepared and finalized in formal printed form;

8. This Agreement is the entire, final and only binding agreement between A.R. and the Board.

Additionally, the Parties agree to the following terms:

The Parties warrant that they have not assigned, transferred or conveyed to anyone else any right to assert a claim against any other Party which would otherwise be released hereunder.

This General Release is made for the benefit of each of the Parties and all who succeed to their rights and responsibilities.

This General Release is not to be construed as an admission of any violation of any federal, state or local statute, ordinance or regulation by any Party.

The provisions of this Release are severable. If any provision or the scope of any provision is found to be unenforceable or is modified by a court of competent jurisdiction, the other provisions or the affected provisions as so modified shall remain fully valid and enforceable.

This General Release may be executed in separated counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one in the same instrument. It is not necessary for the Parties to execute the same counterpart of this General Release in order for this General Release to become effective.

This General Release may be executed by e-mail, facsimile and/or electronic signature.

This General Release shall be governed by, and enforced in accordance with, the laws of the State of New Jersey, without regard to the application of the principles of conflicts of laws.

In Witness Whereof, the Parties have caused this instrument to be executed and delivered as indicated below.

Dated: 6/3/20

Anita Rothmiller
Print Name: Anita Rothmiller

Dated: 5/27/20

Print Name: Albert K. Marmero
Attorney for the Board of Education for the
Township of Deptford

210-20E

OAL Dkt. No. EDU 07846-20
Agency Dkt. No. 181-8/20

New Jersey Commissioner of Education

Order on Emergent Relief

H.L., on behalf of minor child, J.L.,

Petitioner,

v.

Board of Education of the Township of Howell, Monmouth County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.[1]

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted.[2] This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: September 21, 2020
Date of Mailing: September 21, 2020

[1] As petitioner must demonstrate that she satisfies all four prongs of the *Crowe* test to warrant emergent relief, the Commissioner makes no determination on whether petitioner demonstrates irreparable harm since she fails to satisfy the remaining elements.

[2] The Board shall promptly provide petitioner and the requesting school district with all of the student records that they are entitled to receive pursuant to *N.J.A.C.* 6A:32-7.3 and *N.J.A.C.* 6A:32-7.5, if it has not done so already.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON EMERGENT RELIEF
OAL DKT. NO. EDU 07846-2020
AGENCY DKT. NO. 181-8/20

H.L. ON BEHALF OF J.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,
Respondent.

H.L. on behalf of minor child. J.L., petitioner, pro se

Jan L. Wouters, Esq., appearing for respondent (Bathgate, Wegner & Wolf, P.C., attorneys)

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

Petitioner H.L., acting on behalf of her minor son, J.L., a student formerly enrolled in the eighth grade at Howell Middle School, seeks emergent relief in the form of an order declaring her child completed the eighth grade.

In opposition, respondent, Howell Township Board of Education ("BOE") contends it cannot certify J.L. completed the eighth grade as he disenrolled from the district prior to the end of the school year.

PROCEDURAL HISTORY

On August 26, 2020, H.L. filed a petition of appeal and motion for emergent relief with the Commissioner of Education concerning J.L.'s promotion from the eighth grade. The relief requested was promotion to the ninth grade.

On August 27, 2020, the Office of Controversies and Disputes transmitted the petition and emergent relief motion to the Office of Administrative Law (OAL) for a hearing.[1] N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On August 31, 2018, the BOE filed a brief in opposition to the motion. Oral argument on the motion was heard on September 1, 2020.

FACTUAL DISCUSSION

The relevant facts in this matter are largely undisputed. J.L. was enrolled as an eighth-grade student in the Howell School District ("District") during the 2019-2020, school year from September 5, 2019, to May 8, 2020. In early May 2020, H.L., advised District personnel that J.L. was moving to South Carolina. H.L. disenrolled J.L. from the District as of May 8, 2020. J.L. ceased attending school, which was being conducted remotely, as of May 9, 2020. The school year ended on June 20, 2020. J.L. received no final grades or report card for the third trimester. A graduation ceremony for the middle school was held on June 22, 2020. The District forwarded to J.L. a diploma and a cap and gown. He did not participate in the graduation ceremony. The Student Transfer Card for J.L. lists St. James High School, Myrtle Beach, South Carolina as the new school to which J.L. was transferring.

[1] The transmittal mistakenly contained the incorrect case caption however the other information including the nature of the case and the parties identified on the service appear to be correct.

In addition to the facts above, petitioner contends that she was given instruction from the District secretary regarding how to proceed. She inquired about taking the school laptop out-of-state but was advised she was not permitted to do so. She was also told that J.L. could not continue with remote education in the District after he disenrolled. Petitioner further contends no one told her J.L. was in danger of not being promoted. If she had been so advised, petitioner would have explored the option of summer school. It wasn't until August 10, 2020, that petitioner learned from the District that J.L. had no final grades or report card for the last trimester. She contends J.L. did perform schoolwork/had grades for the last trimester and that she has communications from teachers evidencing same. Finally, petitioner contends that during the COVID-19 pandemic (the period in which the third trimester fell) grading policies were modified and students were provided with unusual accommodations, but J.L. was not afforded an accommodation.

Respondent is sympathetic to petitioner and acknowledged that certain misinformation was provided to petitioner by District personnel but contends it cannot certify J.L. completed the eighth grade when he disenrolled from the District more than a month before the end of the school year. Respondent further contends that despite the fact J.L. was mistakenly provided with a diploma and cap and gown, graduation is a social convenience not a legal requirement. Respondent also contends that J.L. could have completed his eighth grade course work (in the District) remotely without the use of a school issued device. Alternatively, petitioner should have enrolled J.L. in middle school rather than in high school. An August 5, 2020, letter from Robert K. Henig, Ed.D, principal of the Howell Middle School, indicates that "[J.L] was passing his courses when he withdrew, with the exception of Language Arts. Without 3rd Trimester grades we cannot assess his final averages." Finally, respondent contends that it provided the new school with J.L.'s records and it is for the new school/South Carolina to determine his grade placement.

LEGAL ANALYSIS AND CONCLUSION

The regulations governing controversies and disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, the petitioner must show that she satisfies the following four elements:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b) (citing Crowe v. DeGioia, 90 N.J. 126 (1982)).]

The petitioner must prove each of these elements by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted).

I. Irreparable Harm

The petitioner has the burden of establishing each of the above required elements to warrant relief in her favor and must prove each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

As to the first element, petitioner must show that irreparable harm will result if emergent relief is not granted, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 299 N.J. Super. 634, 638 (App. Div. 1977).

Here, petitioner contends J.L. will suffer irreparable harm if the District does not declare him to have completed the eighth grade because he will be required to repeat the eighth grade. School in South Carolina begins on September 8, 2020, and petitioner contends she has been waiting for weeks for a resolution. While, I am not unsympathetic to petitioner's situation, which in part, appears to be caused by misinformation and a lack of communication, she has failed to demonstrate that the anticipated harm to J.L. in repeating the eighth grade is either substantial or immediate, particularly if he has not met required learning standards. Accordingly, I **CONCLUDE**, petitioner has failed to demonstrate J.L. will suffer irreparable harm absent an order declaring he has completed the eighth grade.

II. Settled Legal Right

Next, in order to obtain emergent relief, the petitioner must also demonstrate that the legal right underlying her claim is settled. Crowe, 90 N.J. at 133. Petitioner seeks to overturn the decision of the BOE regarding the effect of disenrollment prior to the end of the school year/ satisfactory completion of the third trimester. Actions within a school board's authority, including those taken in this matter, are entitled to a presumption of validity and will not be overturned in the absence of an affirmative showing that the decision was arbitrary, capricious, or unreasonable. Thomas v. Morris Twp. Board of Education, 89 N.J.Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). The arbitrary, capricious, or unreasonable standard of review imposes a heavy burden on challengers of board actions.

Here, petitioner does not address whether or not her legal right is well settled. Rather, she appears to make an equitable argument that given the incorrect information provided to her by the District and the unprecedented times of the COVID-19 pandemic,

respondent should simply provide a letter "stating that [J.L] has been promoted to 9th grade." Based on the foregoing, I **CONCLUDE** petitioner has failed to demonstrate that her legal claim is well settled.

III. Likelihood of Success on the Merits

To obtain emergent relief, petitioner must also demonstrate a reasonable probability of success on the merits.

Petitioner does not address her likelihood of success on the merits. Respondent argues that in order for any of the rights afforded to "pupils" under New Jersey's public education statutes, a child must either be attending or have the right to attend a particular school district. If a student moves from a school district, he no longer has a right to attend school in the district. N.J.S.A. 18A:38-1 et. seq. Based on the above, I **CONCLUDE** petitioner has failed to demonstrate she is likely to succeed on the merits of her claim.

IV. Balancing the Equities

Finally, to demonstrate an entitlement to emergent relief, petitioner must also show that when balancing the relative equities and interests of the parties, she will suffer the greater harm if relief is not granted. Petitioner argues that J.L. will suffer harm if he is not promoted to the eighth grade and that respondent can simply state that he completed same, despite his disenrollment. Respondent, however, has a substantial and valid interest in ensuring that the New Jersey State learning standards are met and that rights under the state public education statutes are afforded only to those students attending or having a right to attend school in the district.

Here, the balance weighs in favor of the BOE over petitioner because a ruling to the contrary could undermine respondent's authority and open up the floodgates for other students who did not complete the 2019-2020 school year. Accordingly, I **CONCLUDE** that the petitioner has failed to meet her burden to show that J.L. will suffer the greater harm if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to meet the required elements set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and N.J.A.C. 6A:3-1.6(b), as a result, she is not entitled to the emergent relief requested.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for emergent relief in the form of an order declaring her child has completed eighth grade is **DENIED**. This order shall remain in effect until the issuance of the decision on the merits in this matter.

A telephone prehearing conference shall be arranged with the parties to determine whether future scheduling of dates for a hearing on the merits of this matter is requested/necessary.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 2, 2020
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SLO/vj

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

DOCUMENTS RELIED UPON

For petitioner:

Petition of Appeal and Motion for Emergent Relief and supporting letters of H.L., dated August 26, 2020

For respondent:

Letter brief in opposition to the Motion for Emergent Relief, August 5, 2020, letter of Robert K. Henig

212-20

New Jersey Commissioner of Education

Decision

Tina Gagliano,

Petitioner,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

Synopsis

Petitioner – a home economics/food teacher formerly employed under tenure by the respondent Board's school district – withdrew her application for disability retirement and sought to return to service in her previous position. The Board advised that her position had been filled, and no comparable position was available. Petitioner filed the within petition of appeal, contending that her tenure rights had been violated, and seeking immediate reinstatement, restoration of her sick and personal days, as well as salary and benefits. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the Board is not required to create a position for petitioner or bump another teacher; petitioner is, however, entitled to the next opening in her former position, provided she is able to perform her former duties; further, petitioner's claim for salary and benefits is not yet ripe for review, as those claims are still pending before the Workers' Compensation Court. The ALJ granted the Board's motion for summary decision, denied petitioner's cross motion, and dismissed the petition without prejudice.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision is this matter. Accordingly, the petition was dismissed.

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

212-20

OAL Dkt. No. EDU 09584-19
Agency Dkt. No. 146-6/19

New Jersey Commissioner of Education

Decision

Tina Gagliano,

Petitioner,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

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

In 2016, petitioner – a tenured home economics/food teacher – suffered job-related injuries, filed claims for workers' compensation, and returned to work intermittently. On February 14, 2017, petitioner was granted leave under the Family and Medical Leave Act (FMLA) and subsequently filed an application for accidental disability retirement on August 14, 2017. The New Jersey Teachers' Pension and Annuity Fund (TPAF) denied her accidental disability retirement application, and petitioner appealed that determination. On March 13, 2019, petitioner withdrew both her TPAF appeal and her application for accidental disability retirement and sought to return to her teaching duties. The Board denied her return because her position was filled, and no comparable position was available. Petitioner filed a

petition of appeal seeking immediate reinstatement, restoration of her sick and personal days, along with salary and benefits.

The Administrative Law Judge (ALJ) found that the Board is not required to create a position for petitioner or bump another teacher, but petitioner is entitled to the next opening in her former position, provided she is able to perform her former duties. With respect to the salary, benefits, and leave days, the ALJ found that they are not ripe for review as those claims are still pending before the Workers' Compensation Court.

Upon review, the Commissioner concurs with the ALJ's conclusion that while petitioner is entitled to the next opening in her former position, the Board is not required to bump an existing teacher or create a position for petitioner. *See Klumb v. Board of Education of the Manalapan-Englishtown Regional High School District, Monmouth County,* 199 *N.J.* 14 (2009). The Commissioner further agrees that he may not exercise jurisdiction on petitioner's claims involving her work-related injury until after the Division of Workers' Compensation makes a determination. *N.J.A.C.* 6A:3-1.3(c) and *N.J.A.C.* 6A:3-1.3(i)(1).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED. [1]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2020
Date of Mailing: October 2, 2020

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

213-20

New Jersey Commissioner of Education

Decision

Lorraine Taddei-Graef,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

Synopsis

Petitioner – a tenured teaching staff member in the respondent Board's school district – contended that her tenure rights were violated when the Board reduced her salary without the filing of tenure charges after discovering that the institution which had granted petitioner's Doctor of Philosophy degree in April 2006 was not accredited. However, the statute requiring such accreditation was not in effect until July 1, 2010. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: the material facts at issue here are not in dispute, and the parties filed a joint stipulation of facts; petitioner received a Doctor of Philosophy degree in Curriculum and Assessment through an online program offered by Breyer State University (University) in April 2006; the Board then placed petitioner on the doctoral salary guide at the beginning of the 2006-07 school year; *N.J.S.A.* 18A:6-8.5 went into effect on July 1, 2010 and stipulates that boards of education may provide additional compensation based on degrees or credit completion *only* from duly authorized institutions of higher education, a category which excluded Breyer State University; however, as petitioner received her degree from the University in 2006, this statute was not yet in effect; on December 2, 2008, the Board notified petitioner that she was being removed from the doctoral salary guide and being placed on the Masters +30 salary guide. The ALJ concluded that petitioner's tenure rights were violated when the Board reduced her salary without the filing of tenure charges, and petitioner was entitled to any additional compensation that she would have received had she remained on the doctoral salary guide from December 2, 2008 until June 30, 2010.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision is this matter. The Board was directed to retroactively reinstate petitioner to the doctoral salary guide from December 2, 2008 until June 30, 2010.

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

213-20

OAL Dkt. No. EDU 02617-09
Agency Dkt. No. 19-2/09

New Jersey Commissioner of Education

Decision

Lorraine Taddei-Graef,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

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

Petitioner, a tenured teacher, received a Doctor of Philosophy degree in Curriculum and Assessment through an online program from Breyer State University (University) in April 2006. Subsequently, the Board placed petitioner on the doctoral salary guide at the start of the 2006-07 school year. Following an Office of Fiscal Accountability and Compliance investigation, the New Jersey Commission on Higher Education advised petitioner in October 2008 that the University is not accredited and therefore she cannot continue to use the title or reference her degrees. Thereafter, on December 2, 2008, the Board notified petitioner that she was being removed from the doctoral salary guide and being placed on the Masters +30 salary guide. Petitioner filed a petition of appeal challenging her salary reduction on the basis that it violated her tenure rights.

The Administrative Law Judge (ALJ) found that the Board violated petitioner's tenure rights under *N.J.S.A.* 18A:28-5 and *N.J.S.A.*18A:6-10 when it reduced her salary without bringing tenure charges. Although case law enables boards to correct salary mistakes at the end of a school year, the ALJ noted that the Board did not make a clerical error. At the time the Board increased petitioner's salary, there was no law prohibiting a Board from increasing a teacher's salary based on a degree from a non-accredited institution. However, on July 1, 2010, *N.J.S.A.* 18A:6-8.5 went into effect, permitting boards to provide additional compensation based on degrees or credit completion *only* from duly authorized institutions of higher education. As such, the ALJ found that petitioner was entitled to any additional compensation that she would have received had she remained on the doctoral salary guide from December 2, 2008 until June 30, 2010.

Upon review, the Commissioner agrees with the ALJ – for the reasons thoroughly expressed in the Initial Decision – that the Board violated petitioner's tenure rights. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to retroactively reinstate petitioner to the doctoral salary guide from December 2, 2008 until June 30, 2010.

IT IS SO ORDERED. [1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 6, 2020
Date of Mailing: October 6, 2020

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 2617-09
AGENCY DKT. NO. 19-2/09

LORRAINE TADDEI-GRAEF,
Petitioner,
v.
FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Stephen Hunter, Esq., for petitioner (Detzky & Hunter, attorneys)

Mark G. Toscano, Esq., for respondent (Comegno Law Group PC, attorneys

Record Closed: March 27, 2020 Decided: August 26, 2020

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioner Lorraine Taddei-Graef moves for summary decision on whether respondent Freehold Regional High School Board of Education (Freehold) violated her tenure rights by reducing her salary upon discovering that she received a doctoral degree from an unaccredited university, along with the reinstatement of her previous salary in accordance with Freehold's doctoral degree salary schedule.

STATEMENT OF FACTS

The parties have submitted a lengthy joint stipulation of facts and the material facts are not in dispute. The Stipulation of Facts are as follows:

1. Petitioner, Lorraine Taddei-Graef, resides at 1209 Koa Drive, Forked River, New Jersey, 08731.

2. Petitioner is a tenured teaching staff member employed by Freehold. Petitioner is currently assigned as a Learning Consultant and Child Study Team Leader at the Freehold Township High School.

3. In or around May 2005, petitioner enrolled in a coursework program through the on-line program provided by Breyer State University (University). The University held itself out as an institution with the authority to confer doctorate degrees on individuals who completed the program.

4. On or about April 26, 2006, petitioner was advised by Dominick Flarey, Ph.D., via electronic mail, that she met the University's coursework requirement, and a Degree of Doctor of Philosophy, Curriculum and Assessment, was conferred.

5. Upon receipt of the degree, petitioner was placed on the doctorate salary guide for the 2006-2007 school year pursuant to the collective bargaining agreement entered into by respondent and the Freehold Regional High School District Education Association. Petitioner's salary was $58,410. See, Official Salary Card, attached hereto as Exhibit A.

6. Petitioner remained on the doctorate guide until on or about December 2, 2008. Between September 1, 2008, and December 2, 2008, petitioner was placed on Step 10 of the doctorate guide, for a base salary in the amount of $73,620. See, 2008-2009 Collective Bargaining Agreement, attached hereto as Exhibit B. The differential in base salary between Step 10 of

Masters +30 guide, where petitioner would have been placed if she had not earned the doctorate, and the Step 10 of the doctorate salary guide was $1,500. See, 2008-2009 Collective Bargaining Agreement between the Freehold Regional High School District Board of Education and the Freehold Regional High School Education Association, attached hereto as Exhibit B.

7. In or around August 2008, the Office of Fiscal Accountability and Compliance (OFAC) conducted an investigation assessing the respondent's policies and practices relating to tuition reimbursement and salary increases upon completion of a doctorate degree program. The OFAC investigation centered around several administrators employed by respondent. Each had received doctorate degrees from the University. See, OFAC report attached hereto as Exhibit C.

8. OFAC did not determine whether the degrees received from the University were valid and recognizable in the State of New Jersey. The matter was referred to the New Jersey Commission on Higher Education (Higher Education), the agency charged with regulation of degrees of higher education, for further evaluation.

9. Although petitioner was not a subject of the initial OFAC investigation, Higher Education subsequently learned that she had received a degree from the University. On October 8, 2008, Higher Education issued a letter to petitioner advising her that degrees from the University did not meet the accreditation standards required for degree recognition. See, October 8, 2008, letter to petitioner attached hereto to Exhibit D.

10. Higher Education advised petitioner that continued use of her title was "legally impermissible" and in "violation of State law and must cease and desist." See Exhibit D.

11. Higher Education instructed petitioner to submit a notarized letter avowing that she has ceased appending the degree designation to the end of her name (i.e., Ed.D., Dr. or Ph.D.). On or about October 20, 2008, petitioner complied with this directive. See, October 20, 2008, letter from petitioner to Higher Education attached hereto as Exhibit E.

12. On or about September 2, 2008, the Commissioner of Education issued a memorandum reiterating the requirements for degrees of higher education. See, September 2, 2008, letter from Commissioner Davy attached hereto as Exhibit F.

13. On or about December 2, 2008, the Assistant Superintendent for Business Administration notified petitioner that the respondent was removing petitioner from the doctorate column of the salary guide, and placed on the Masters +30 guide, as a result of the aforesaid correspondences from the Commission on Higher Education and the Department of Education. See, Salary letter to petitioner, dated December 2, 2008, attached hereto as Exhibit G. Step 10 of the Masters +30 salary guide provided a salary of $72,160. See Exhibit B.

14. On or about January 28, 2008, petitioner filed the instant Petition of Appeal. She seeks to be replaced on the doctoral salary column of the salary guide contained collective bargaining agreement. Petitioner further seeks reinstatement of the use of her title.

15. Petitioner never filed an appeal of the October 8, 2008, Higher Education determination.

LEGAL ANALYSIS

The purpose of teacher tenure laws is "to aid in the establishment of a competent and efficient school system by affording teachers 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522,

528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App.Div.1949)); N.J.S.A. 18A:28-1 to -18; N.J.S.A. 18A:6-10 to -18.1 ("Tenure Employees Hearing Law"). As such, a tenured teacher may not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after the appropriate procedural requirements under the Tenure Employees Hearing Law have been met. N.J.S.A. 18A:28-5; N.J.S.A. 18A:6-10.

A person shall not append to his name any letters in the same form designated by the Commission on Higher Education as entitled to the protection accorded to an academic degree unless the person has received from a duly authorized institution of higher education the degree or certificate for which the letters are registered. N.J.S.A. 18A:3-15.3; N.J.A.C. 9A:1-8.1.

A motion for summary decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

There are several school law decisions that offer support for the proposition that Freehold violated petitioner's tenure rights by unilaterally reducing her compensation without adhering to the procedural requirements of the Tenure Employees Hearing Law. In Fedor v. Elmwood Park Bd. of Education, 97 N.J.A.R.2d (EDU) 96, a school board adopted a resolution to increase the salary of a tenured principal who was transferred from a high school to an elementary school, and then three weeks later adopted another resolution rescinding the original resolution and reinstating his previous salary amount. In voiding the school board's second resolution as a violation of the principal's tenure rights, ALJ Springer provided a summary of school law decisions establishing tenured teachers' rights when a school board attempts to reduce their salaries:

> [a] long line of school law decisions has interpreted this reduction-in-compensation language [at N.J.S.A. 18A:28-5 and the Tenure Employees Hearing Law] as prohibiting a local board from rescinding a resolution approving a tenured employee's salary in a given year, unless the board

> successfully brings tenure charges or the employee is laid off or demoted as the result of a reduction in force. Illustratively, in Anson v. Bridgeton Bd. of Educ., 1972 S.L.D. 638, 640 (Comm'r Dec. 5), the Commissioner declared that tenured teachers 'acquired vested rights to the salaries established for them by the Board's adoption of their salary placement' and that they could not 'be deprived of a right they had acquired by action of the board.' Accord, Docherty v. West Paterson Bd. of Educ., 1967 S.L.D. 297 (Comm'r Oct. 23), where the Commissioner ruled that a board may not adopt a subsequent resolution to correct a mistake in a tenured teacher's placement on the salary guide, if the mistake "was not of the teacher's making." See also, Rivers v. Mercer Cty. Area Vo-Tech. Sch., 1984 S.L.D. 102, 108 (Comm'r Jan 17) and Galop v. Hanover Twp. Bd. of Educ., 1975 S.L.D. 358 (Comm'r May 16), aff'd 1975 S.L.D. 366 (St. Bd. Sept. 10), where the Commissioner invalidated attempts by local boards to recoup small overpayments of salary that were not 'of windfall proportions.'

In that case, ALJ Springer also noted that the school board's original decision reflected "a good faith effort" by the school board "to set a fair salary for an administrator who had been involuntarily transferred to a new position" and that "the situation is very different from genuine mistake, such as inadvertently placing a teaching staff member on the wrong step of the salary guide for a person with his particular experience and qualifications."

Here, unlike in Fedor, Freehold did not attempt to set a fair salary for a teacher who is transferred. However, upon receipt of her doctoral degree, petitioner "was placed on the doctorate salary guide for the 2006-2007 school year pursuant to the collective bargaining agreement" between Freehold and the teachers' union, and remained on the doctorate guide until December 2, 2008 when Freehold unilaterally reduced petitioner's salary by $1500. See Joint Stipulation of Facts ¶5, 6, 13. Thus, as in Fedor, once Freehold set petitioner's salary for the 2007-2008 school year, Freehold could not rescind its resolution approving petitioner's salary unless Freehold successfully brought tenure charges. As such, Freehold improperly reduced petitioner's salary by failing to bring tenure charges against her.

Most school law cases in which a tenured teacher argues that his or her salary has been illegally reduced involved a clerical error in which an employee of the school board mistakenly set a tenured teacher's salary at a level at which the teacher should not have received his or her salary. See, e.g., Stockton v. Trenton Bd. of Educ., 1987 S.L.D. 512, 521; Trenton Educ. Assn. v. Trenton Bd. of Educ., 1986 S.L.D. 2415, 2434; Rivers v. Mercer Cty. Vo-Tech Sch. Bd. of Educ., EDU 1368-83, Initial Decision (November 30, 1983), aff'd, Comm'r (January 17, 1984). In Stockton, for example, the Trenton Board of Education incorrectly placed Stockton on a higher step on the salary guide. While the Commissioner in that case held that the Board could correct its mistake, he found that the teacher was entitled to be paid at the incorrect level for the rest of the school year and that the board had to reimburse him for the difference between what he was paid after the Board corrected its mistake and what he should have been paid at the incorrect salary step. According to the Commissioner, a board may correct a clerical error with respect to salary; however, "during a given school year, once an individual has been placed and paid at a given step of the salary guide, he or she may not be subject to any corrective action during that year, which reduces his or her salary . . ." Id. at 521. In such instances, the Commissioner stated that "only a board of education may act to correct an error/mistake and it must provide reasonable notice to the individual that a correction is to be made." Ibid. Thus, under circumstances involving a clerical error in which a tenured teacher's salary is inadvertently increased, it appears that a school board does not have to file tenure charges in order to correct its mistake.[1]

Here, it is not clear that Freehold actually made an error in increasing petitioner's salary. Yes, it appears that Freehold believed at the time it approved petitioner's salary

---

[1] There is a case that is more directly on point. Unfortunately, the case was dismissed for procedural reasons. In Hoffman v. Bd. of Educ. of the Twp. of Hillsborough, 96 N.J.A.R.2d (EDU) 944, the school board mistakenly increased a tenured teacher's salary after she obtained a doctoral degree from LaSalle University in Louisiana.[1] When the school board realized that the university was not an accredited institution, the school board notified the teacher that her advancement on the salary guide was denied despite the fact that she had already received a paycheck reflecting her placement on the doctoral scale. While the Commissioner dismissed the teacher's petition as untimely under the 90-day rule for appeals, the Commissioner noted that "a board may not act to unilaterally recoup monies erroneously paid to a teaching staff member as numerous Commissioner and State Board of Education decisions so aptly point out."

This language from the Commissioner suggests that but for the 90-day rule violation, the Board would have had to have brought tenure charges against Hoffman in order to reduce her salary after it affirmatively increased it.

increase that Breyer University had been or was accredited even though it was not (or subsequently lost its accreditation before petitioner received her degree). However, there also appears to be no language in the relevant CBA or Freehold's policy (which is not in evidence here but is referred to in the Office of Fiscal Accountability and Compliance's (OFAC) report, Stipulation of Facts, Exhibit C) that would have prohibited Freehold from placing on the doctoral salary scale a tenured teacher who obtained a doctoral degree from a non-accredited university. Moreover, at the time of the salary increase, the Legislature had yet to address this issue, and the Commission on Higher Education regulations address degree designations and not salary increases in response to degrees obtained from non-accredited institutions. Freehold determined that petitioner had obtained a doctoral degree and accordingly increased her salary under the salary guide set forth in the relevant CBA. Therefore, as noted in Fedor, Freehold should have brought tenure charges against petitioner if it believed it had just cause to reduce her compensation and petitioner should have had the opportunity to defend her rights pursuant to the Tenure Employees Hearing Law. Since Freehold did not do so, Freehold violated petitioner's tenure rights and she is entitled to a doctoral salary retroactive to December 2, 2008, until the end of the 2009-2010 school year when P.L. 2010, c.13 goes into effect.

Nevertheless, the legislature has enacted a law prohibiting a local board of education from increasing a teacher's salary upon completion of a degree program unless the institution from which she obtained the degree meets the requirements of N.J.S.A. 18A:3-15.3.[2] According to the act, "[t]his act shall take effect on July 1 of the school year next following the date of enactment, except that this act shall not be deemed to impair an obligation set forth in a [CBA] or an individual contract of employment in effect on the effective date." P.L. 2010, c. 13. In addition to the relevant CBA, OFAC report, and higher education laws, this legislative development shows that at the time of Freehold's decision to approve Taddei-Graef's salary there was no authority prohibiting such action. Thus, since P.L. 2010, c. 13 was not effective until the start of the 2010-2011 school year, petitioner is entitled to compensation under the doctoral scale until June 30, 2010, and

[2] P.L. 2010, c. 13.

reimbursement from Freehold to compensate her for the reduction in salary unilaterally implemented by Freehold in December 2008.

CONCLUSION

Freehold violated petitioner's tenure rights by unilaterally reducing her salary without bringing tenure charges or holding a tenure hearing. While there is case law that stands for the proposition that a school board may correct at the end of the relevant school year any clerical error that results in an increase in a tenured teacher's salary, Freehold does not here appear to have made a clerical error. In addition, at the time of the increase in petitioner's salary, there was no law barring such action by a school board, and Freehold policy and the relevant CBA did not prohibit such action. Finally, the legislature enacted a statue which prohibits salary increases for teachers who attain degrees from non-accredited universities. That act went into effect July 1, 2010. As a result, Freehold violated petitioner's tenure rights and she is entitled to be reinstated to the doctoral salary guide until June 30, 2010 and reimbursed for any monies she should have received had she remained on that guide retroactive to December 2, 2008. While such a result contravenes a proper public policy that frowns upon using public money pay educators for degrees from unaccredited institutions, there was no law in place at the time of petitioner's increase and the tenure laws protect tenured teachers' rights against unlawful reductions in salary.

ORDER

It is hereby **ORDERED** that petitioner be reinstated to the doctoral salary guide from December 2, 2008, until June 30, 2010.

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

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

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Patricia M. Kerins

August 26, 2020
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: August 26, 2020 (emailed)

Date Mailed to Parties:

/mel

214-20

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

Synopsis

The petitioner, Board of Education of the Township of Barnegat (Barnegat), sought an order directing the respondent, Board of Education of the Freehold Regional High School District (Freehold), to share responsibility for the cost of providing T.M. with a free public education in an out-of-district placement, including tuition and all other related educational and residential expenses, for the period from October 16, 2018 forward, pursuant to *N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2). Barnegat filed a motion for summary decision, which was opposed by Freehold.

The ALJ found, *inter alia,* that: there are no material facts at issue in this case, and the matter is ripe for summary decision; T.M. resides out-of-state for the majority of the year and splits his time equally between his parents when he is in New Jersey; his parents do not have a written agreement designating the school district of attendance; and, because T.M.'s domicile cannot be determined, the two school districts must share in the cost of his out-of-district placement in accordance with *N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2). The ALJ determined that Freehold is obligated to share T.M.'s educational costs for the 2019-20 school year but denied Barnegat's request that Freehold share costs for the 2018-19 school year because Barnegat failed to request such cost sharing at that time. Accordingly, the ALJ granted Barnegat's motion for summary decision and ordered Freehold to reimburse petitioner for one-half of T.M.'s educational costs beginning with the 2019-20 school year and going forward.

Upon a comprehensive review, the Commissioner found, *inter alia,* that: in analyzing *N.J.A.C.* 6A:22-3.1, it is not possible to determine T.M.'s residence for the 2019-20 school year, and an equitable determination of shared responsibility for the cost of T.M.'s placement is therefore permitted under *N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2); the circumstances in this case are precisely those anticipated by the regulation; and the exceptions raised by Freehold are without merit. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The Commissioner directed the respondent to reimburse Barnegat for one-half of the cost of T.M.'s out-of-district placement for the 2019-20 school year, and to share equally in the future costs of T.M.'s placement at the American School for the Deaf so long as the present circumstances remain unchanged.

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

214-20

OAL Dkt. No. EDU 16397-19
Agency Dkt. No. 294-11/19

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by respondent Freehold Regional High School District Board of Education (Freehold) pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto submitted by petitioner Barnegat Township Board of Education (Barnegat).

In this matter, Barnegat seeks an order directing Freehold to share responsibility for the cost of T.M.'s education at an out-of-district residential placement. By way of background, T.M. is a 16-year-old who has been enrolled in the Barnegat School District since April 24, 2017, but has resided year-round at the American School for the Deaf since September 1, 2018.[1] T.M.'s parents are divorced and share custody. H.L. is the designated

[1] Pursuant to an August 24, 2018 settlement agreement between Barnegat and the parents following a petition for due process, Barnegat agreed to be responsible for the cost of T.M.'s placement.

parent of primary residence and lives in Barnegat, while P.M. is the parent of alternate residence[2] and lives in Marlboro Township.[3] The parents split time with T.M. equally during school recesses and holidays. On September 6, 2019, Barnegat requested that Freehold share the cost of T.M.'s out-of-district placement, but Freehold refused.

The Administrative Law Judge (ALJ) found that Freehold is obligated to share in T.M.'s educational costs beginning in the 2019-20 school year.[4] T.M. resides out-of-state for the majority of the year and splits his time equally between his parents when he is in New Jersey; his parents do not have a written agreement designating the school district of attendance. As such, the ALJ found that, because T.M.'s domicile cannot be determined, the districts must share in the cost of his out-of-district placement in accordance with *N.J.A.C.* 6A:22-3.1(a)(1)(ii).

In its exceptions, Freehold argues that the ALJ incorrectly determined that T.M.'s domicile could not be determined under *N.J.A.C.* 6A:22-3.1. Freehold maintains that T.M. is domiciled with his mother in Barnegat, as she was designated as the parent of primary residence in the Final Judgment of Divorce, and the residence of a child of divorced parents follows the parent of primary residence. Freehold contends that the ALJ erred in finding that the parents share equal physical custody because, pursuant to the custody arrangement, T.M. resides with H.L. for approximately two-thirds of the year. Additionally, Freehold points out that in the due process petition filed by the parents against Barnegat, the parents indicated that Barnegat was the district of residence, and in a settlement agreement of that matter, Barnegat agreed to be

---

[2] The terms "designated parent of primary residence" and "parent of alternate residence" were used in the Final Judgment of Divorce and Property Settlement Agreement between H.L. and P.M

[3] The Freehold Regional High School District serves students from Marlboro Township.

[4] Barnegat also sought that Freehold share costs for the 2018-19 school year. The ALJ denied that request as Barnegat made no demand for cost sharing at that time. The Commissioner agrees and therefore makes no determination as to where T.M. was domiciled for the 2018-19 school year pursuant to *N.J.A.C.* 6A:22-3.1.

financially responsible for the out-of-district placement. As such, Freehold argues that under *N.J.A.C.* 6A:22-3.1, T.M.'s domicile can be determined as Barnegat, and therefore, the ALJ erred in finding that tuition should be shared.

Freehold also takes exception to the Initial Decision's position that an out-of-district placement can eliminate the domicile of a child of divorced parents. According to Freehold, the Department has consistently found that dual domiciles for school district purposes should only occur in very narrow circumstances, which are not found here. As such, Freehold maintains that although T.M. spends time equally with both parents during school recesses, his domicile did not change; he remains domiciled in Barnegat.

Alternatively, Freehold argues that Barnegat was out of time in filing the instant petition because it was filed more than 90 days after the August 2018 settlement agreement that placed T.M. in the out-of-state placement. Additionally, Freehold argues that Barnegat is estopped from seeking payment from Freehold because it failed to involve Freehold in the underlying due process matter with the parents, which ended with Barnegat agreeing to be solely responsible for the cost of T.M.'s placement. Accordingly, Freehold urges the Commissioner to reject the Initial Decision and find that T.M. is domiciled in Barnegat, and – in the alternative – that Barnegat is barred from seeking payment from Freehold.

In reply, Barnegat argues that the ALJ correctly determined that T.M.'s domicile could not be determined by *N.J.A.C.* 6A:22-3.1(a). Barnegat maintains T.M. resides at his out-of-state placement and visits his parents equally when in New Jersey; therefore, he lived with neither parent. Furthermore, Barnegat contends that the ALJ appropriately found that there is no court order or written agreement between the parties designating the school district of attendance, and that a designation of legal custody does not suffice. As such, Barnegat agrees

with the ALJ that *N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2) permits an equitable determination of shared responsibility in these circumstances.

With respect to the settlement, Barnegat argues that Freehold was not a party and did not need to be involved; the settlement resolved disputes between Barnegat and the parents at that time. Barnegat further notes that the settlement agreement only provided for T.M.'s placement for the 2018-19 school year, and the ALJ concluded that Freehold was not responsible for cost sharing during that school year. Accordingly, Barnegat urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner concurs with the ALJ that the circumstances of this matter support an equitable determination of shared responsibility for the cost of T.M.'s out-of-district placement. *N.J.A.C.* 6A:22-3.1(a)(1) provides:

> (a) A student is eligible to attend a school district if he or she is domiciled within the school district.
>
> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.
>
> i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.
>
> ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided

> on the last school day prior to the October 16 preceding the application date.
>
> (1) When a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is that of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. When the parents or guardians do not designate or cannot agree upon the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian previously indicated, the student shall attend school in the school district of domicile of the parent or guardian with whom the student actually lives as of the last school day prior to October 16.
>
> (2) When the domicile of a student with disabilities as defined in *N.J.A.C.* 6A:14, Special Education, cannot be determined pursuant to this section, nothing in this section shall preclude an equitable determination of shared responsibility for the cost of the student's out-of-district placement.

As explained in the Initial Decision, the regulation confirms the "general proposition that a child's domicile follows that of his parents; it goes on to countenance a variety of factual complications, and resolves each with a formula for determining a single domicile." *Board of Education of the Borough of Lodi, Bergen County v. Board of Education of the Township of Rochelle Park, Bergen County*, EDU 20236-15, Initial Decision (June 10, 2016), *adopted,* Commissioner's Decision No. 267-16, decided July 21, 2016. "Where a special education student is placed out-of-district; his parents reside in different districts; and the

regulatory formulas offer no clarity; then, and only then, is a dual domicile assigned for the child." *Ibid.*

In analyzing *N.J.A.C.* 6A:22-3.1, the Commissioner is unable to determine T.M.'s residence for the 2019-20 school year, and therefore an equitable determination of shared responsibility for the cost of the placement is permitted. First, T.M.'s parents are domiciled in different school districts and there is no "court order or written agreement between the parties designating the school district of attendance." The regulation's requirement for a court order or written agreement is explicit. *G.P. and I.R.-P., on behalf of minor child, A.P. v. Board of Education of the Township of Hamilton, Mercer County*, EDU 02621-16, Initial Decision (October 28, 2016), *adopted*, Commissioner Decision No. 422-16, decided December 15, 2016. Additionally, "when there is a consent order or a written agreement between the parents that designates the school district of attendance, the amount of time spent with either parent does not dictate where the children must attend school." *K.H., on behalf of minor children, A.H. and V.H. v. Board of Education of the Borough of Butler, Morris County,* Commissioner's Decision No. 70-17, decided March 2, 2017. Although Freehold argues that the custody arrangement in the Final Judgment of Divorce designating the mother as the parent of primary residence qualifies as an agreement determining that Barnegat is the school district of attendance, the regulation's requirement is explicit. A parenting time arrangement as part of a divorce decree is not equivalent to a designation of the school district of attendance. Moreover, at the time of the divorce, neither parent resided in Barnegat, so a written agreement determining Barnegat as the school district of attendance could not have been contemplated at the time the parents executed the Final Judgment of Divorce, and the record is devoid of any other agreement between the parents designating a district of attendance.

Next, T.M. resides with neither parent for the majority of the school year as he is in an out-of-state housing placement year-round. According to Freehold, T.M.'s residence remains with his mother because the Final Judgment of Divorce designated her the parent of primary residence. While T.M. previously spent more time with his mother in accordance with the established parenting time schedule, his circumstances have changed. He now lives full-time at an out-of-district placement, and – according to the Final Judgment of Divorce – the parties "equally share all recesses from school and utilize the Court Holiday Schedule unless they can agree otherwise." There is no evidence in the record that the parties have changed that arrangement, so T.M. splits his time equally between his parents when on recesses from his residential placement and lives with neither parent for the majority of the school year.

As T.M.'s residence cannot be determined in the above analysis, the next step is to determine where T.M. resided on the last school day prior to the October 16 preceding the application date or, otherwise, where he will reside on the last school day prior to the ensuing October 16. T.M. resided at his out-of-state placement on October 15 in 2018, 2019 and is expected to be residing there again in 2020.

Since T.M.'s residence cannot be determined under any of the above steps, an equitable determination of shared responsibility is permitted under *N.J.A.C.* 6A:22-3.2(a)(1)(ii)(2). The circumstances here are precisely those anticipated by the regulation. A student with disabilities resides at an out-of-district placement and the domicile of the student cannot be determined because the parents live in different districts. Accordingly, an equitable determination may be made for the districts to share the responsibility for the cost of the out-of-district placement.

The Commissioner is not persuaded by Freehold's additional exceptions. This matter is not out of time; it was filed within 90 days of Freehold's refusal of Barnegat's request for cost sharing for the 2019-20 school year. Accordingly, this matter was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i). Additionally, Barnegat is not estopped from seeking to share costs with Freehold. The due process petition that resulted in T.M.'s out-of-district placement did not involve Freehold because, at the time, T.M. resided in Barnegat. As explained, T.M.'s circumstances have changed such that his domicile is no longer determinable. Therefore, Barnegat is not estopped from seeking financial assistance from Freehold for the cost of T.M.'s placement beginning in the 2019-20 school year.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Freehold is directed to reimburse Barnegat for one-half of the cost of T.M.'s out-of-district placement for the 2019-20 school year and to share equally in the future costs of T.M.'s placement at the American School for the Deaf, so long as the present circumstances remain the same.

IT IS SO ORDERED.[5]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 6, 2020
Date of Mailing: October 6, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

OAL DKT. NO. EDU 16397-19
AGENCY DKT. NO. 294-11/19'

Jessika Kleen, Esq. for petitioner (Machado Law Group, attorneys)

Mark G. Toscano, Esq., and **Alexandra A. Stulpin**, Esq., for respondent (Comegno Law Group, PC, attorneys)

Record Closed: July 8, 2020 Decided: July 20, 2020

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the Township of Barnegat, Ocean County (Barnegat), brings an action against Respondent Board of Education of the Freehold Regional High School District, Monmouth County (Freehold), seeking an order directing Freehold to assume shared responsibility for providing minor child T.M. with a free appropriate public education (FAPE) in an

out-of-district placement, including tuition and all other related educational and residential expenses, from October 16, 2018 or the date on which T.M.'s father resided in the Freehold District, whichever is earlier, pursuant to N.J.A.C. 6A:22-3.1(a)(1)(ii)(2).

PROCEDURAL HISTORY

On November 8, 2019, Barnegat filed a petition with the Department of Education (DOE), Office of Controversies and Disputes. On November 14, 2019, Freehold filed its answer to the petition. The matter was transmitted by the DOE to the Office of Administrative Law (OAL), where it was filed on November 21, 2019, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial prehearing conference scheduled for January 30, 2020, was adjourned at the request of petitioner, and rescheduled for February 4, 2020. A prehearing order was issued on February 18, 2020, setting deadlines for the completion of discovery and the filing of dispositve motions. On March 4, 2020, a consent order was entered to permit the production of relevant, confidential student records in response to discovery requests.

On May 26, 2020, Barnegat filed a motion for summary decision in its favor. On June 29, 2020, Freehold filed a response in opposition to Barnegat's motion. Barnegat replied on July 8, 2020, and the matter is now ripe for decision.

FACTUAL DISCUSSION AND FINDINGS

Based on the documentary evidence filed in this matter, including the certifications of counsel and P.M., father of minor child T.M., I **FIND** the following as **FACTS:**

1. Barnegat is a local public school district in Ocean County, New Jersey, responsible to provide a FAPE, pursuant to 20 U.S.C.A. 1400(d)(1)(A), to students within Barnegat Township.

2. Freehold is a public regional school district in Monmouth County, New Jersey, responsible for providing FAPE to students in ninth through twelfth grades from eight localities, including Marlboro Township.

3. T.M. is a sixteen year old male who is eligible for special education and related services under the classification multiply disabled. T.M.'s disabilities include bilateral severe to profound hearing loss. He is enrolled in the Barnegat School District and resides at the American School for the Deaf (ASD), an out-of-district residential placement.[1] Certification of Jessika Kleen, Esq., in Support of Petitioner's Motion for Summary Decision (May 26, 2020), Exhibit A (June 24, 2019 Individual Education Program for T.M.).

4. For the 2018-2019 school year and the 2019-2020 school year, Barnegat placed T.M. at ASD and paid all educational and residential costs of T.M.'s placement pursuant to a settlement agreement entered on October 2, 2018, by T.M.'s parents and Barnegat. Kleen Cert., Ex. B.

5. T.M.'s parents, P.M. and H.L. (formerly H.M.), divorced in 2007. They share joint legal and physical custody of T.M.; H.L. is the "designated parent of primary residence" and P.M. is the "parent of alternate residence." Kleen Cert., Ex. C [Final Judgement of Divorce, Ocean County Sup. Ct. Docket No. FM-15-883-07N (December 21, 2007), at 6].

6. At all relevant times, P.M. has resided in Marlboro Township. Certification of P.M. (May 6, 2020), ¶¶ 2, 3.

7. At all relevant times, H.L. has resided in Barnegat Township. Br. of Petitioner in Support of Motion for Summary Decision (May 26, 2020), ¶ 12.

---

[1] While Freehold makes much of the Judgement of Divorce designation of H.L. with primary custody of T.M., the exhibits attached to counsel's certification make clear that since September 1, 2018, T.M. has lived at ASD year-round. See, Certification of Alexandra A. Stulpin in Support of Respondent's Opposition to Motion for Summary Decision (June 29, 2020), Exs. F, G and H.

8. On April 24, 2017, H.L. registered T.M. in the Barnegat School District. Br. of Respondent in Opposition to Motion for Summary Decision (June 29, 2020), at 15.

9. Since the 2018-2019 school year, T.M. has lived at ASD year-round and does not reside with either parent. P.M. Cert., ¶¶ 8-9. As provided in the Final Judgement of Divorce, P.M. and H.L. equally share time with T.M. while he is on recess from school. Kleen Cert, Ex. C, at 6; P.M. Cert., ¶ 9.

10. There is no court order or written agreement between P.M. and H.L.. designating T.M.'s school district of attendance. P.M. Cert, ¶ 11.

11. T.M. resided at ASD and not with either parent on the last school day prior to October 16, 2019. P.M. Cert., ¶ 12.

12. According to his father, T.M. will reside at ASD and not with either parent on the last school day prior to October 16, 2020.[2] Id., ¶ 13.

13. On September 6, 2019, through counsel, Barnegat proposed that the cost of T.M.'s placement be shared by the two districts. Freehold refused, citing the custody arrangement in the Final Judgement of Divorce, and this petition of appeal followed.

LEGAL ANALYSIS AND CONCLUSIONS

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540.]

I **CONCLUDE** that the parties raise no dispute with respect to material facts and the obligations of Barnegat and Freehold to share in the costs of T.M.'s out-of-district placement can be decided as a matter of law.

New Jersey public schools are required to provide FAPE to children between the ages of five and twenty who are domiciled within the school district. N.J.S.A. 18A:38-1. Typically, a child's domicile follows that of his or her parent(s). N.J.A.C. 6A:22-3.1(a)(1). The resolution of this dispute will turn on a legal question, specifically how New Jersey regulations define the domicile of a child of divorced parents who reside in different school districts. In this regard, N.J.A.C. 6A:22-3.1(a)(1)(i) provides:

> (a) A student is eligible to attend a school district if he or she is domiciled within the school district.
>
> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.
>
> i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.

[2] Neither party produced any evidence that T.M. will not be in residence at ASD on October 15, 2020.

ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date.

(2) When a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is that of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. When the parents or guardians do not designate or cannot agree upon the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian previously indicated, the student shall attend school in the school district of domicile of the parent or guardian with whom the student actually lives as of the last school day prior to October 16.

(3) When the domicile of a student with disabilities as defined in N.J.A.C. 6A:14, Special Education, cannot be determined pursuant to this section, nothing in this section shall preclude an equitable determination of shared responsibility for the cost of the student's out-of-district placement.

The above regulation first confirms "the general proposition that a child's domicile follows that of his parents; it goes on to countenance a variety of factual complications, and resolves each with a formula for determining a single domicile." Bd. of Educ. of the Borough of Lodi v. Bd. of Educ. of the Tsp of Rochelle Park, OAL Dkt. No. EDU 20236-15 (June 10, 2016), http://njlaw.rutgers.edu/collections/oal/html/initial/edu20236-15_1.html., adopted, Comm'r (July 26, 2016), http://njlaw.rutgers.edu/collections/oal/final/edu20236-15_1.pdf. T.M.'s parents are domiciled in different districts and, given that he lives at ASD year-round and did not stay with either parent on October 15, 2019, and is expected to be at ASD on October 15, 2020, the only question left is whether there is a "court order or written agreement between the parents designating the school district of attendance[.]" N.J.A.C. 6A: 22-3.1(a)(1)(ii).

Freehold argues that the 2007 Final Judgement of Divorce dictates custody of T.M. and, since H.L. is designated with primary custody, this document serves as "a written agreement under N.J.A.C. 6A:22-3.1(a)(1)(i), that show [sic] their united intent to confer T.M.'s domicile with his mother in Barnegat." Br. of Respondent in Opposition to Motion for Summary Decision (June 29, 2020), at 14.[3] But, the regulations make clear that the designation of legal custody does not suffice for a specific court order or written agreement between the parents designating the school district of attendance for T.M. See, G.P. and I.R.-P. on behalf of A.P. v. Bd. of Educ. of the Tsp. of Hamilton, OAL Dkt. No. EDU 02621-16 (October 28, 2016) ("[R]egulation explicitly calls for a court order or a written agreement," and in the absence of such documents, the domicile of the minor child "on any given day is to be determined in accordance with the provisions of N.J.A.C. 6A:22-3.1(a)1ii[.]"), http://njlaw.rutgers.edu/collections/oal/html/initial/edu02621-16_1.html, adopted, Comm'r (December 15, 2016), http://njlaw.rutgers.edu/collections/oal/final/edu02621-16.pdf.

When, as here, a special education student is placed out-of-district, his parents reside in different districts, and the above regulatory formulas offer no clarity, then, and only then, is a dual domicile assigned for the child. Lodi v. Rochelle Park (cited above). Respondent claims that Barnegat relies too heavily on the finding of dual domicile in Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super 6 (App. Div. 2000), as that case was decided before the current regulations were promulgated and the decision is rarely cited. The dearth of citations may only be because the circumstances supporting use of dual domicile are so rare. In Lodi v. Rochelle Park, ALJ Ellen Bass explained that the current regulations are in fact consistent with both Somerville and the later decision in Cumberland Regional H.S. District Board of Education v Freehold Regional H.S. District Board of Education, 293 Fed. Appx. 900 (3d Cir. 2008):

---

[3] Freehold cites an email exchange with P.M. confirming that the Judgment of Divorce remains unchanged. Stulpin Cert. (June 29, 2020), ¶ 33. That is not enough, however, to turn the Judgment into "a court order or written agreement designating the school district of attendance." Further, it raises the question of whether had the parents so designated a district in 2007, it would have been Barnegat, as H.L. lived in Jackson, New Jersey, at the time of the divorce. See, Kleen Cert, Ex. C at 2.

> [In Cumberland,] the special needs child of divorced parents was placed in a residential facility out-of-state. Freehold Regional, the district where the father lived, contended that the home district of the child's mother should share in the cost of the placement. The court agreed, relying on the Somerville decision to direct that the districts share the cost of the placement. Cumberland predates the regulations that now guide thomy domicile determinations but offers a scenario that would result in a dual domicile determination even today. The special education student in Cumberland resided out-of-state and thus in neither parents' home; as a result, her domicile could not 'be determined pursuant to [the regulation].'

The undisputed facts are that T.M. resides out-of-state for the majority of the year and when he is in New Jersey, he divides his time equally at the separate residences of his parents. At the time of their divorce, P.M. and H.L. did not enter into a written agreement designating the school district of attendance for T.M. as Barnegat and why would they have, given that H.L. did not move to Barnegat until approximately ten years later. Neither party has provided any evidence that such a document was executed at any time after the divorce. I **CONCLUDE** that T.M.'s domicile cannot be determined and therefore, pursuant to N.J.A.C. 6A: 22-3.1(a)(1)(ii), Barnegat and Freehold, the districts of domicile of T.M.'s parents, must share in the cost of T.M.'s out-of-district placement.

Barnegat's request for relief included one-half of all costs incurred by Barnegat related to T.M.'s out-of-district placement beginning October 16, 2018. Barnegat made no demand for payment at that time and Freehold should not be responsible to cover costs for which it could not anticipate nor budget. I **CONCLUDE** that Freehold's obligation to share costs began with the 2019-2020 school year, coincident with the September 2019 demand from Barnegat. See I.G. obo L.G. v. Cumberland Regional High School District Bd. of Educ., OAL Dkt. Nos. EDS 2994-02 and EDS 6938-02 (July 27, 2005) (district's shared responsibility for education costs began with notice of litigation).

ORDER

For the foregoing reasons, I **ORDER** that the motion of Petitioner Board of Education of the Township of Barnegat for summary decision in its favor is **GRANTED** and Respondent

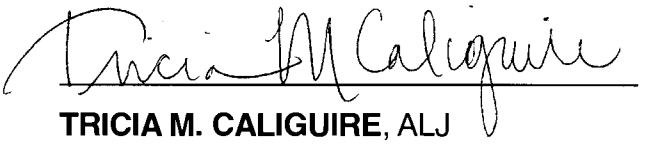
Board of Education of the Freehold Regional High School District is **ORDERED** to reimburse petitioner for one-half of the costs of T.M.'s placement at the American School for the Deaf for the 2019-2020 school year, and to share equally in all future costs continuing until such time as T.M. is no longer enrolled at ASD or P.M. no longer resides in Freehold, whichever is earlier.

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

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

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

July 20, 2020
DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES
TENURE HEARING

~~~~~~~~~~~~~~~~~~~~~~~~

In the Matter of the
Arbitration Between:

SCHOOL DISTRICT OF THE CITY OF PATERSON	)	**OPINION**
PETITIONER	)	**AND**
AND		**AWARD**
TOBI KNEHR	)	
RESPONDENT	)	

~~~~~~~~~~~~~~~~~~~~~~~~

DOE 297-12/18

ARBITRATOR GERARD G. RESTAINO, ASSIGNED BY THE NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH C:18A:6-17.1

APPEARANCES

<u>FOR THE PETITIONER</u>	
KAREN MURRAY, ESQ.	COUNSEL FOR PETITIONER
<u>FOR THE RESPONDENT</u>	
ROBERT SCHWARTZ, ESQ.	COUNSEL FOR RESPONDENT
TOBI KNEHR	RESPONDENT

PROCEDURAL BACKGROUND

Tobi Knehr, hereinafter referred to as the Respondent, is a tenured employee with over sixteen years of service in the Paterson School District. On February 2, 2012, she was appointed to the position of Director of Reform and Innovation. Prior to the tenure charges being filed, the Respondent was the Director of Full Service Community Schools.

On October 29, 2019, Eileen Shafer, State District Superintendent, sent a letter to the Respondent notifying her that charges of misconduct had been filed against her. Accompanying that letter was a Statement of Charges, Statement of Evidence and 165 exhibits in support of the Charges. The Respondent was informed that within fifteen (15) days of receipt of the letter she may submit a written Statement of Position and Statement of Evidence, and both must be executed under oath. Also on that date Susana Peron, Acting Deputy Superintendent for the Paterson School District, signed a notarized statement in support of the charges, and in fact, stated that she was the person initiating the tenure charges. She further indicated that *"[T]hese charges are supported by the attached documents, the District's investigation and the on-going investigation by the N.J. Department of Education's Office of Fiscal Accountability and Compliance, as well as the N.J. Division of Criminal Justice in the Office of the Attorney General of the State of New Jersey."* In addition, Ms. Peron stated that *"Ms. Knehr's conduct constitutes misconduct, conduct unbecoming and a complete dereliction of the duties of the Director's position to which she was appointed."*

On November 16, 2018, the Respondent filed her answers to the charges,and there is no reference in those answers that the charges lack specificity.

On December 6, 2018, a Certificate of Determination was executed by Superintendent Shafer. On that date the Board of Education approved a Resolution to file the tenure charges against the Respondent.

Also on December 6, 2018, in accordance with N.J.S.A. 18A:6-11, et al and N.J.A.C. 6A:3-5.1, et al., the Paterson Board of Education filed tenure charges against the Respondent with the Commissioner of Education.

Statement Of Charges And Specifications Regarding The Employment Of Tobi L. Knehr, A Tenured Teaching Staff Member Employed By The Paterson School District

I, Susana Peron, Acting Deputy Superintendent, hereby charge that Tobi L. Knehr, a tenured teaching staff member, holding the title of Director of Reform and Innovation, employed by the Paterson School District Board, is guilty of misconduct, dereliction of duties, and conduct unbecoming her position so as to require that her employment be terminated. Specifically, it is charged that:

CHARGE 1: Tobi L. Knehr engaged in misconduct by failing to research, review and/or properly authorize the expenditure of federal and state funds for several of the District's schools.

SPECIFICATION A: From or about February 3, 2012, until she commenced a series of leaves of absences, Ms. Knehr entered into arrangements with vendors without following applicable statutes and regulations for public bidding. Ms. Knehr approved payments to vendors, including Teens2Work, in violation of public bidding laws and Board of Education policies.

SPECIFICATION B: During the time she served as Director, Ms. Knehr approved, authorized and/or permitted regular and substantial payments to vendors with minimal, or no verification of work or services rendered. For

example, Teens2Work was routinely paid for work never performed.

SPECIFICATION C: Ms. Knehr approved, authorized and/or permitted the expenditures of federal and/or state funds controlled by her Department and under her oversight. One of the vendors, Teens2Work, was owned/operated and/or managed by her subordinate administrator, Christine Breit, School Community Program Coordinator. Ms. Knehr regularly authorized payments to Ms. Briet's business, Teens2Work. Ms. Breit's business, Teens 2 Work, was operated out of her residence and was not reported in her Annual Financial Disclosure form. Ms. Knehr took no steps to correct and/or stop the payment of federal grant monies, the Century 21 Grant, to a colleague in her Department and her subordinate administrator, whom she was responsible for overseeing and supervising.

SPECIFICATION D: In her position as Director, Ms. Knehr, approved, authorized and/or permitted the expenditure of federal grant monies for numerous field trips many of which did not occur. Ms. Knehr authorized purchase orders permitting advance payments for field trips, many of which never occurred. These invoices, approved by Ms. Knehr lacked all appropriate and required supporting documentation.

SPECIFICATION E: Ms. Knehr permitted and/or authorized her staff to Improperly and/or fraudulently fill out invoices for the purchase of goods and materials, without any regard for District and State procedures for the ordering of supplies. Many of these supplies were never received by the District's community schools and the students of the Paterson school district.

SPECIFICATION F: Ms. Knehr did not properly vet and/or supervise her staff whether Paterson District employees and/or vendors' staff providing services through monies and programs under the 21st Century Grant.

CHARGE 2: Ms. Knehr' s misuse and mishandling and/or misappropriation of federal and/or state monies significantly impacted the students of Paterson by depriving them of academic enrichment opportunities and preparedness for further educational and career opportunities.

SPECIFICATION A: The misuse and/or misappropriation of a $500,000. federal 21st Century Grant, in addition to an annual budget of approximately $3,000,000., significantly deprived a substantial number of students of the Paterson School District of educational programs and opportunities.

CHARGE 3: Documentation for various field trips and activities which were to have been organized and operated through and under Ms. Knehr' s Department was false, misleading and/or fraudulent, resulting in the misappropriation of federal and/or state funds.

SPECIFICATION A: Field trips and activities were invoiced and reimbursed prior to the date of the event.

SPECIFICATION B: Field trips and activities which never occurred were invoiced and paid pursuant to Ms. Knehr's authorization.

SPECIFICATION C: The invoices for various field trips and activities lacked required documentation and necessary details.

SPECIFICATION D: Field trips and activities invoices failed to indicate whether: a) the requested parent approvals had been obtained; b) transportation with properly licensed drivers had been secured; c) adequate adult supervision had been properly vetted and fingerprinted. Further, the invoices provided no breakdown of costs for the items, including staff costs, transportation, tickets and/or admission fees.

CHARGE 4: Ms. Knehr' s misconduct relative to the implementation of federal grant programs, and the mishandling of her Department's several million dollar budget has resulted in an on-going investigation by the N.J. Department of Education's Office of Fiscal Accountability and Compliance (OFAC).

Further, due to the mishandling and/or misappropriation of federal grant monies, the N.J. Office of the Attorney General's Division of Criminal Justice is also engaged in an ongoing investigation.

SPECIFICATION A: The bulk of the Paterson School District's finding derives from the State of New Jersey. Ms. Knehr, as the Director of Reform and Innovation, had an annual budget of approximately 3 million dollars, which she failed to legally and properly oversee and manage in accordance with all applicable statutes, regulations and Board policies.

SPECIFICATION B: Ms. Knehr failed to adhere to the 21st Century grant guidelines for the utilization of the approximately $500,000 awarded to the Paterson School District for community based school and programs under her supervision and direction.

DISCUSSION AND OPINION

The Respondent continually argued that the charges are in violation of N.J.S.A. 18A:6-11 because the charges lack specificity, are procedurally defective and deprive her of a meaningful opportunity to defend against these flawed charges. However, the Petitioner contends "that the Respondent's position is disingenuous and not credible, as she already answere3d the charges prior to certification and was willing to discuss them with the Assistant Superintendent.

Nevertheless, the parties submitted briefs and on March 7, 2019, I rendered the following decision:

Upon careful review of all documents and pleadings by the parties, I dismiss the

following Charges:

Charge 1, Specification D

Charge 1, Specification E

Charge 1, Specification F

Charge 3, Specification A & B

Accordingly, the Motion to Dismiss is denied as to all other charges.

From that date forward there was a substitution of counsel for the Respondent and the parties engaged in serious settlement discussions
I informed DOE of the status of this matter. COVID 19 prevented both parties from meeting, but ultimately a Settlement Agreement was voluntarily reached by the parties.

On August 26, 2020, the parties executed a Settlement Agreement which is incorporated by reference into my award.

I have reviewed the terms of the Settlement Agreement and find that it is in accordance with N.J.A.C.6A:3-5.6, set forth in re Cardonick, State Board Decision of April 6, 1983 (School Law Decision SLD 842,846). The Settlement Agreement is consistent with the established standards set forth in the above cited SLD.

Dated: September 23, 2020

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 23rd day of September, 2020, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing Arbitration Award and he duly acknowledged to me that he executed the same.

Brooke Craven

Commonwealth of Pennsylvania - Notary Seal
Brooke M. Craven, Notary Public
Wayne County
My commission expires November 6, 2022
Commission number 1340165
Member, Pennsylvania Association of Notaries

PATERSON PUBLIC SCHOOL DISTRICT
RESOLUTION FORM

1. All Board resolutions must clearly state how that program/initiative relates to or is specifically connected to the Priorities and Goals contained in the Strategic Plan.
2. This resolution must be in the Superintendent's office according to cutoff date before the meeting of the Board of Education.

Recommendation/Resolution:

WHEREAS, the Paterson Board of Education ("Board") and employee T.K. have negotiated a Settlement Agreement ("Agreement") (collectively "Parties") in connection with litigation filed by the employee in the New Jersey Office of Administrative Law, under docket number 285-10/19; and

WHEREAS, the Parties have agreed, by way of this Agreement, to resolve the above-referenced litigation and matters referenced in the Agreement; and

WHEREAS, the Board has reviewed the Agreement and determined that it is in its best interest for cost efficiency to settle this matter without further litigation; and

BE IT RESOLVED that the Board hereby approves the Agreement.

BE IT FURTHER RESOLVED that the Board authorizes the Board President and the Business Administrator/Board Secretary to execute the Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Agreement and carry out this action of the Board.

APPROVALS REQUIRED

1. Submitted by Luis Rojas, Assistant Superintendent (Name, Title) _____ 8/20/2020 Date

2. Approval by Divisional Administrator _____ Superintendent, Deputy, Assistant Superintendent, or Business Administrator etc. _____ Date

LEGAL DEPARTMENT USE ONLY	Requires Board Approval	☒	Does Not Require Board Approval	

3. Verification by Legal Department _____ 8/26/2020 Date

Funds Available		Funds Not Available		Funds Not Needed		Non-Budget Item	

Account No. _____

4. Certification of Funds – Business Administrator Richard L Matthews Signature 8/27/21 Date

5. Approval by Superintendent Eileen Shafer 8/27/20 Date

6. Board Adoption Date _____ _____ Resolution Number 9-16-20/37

Copies as follows:
White-To Board Office Green-To Deputy Yellow-To Business Administrator Pink-To #1 Gold-To #2

Sept. 2019

SETTLEMENT AGREEMENT BETWEEN
THE PATERSON BOARD OF EDUCATION
AND
TOBI KNEHR
Agency Dkt. No.: 297-12/18 (Arb. G. Restaino)

WHEREAS, the Paterson Board of Education (hereinafter PBOE) certified tenure charges to the NJ Commissioner of Education on December 6, 2018 alleging conduct unbecoming and dereliction of duties and misconduct against the Respondent, Tobi Knehr (hereinafter referred to as Respondent) while she served as the Director of Reform and Innovation, (see Exhibit A, Certification of Determination and Exhibit B, PBOE Resolution),

WHEREAS, by letter dated December 28, 2018 from the Director of the Department of Education's Office of Controversies and Disputes, Gerard G. Restaino was appointed as the arbitrator to hear the tenure charges pursuant to N.J.S.A. 18A:6-16, as amended by P.L. 2012, C. 26 and P.L. 2015, C. 109, (Exhibit C) and,

WHEREAS, Respondent's counsel filed a Motion to Dismiss the charges, which, after receipt of responsive pleadings filed on behalf of the PBOE was denied by Arbitrator Restaino, and,

WHEREAS, Respondent's initial counsel, Carol Smelzer, was subsequently replaced because of alleged conflict, on or about April 5, 2019, and,

WHEREAS, Respondent's new counsel, Wayne Oppito, (hereinafter referred to as "Oppito") entered his appearance on or about May 23, 2019, and,

WHEREAS, on June 13, 2019, during a phone conference conducted with Arbitrator Restaino, Oppito advised that because of a medical issue he was experiencing which required immediate medical attention he was requesting that the matter be held in abeyance, which request was granted by Arbitrator Restaino, and

WHEREAS, commencing in late November 2019, the parties met and discussed settlement proposals on several occasions, advising the Arbitrator throughout this process of the status of the parties' settlement discussions, and,

WHEREAS, on or about October 21, 2019, a separate Petition of Appeal was filed with the Department of Education's Bureau of Controversies and Disputes on behalf of Respondent contending that she had been improperly reassigned to a teaching position. (EDU) 16407-19; Agency Ref. # 285-10/19), which remains pending, and,

WHEREAS, the parties have now reached a final settlement in the instant matter through negotiations between counsel for both parties, subject to both parties' approval of same, and the final approval of the Commissioner of Education, and

WHEREAS, counsel Oppito retired, effective June 30, 2020 and Robert M. Schwartz, Esq. became the new substitute counsel for Respondent, and

Whereas, the parties hereto are in agreement with the terms set forth below,

NOW, THEREFORE BE IT RESOLVED that the parties hereby agree to settle the tenure charge case, for the reasons set forth herein, on the following specified terms:

Rationale for Settlement

1. The settlement is in the best interest of both parties in that it provides certainty and finality to this matter and avoids an expensive and protracted hearing which would have included many witnesses for both parties and whose outcome, given the nature of matters such as this, is uncertain. This settlement does not and should not be construed as an admission by either party.
2. More specifically, as a result of the extensive documents associated with this matter, the expectation was that at a minimum this matter would require 5 – 8 days of a hearing

coupled with an extensive briefing schedule that would have required the parties to order transcripts of the proceedings. The hearing would have required the assistance and testimony of administrative staff whose time and energies would be better served to provide meaningful education to the over 20,000 students in Paterson for the upcoming 2020 – 2021 academic year, particularly during this time of the Covid-19 pandemic.

3. In addition, a settlement will save the PBOE the continuing costs of preparing and participating in the instant tenure case, and for the costs of preparing and participating in the OAL matter having docket no. EDU 16407-19; Agency Ref. # 285-10/19, along with the cost of any potential appeals in either matter.

Terms and Conditions of Settlement

1. Respondent shall continue to be paid her teacher salary during the 2019 – 2020 year. As of September 1, 2020, through December 31, 2020, Respondent shall be paid a pro-rata portion of her annual teacher base salary of $77,225, in addition to which she will receive $2100 in longevity and such other benefits to which she is entitled pursuant to the collective bargaining agreement of the teachers in Paterson. Said payments shall be made on the same bi-monthly schedule as Respondent was paid during the 2019-2020 school term.
2. Effective January 1, 2021, Respondent shall not be entitled to any further salary or longevity payments, but she shall be paid for 32.25 accrued vacation days from the 2017 – 2018 academic year, which she earned when she served as 12-month Director, said days having a gross value of $13,608.88. Said payment shall be made in three equal installments of $4,536 each beginning on January 15, 2021 and continuing on

February 15, 2021 and March 1, 2021. Said payments shall be subject to standard and ordinary deductions.

3. Respondent shall continue to receive all health benefits through the PBOE through December 31, 2020 and during the months of January, February and March 2021, while she is receiving the balance of her vacation pay. Respondent's required contribution for health insurance shall be deducted from her compensation through December 31, 2020 and from the vacation pay she will receive in the months of January, February and March 2021. The PBOE shall give notice to its insurance carriers no later than February 26, 2021 that Respondent is to be removed as an employee from all health insurance as of March 31, 2021. Any continuation of health insurance received through the PBOE after March 31, 2021 shall be at the sole expense of Respondent by way of COBRA payments, if she elects to do so. The PBOE shall provide Respondent with all necessary information no later than March 1, 2021 regarding COBRA and what is required to continue health insurance through COBRA.
4. In conjunction with the execution of this agreement subject to the approval of the Commissioner of Education, Respondent shall submit to her counsel an irrevocable letter of voluntary resignation made effective March 31, 2021 addressed to the superintendent which shall be submitted by Respondent's counsel to counsel for the PBOE. It is understood that the letter of resignation shall not be effective if this agreement is not approved by the Commissioner of Education.
5. Respondent shall withdraw, with prejudice, her Petition of Appeal (Dkt. # EDU 16407-19, Agency Ref. # 285-10/19) upon approval of this Agreement by the Commissioner of Education.

6. Respondent also hereby releases, waives and discharges the PBOE, its officers, trustees, agents, employees, successors and assigns (hereinafter "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Respondent now has, or may in the future have against the PBOE on account of or arising out of this matter or related matter, including but not limited to the pending matter before the OAL having docket no. EDU 16407-19; Agency Ref. # 285-10/19. This Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or educational statute or regulation and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order, or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

   i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD).

   ii. Any federal claim, cause of action, demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended.

   iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA).

   iv. Any claim cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA).

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) and any claim, cause of action, demand or complaint arising out of or under the New Jersey Family Medical Leave Act (NJFMLA).

vi. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973 as amended.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA).

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA).

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA).

The aforesaid list shall not be deemed exhaustive, but by way of example.

b. The PBOE agrees to a reciprocal release under the same terms as set forth herein of any claims it may have against Respondent arising from this matter or related matters that it now has or may have in the future.

c. If Respondent and/or the PBOE or any of its agents violate this Release by filing any grievance, claim, charge or complaint against the other, as prohibited above, they each agree to pay all costs and expenses incurred by the other in defense of such action, including reasonable attorney's fees.

General Conditions of the Agreement

1. Respondent acknowledges that her attorney has fully advised her of the requirements of N.J.A.C. 6A:3-5.6 relative to terms of this Agreement and the overall settlement of the tenure charge case filed against her by the PBOE. Further, Respondent acknowledges that under the aforementioned regulation and applicable case law, the Commissioner of Education may refer this matter to the State Board of Examiners for action having to do with the Respondent's certificates.
2. This document contains the entire Agreement between the PBOE and Respondent with respect to the tenure charges certified by the PBOE and the Petition of Appeal filed by Respondent and supersedes any prior agreements, understandings and/or dealings, whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the PBOE to do anything other than what is expressly stated in this Agreement. This Agreement shall with all respect be interpreted, enforced and governed by the laws of the state of New Jersey. It is understood between and among all parties hereto that the terms of this Agreement shall not have any precedential effect or constitute binding practice for the PBOE or the Paterson Education Association.
3. Respondent warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Respondent represents and warrants that she enters into this Agreement voluntarily, of her own free will, and without any pressure or coercion from any person or entity including, but not limited to, the PBOE.

FOR THE PATERSON BOARD OF EDUCATION

EILEEN SHAFER, SUPERINTENDENT

Dated:_____

FOR TOBI KNEHR

TOBI KNEHR

Dated:_____

Agreement. This Agreement shall with all respect be interpreted, enforced and governed by the laws of the state of New Jersey. It is understood between and among all parties hereto that the terms of this Agreement shall not have any precedential effect or constitute binding practice for the PBOE or the Paterson Education Association.

Respondent warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Respondent represents and warrants that she enters into this Agreement voluntarily, of her own free will, and without any pressure or coercion from any person or entity including, but not limited to, the PBOE.

3.

FOR THE PATERSON BOARD OF EDUCATION

Eileen J Shafer

EILEEN SHAFER, SUPERINTENDENT

Dated:

FOR TOBI KNEHR

Tobi S Knehr

TOBI KNEHR

Dated: 8/4/20

1

Tobi Knehr

59 Lenape Rd. Andover, NJ 07821• Phone: 201-240-0717 •E-Mail: tknehr@gmail.com

August 4, 2020

Ms. Eileen Shafer
Superintendent
Paterson Public Schools
90 Delaware Ave.
Paterson, NJ
07508

Dear Ms. Shafer:

Please accept this letter as my irrevocable letter of resignation from my employment at the Paterson Board of Education, effective March 31, 2021.

Sincerely,

Tobi Knehr

218-20

OAL Dkt. No. EDU 01768-20
Agency Dkt. No. 1-1/20

New Jersey Commissioner of Education

Final Decision

N.W., on behalf of minor child, E.F.,

Petitioner,

v.

Board of Trustees of the North Star Academy Charter School, Essex County,

Respondent.

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

Paragraph 2 of the Agreement references certain actions to be taken by the respondent no later than May 30, 2020. This time frame has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2020
Date of Mailing: October 2, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01768-20
AGENCY DKT. NO. 1-1/20

N.W. ON BEHALF OF E.F.,
Petitioner,
v.
NORTH STAR ACADEMY CHARTER SCHOOL BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

Esther Canty-Barnes, Esq., for petitioner (Rutgers University Special Education Clinic School of Law)

Teresa L. Moore, Esq., for respondent (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: August 19, 2020 Decided: September 3, 2020

BEFORE **SARAH H. SURGENT**, ALJ:

On January 3, 2020, petitioner N.W. o/b/o E.F. filed a Petition with the Commissioner of Education seeking, among other relief, reversal of E.F.'s disciplinary

school suspensions by respondent North Star Academy School Board of Education and the Academy's Head of the School (collectively, the Board). On or about February 3, 2020, the Board filed an Answer to the Petition and the Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on February 5, 2020, for determination as a contested case.

Following telephone conferences with counsel, counsel for the Board submitted the attached confidential Settlement Agreement, (J-2), with a letter dated August 14, 2020, (J-1), along with a Resolution of the Board approving the Settlement Agreement, which are incorporated herein.

I have reviewed the record and the terms of the Settlement Agreement and I **FIND**:

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

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

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

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

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

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 3, 2020
DATE

Sarah H. Surgent
SARAH H. SURGENT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

RIKER
DANZIG
SCHERER
HYLAND
PERRETTI LLP

ATTORNEYS AT LAW

Teresa L. Moore
Counsel

Direct:
t: 973.451.8594
f: 973.451.8698
tmoore@riker.com

Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981

August 14, 2020

Honorable Sarah H. Surgent, A.L.J.
New Jersey Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: N.W. o/b/o E.F. v. North Star Academy Charter School
OAL Docket No. EDU-01768-20

Dear Judge Surgent:

On behalf of North Star Academy Charter School and the parent, we submit the enclosed fully-executed Settlement Agreement in this matter for Your Honor's approval and issuance of a final decision.

Respectfully submitted,

Teresa L. Moore

Encl.
cc: Esther Canty-Barnes, Esq. (by email ecantyb@law.rutgers.edu w/encl.)

J-1

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800
Attorneys for Respondent
North Star Academy Charter School

N.W., on behalf of E.F., Petitioner, vs. NORTH STAR ACADEMY CHARTER SCHOOL, Respondent.	NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 01768-20 Agency No. 1-1/20 SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made by and between Nigeria Womack-Coleman ("Parent"), with a mailing address of P.O. Box 6300, Newark, New Jersey 07106, in the County of Essex, on behalf of her child, E.F., and North Star Academy Charter School, with a central office located at 18 Washington Place, Newark, New Jersey 07102 ("North Star").

WHEREAS, E.F.'s date of birth is September 20, 2001 and E.F. has provided written consent for Parent to make educational decisions for him, including in connection with this lawsuit; and

WHEREAS, on December 23, 2019, the Parent filed a petition in this matter appealing four (4) out-of-school suspensions that E.F. had received in the 2019-2020 school year challenging the procedural and substantive bases for the suspensions; thereafter, North Star filed an Answer denying the allegations in the petition and asserting affirmative defenses; and

J-2

WHEREAS, the parties wish to enter into this Settlement Agreement ("Agreement") in order to reach a compromise and to avoid the time and expense associated with litigation;

NOW, THEREFORE, the Parent and North Star agree as follows:

1. The parties acknowledge that E.F. received out-of-school suspensions in the fall of 2019 arising from behavior that the Parent and E.F. dispute but that North Star believes both occurred and violated its code of conduct for students.

2. North Star agrees that the paper copies of E.F.'s 2019-2020 discipline records are to be destroyed and removed from E.F.'s official school records. North Star agrees to instruct its staff to destroy any paper copies of discipline records of E.F. from the 2019-2020 school year that staff may have, and that all such paper copies shall be destroyed no later than May 30, 2020.

3. E.F.'s 2019-2020 electronic discipline records are to bear the following notation: "CONFIDENTIAL, EXPUNGED FROM DISCLOSURE PURSUANT TO COURT ORDER." Access to E.F.'s 2019-2020 electronic discipline records is and will be limited to North Star Academy High School Operational Leaders.

4. The parties agree that this Agreement is the compromise of disputed claims and that any consideration set forth in this Agreement is not to be construed as an admission of liability by North Star, or of the violation of any law, statute, or regulation or an admission of culpability by the student. North Star denies any liability and has agreed to settle this matter solely to avoid the expense and burden of litigation.

5. By entering into this Agreement, the parties agree that the Parent and E.F. do not waive any rights that they may have in any forum, including but not limited to rights that they may have under the IDEA, Section 504 and the ADA. This Agreement specifically relates solely to the Parent's appeal of the four (4) out-of-school suspensions in the 2019-2020 school year of E.F. The parties further agree that North Star specifically reserves all rights and defenses as to any action that the Parent and/or E.F. may file against it in the future.

6. This Agreement constitutes full and final settlement as to the claims regarding the four (4) out-of-school suspensions imposed in the 2019-2020 school year on E.F. which were raised on behalf of E.F. in the petition against North Star, its employees and/or agents individually or collectively. In consideration for the mutual promises contained in this Agreement, the Parent, individually and on behalf of E.F, hereby releases, acquits, and forever discharges North Star, its current and former members, officers, employees, agents, attorneys, successors, assigns, and affiliates, of claims related to the four (4) out-of-school suspensions imposed in the 2019-2020 school year that the Parent or E.F. raised in this action, including but not limited to any and all claims for compensatory or punitive damages, or other expenses, except as referred to in paragraph 5 hereinabove.

7. This Agreement and all of its terms are and shall remain confidential to the maximum extent permitted by law. Nothing, however, shall preclude the parties, or any of them, from disclosing the terms and conditions of this Agreement for purposes of enforcing the terms and conditions in a court or government agency with competent jurisdiction.

8. This Agreement represents the entire understanding between the parties and shall not be modified in whole or in part except as a mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity for the parties to consult with legal counsel of their choosing and option. The parties did consult with legal counsel and acknowledge that they were represented by competent legal counsel, and that they understand the contents of this Agreement.

9. The parties agree that neither shall be considered the "prevailing party" in this case and that each party shall be responsible for their own legal fees and costs incurred through the date of the issuance of a Final Decision approving the terms and conditions of this Agreement by the administrative law judge assigned to this case.

10. This Agreement may be executed in one or more counterparts, all of which shall be one instrument, and all of which shall be considered duplicate originals.

11. Any notices or delivery required by this Agreement shall be provided by hand, electronically, or by U.S. First Class Mail, as follows:

To the Parent: P.O. Box 6300, Newark New Jersey 07106 or nigeriacoleman1@yahoo.com

To North Star: Cynthia Leger, 18 Washington Place, Newark, New Jersey 07102 or Cynthia Leger at cleger@uncommonschools.org

12. This Agreement is subject to approval by North Star's Board of Trustees and an administrative law judge. Upon obtaining such approvals, the Agreement shall be incorporated into an Initial Decision issued by the New Jersey Office of Administrative Law and a final order issued by the Commissioner of Education, which Order shall be a precondition to the enforcement of this Agreement. If this Agreement is not approved by North Star's Board of Trustees, an administrative law judge, or the Commissioner, the parties shall return to their original positions without prejudice.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below:

FOR THE PARENT, ON BEHALF OF E.F.:

Date: 6-12-20

Nigeria Womack-Coleman

FOR NORTH STAR ACADEMY CHARTER SCHOOL:

Date: 6/16/2020

Cynthia Leger

Digitally signed by B51AC3B2-8300-4A78-A4E8-EF7A00F21E08
DN: cn=B51AC3B2-8300-4A78-A4E8-EF7A00F21E08
Date: 2020.06.16 16:55:31 -04'00'

Cynthia Leger
Managing Director of Operations

219-20

OAL Dkt. No. EDU 05407-19
Agency Dkt. No. 42-2/19

New Jersey Commissioner of Education

Final Decision

Valerie Boodaghians,

Petitioner,

v.

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

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2020
Date of Mailing: October 2, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05407-2019
AGENCY DKT. NO. 42-2/19

VALERIE BOODAGHIANS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN COUNTY,
Respondent.

Michael T. Barret, Esq. for petitioner (Bergman and Barrett, attorneys)

Robert A. Muccilli, Esq., for respondent (Capehart and Scatchard, P.A., attorneys)

Record Closed: August 28, 2020 Decided: September 2, 2020

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

This matter was transmitted to the Office of Administrative Law on April 18, 2019for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

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

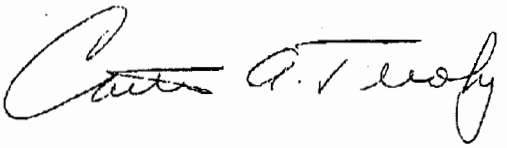
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement.

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

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

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

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



September 2, 2020
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 9/2/2020

Mailed to Parties: 9/2/2020

/mel

CAPEHART SCATCHARD
ATTORNEYS AT LAW

Robert A. Muccilli
856.914.2074
rmuccilli@capehart.com
Fax: 856.235.2786

RECEIVED
2020 SEP -2 A 8:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

August 28, 2020

VIA EMAIL TO: Marianne.hatrak@oal.nj.gov
and REGULAR MAIL

Hon. Catherine A. Tuohy, A.L.J.
State of New Jersey
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: Valerie Boodaghians v. Township of Ocean Board of Education
OAL Docket No. EDU 05407-2019
Agency Ref. No. 42-2/19
Our File No. 05179-81912

Dear Judge Tuohy:

Enclosed please find a copy of the fully executed Settlement and Separation Agreement with Exhibit A. Also enclosed is the certification of the motion by the Township of Ocean Board of Education approving of the settlement agreement. If same meets with your approval, kindly render an Initial Decision Approving Settlement.

Thank you.

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.

/s/ Robert A. Muccilli

Robert A. Muccilli

RAM/jmv
Enclosures
8213417
cc: Michael T. Barrett, Esq. (w/enc. via email and regular mail)
Kenneth Jannarone, B.A. (w/enc. via email only)

TOWNSHIP OF OCEAN BOARD OF EDUCATION
MONMOUTH COUNTY, NEW JERSEY

RECEIVED
2020 SEP -2 A 8:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PERSONNEL COMMITTEE
MOTIONS SUBMITTED BY
MRS. DENISE PARLAMAS, CHAIRPERSON
AT THE BOARD OF EDUCATION MEETING
AUGUST 25, 2020

EXTRACT from the minutes of a meeting of the Board of Education of the Township of Ocean in the County of Monmouth, New Jersey held at the Administrative Offices of the Board of Education, at 163 Monmouth Road, Oakhurst, New Jersey, and virtually, on August 25, 2020 at 7:00 p.m.

ROLL CALL OF ATTENDANCE
Mr. James Dietrich, Mrs. Janice Fuller, Mrs. Irene Gilman, Mr. Joseph Hadden, Dr. David Marshall, Mrs. Amy McGovern, Mrs. Denise Parlamas, Ms. GraceAnne Talarico and Mr. Jeffrey Weinstein.

Personnel:
Mrs. Parlamas made a motion, seconded by Mr. Weinstein, for approval of the following:

10.5 **Settlement and Separation Agreement**
Move to approve the Settlement and Separation Agreement between the Township of Ocean Board of Education and Employee #4848.

Motion carried: 9-0

CERTIFICATION
I, KENNETH JANNARONE, Board Secretary and School Business Administrator of the Township of Ocean Board of Education, hereby certify the forgoing is a true copy of a motion adopted by the Township of Ocean Board of Education at a Regular meeting held August 25, 2020.

Kenneth Jannarone
Board Secretary/School Business Administrator

SETTLEMENT AND SEPARATION AGREEMENT

THIS SETTLEMENT AND SEPARATION AGREEMENT ("Agreement") is made by and between Valerie Boodaghians, residing at 33 Hillside Terrace, Ocean Township, NJ, 07712 (hereinafter referred to as "Ms. Boodaghians") and the Ocean Township School District, 163 Monmouth Road, Oakhurst, NJ, 07755, (hereinafter collectively referred to as "the Board" or "the School District"):

WHEREAS, Ms. Boodaghians is employed in the District as a school nurse and she holds tenure in that position;

WHEREAS, Ms. Boodaghians filed a Petition of Appeal in Boodaghians, Valerie v. Twp. of Ocean BOE, (OAL Docket No.: EDU 05407-2019S; Agency Ref. No: 42-2/19) seeking among other things, restoration of sick days allegedly related to exposures asserted in various workers' compensation claims petitions referenced in the Petition together with any lost salary;

WHEREAS, the Board filed an Answer denying and disputing all claims asserted against it;

WHEREAS, Ms. Boodaghians has decided to resign her employment by virtue of retirement;

WHEREAS, given these developments the parties desire to amicably enter into a Settlement and Separation Agreement resolving the all claims in asserted in the Petition and all matters related to Ms. Boodaghian's employment with the Board, all with the goal of facilitating a smooth transition upon Ms. Boodaghian's departure;

THE PARTIES HEREBY AGREE as follows:

1. Resignation By Way Of Retirement. Ms. Boodaghians will resign her position by way of retirement from the District and thereby terminate her employment relationship with the Board effective on June 30, 2021. **MS. BOODAGHIANS UNDERSTANDS AND AGREES THAT HER SIGNATURE ON THIS AGREEMENT CONSTITUTES AN ACKNOWLEDGMENT THAT SHE IS RELINQUISHING ALL RIGHTS TO EMPLOYMENT AND ANY OTHER FUTURE RIGHTS TO EMPLOYMENT AND/OR RE-EMPLOYMENT WITH THE DISTRICT AS OF JUNE 30, 2021, INCLUDING BUT NOT LIMITED TO HER TENURE RIGHTS.** In this regard, Ms. Boodaghians will execute the letter notifying the board of her resignation by way of retirement which is attached as **Exhibit A** and return the original of same to the Board with the signed original of this Agreement. The letter is not revocable once submitted. The Board will cooperate in the processing of any application for retirement Ms. Boodaghians may choose to make with the New Jersey Division of Pensions. However, this Agreement and Ms. Boodaghian's resignation shall not be contingent upon the Division's approval of any such application.

2. Administrative Leave of Absence. Ms. Boodaghians will be on leave of absence with pay for the 2020-21 school year. To cover this period of paid leave, Ms. Boodaghians will utilize all of her accumulated sick leave (22.5 days), her allotted personal leave (3 days) and 6.33 restored sick days which correlate to $2,845.00 of previously docked pay. After the aforementioned paid leave time is exhausted, the District will restore the exact number of sick days sufficient to carry Ms. Boodaghians on paid leave status through the remainder of the 2020-21 school year. Ms. Boodaghians

agrees that the District may immediately hire her replacement while she is on leave of absence. During the period of her leave, Ms. Boodaghians agrees that she will not engage in any unsolicited action or communication pertaining to the role of the person acting in her place. Ms. Boodaghan's replacement may communicate with Ms. Boodaghians when necessary. Any such communication will not be constitute a violation of this Agreement. Ms. Boodaghians agrees to cooperate during the transition.

3. Dismissal of Petition of Appeal. Ms. Boodaghians agrees to dismissal of her Petition of Appeal with prejudice.

4. Release and Waiver to the Board. Ms. Boodaghians, her executors, heirs and assigns, hereby release and discharge the Board, as well as any and all of their former and current members, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators (hereinafter "Releasees"), from any and all liability, claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which she may have had, now has or may hereafter have for any reason whatsoever on account, arising out of or in consequence of her employment relationship and/or separation of employment, including, but not limited to:

(a) All federal and state statutory claims and any amendments to such statutes, including but not limited to claims arising under the New Jersey Law Against Discrimination, the New Jersey Civil Rights Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, Title VII of the Civil Rights Act of 1964, Sections 1981 through 1988 of Title 42 of the United States Code, the Age

Discrimination in Employment Act of 1967, including the Older Workers' Benefit Protection Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act, the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the National Labor Relations Act, the Federal Warn Act, the Family and Medical Leave Act of 1993, the Occupational Safety and Health Act, the Equal Pay Act, the New Jersey Minimum Wage Law, the New Jersey Wage and Hour Law, Equal Pay Law for New Jersey, the New Jersey Worker Health and Safety Act and the Labor Management Relations Act;

(b) All claims arising under the United States or New Jersey Constitutions;

(c) All claims arising under any Executive Order or derived from or based upon any state or federal regulations;

(d) All common law claims, including but not limited to any and all rights to discovery, breach of contract, tort claims, claims for wrongful discharge, constructive discharge, violation of public policy, breach of an express or implied contract, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, hostile work environment, defamation, conspiracy, tortious interference with contract or prospective economic advantage, promissory estoppel, equitable estoppel, fraud, misrepresentation, detrimental reliance, retaliation and negligence;

(e) All claims for any compensation including, back wages, front pay, punitive damages, pay increases, bonuses or awards, fringe benefits, disability benefits,

severance benefits, reinstatement, retroactive seniority, pension benefits, contributions to retirement plans, or any other form of economic loss;

(f) All claims for personal injury, including physical injury, mental anguish, emotional distress, pain and suffering, embarrassment, humiliation, damage to name or reputation, interest, liquidated damages and punitive damages;

(g) Any claims arising out the terms and conditions of Ms. Boodaghian's employment with the Board and the separation of such employment;

(h) Any rights to reemployment with the Board;

(i) Any claim of tenure, re-employment, placement on a re-employment list and/or seniority arising under Title 18A of the New Jersey Statutes, including but not limited to N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-6, and N.J.S.A. 18A:28-12.

(j) Any grievance pursuant to any Board policy or regulation and any collective bargaining agreement; and

(k) All claims for costs, interest and attorneys' fees.

Except as otherwise provided herein, Ms. Boodaghians has not, and agrees that she shall not, file any lawsuit or claim against the Releasees based on any events, whether known or unknown, including, but not limited to, any events related to, arising out of, or in connection with, her employment with the Board or the separation of such employment, in any court or tribunal of the United States, New Jersey, or any other state, city, county, or locality, or under any arbitration or grievance procedure. Ms. Boodaghians further understands that she shall not personally recover monies, and

expressly waives the right to recover such monies, for any complaint or charge filed against the Releasees with any federal, state or local board, agency or court.

5. Requirement of Board Approval. This Agreement is contingent upon approval by the Ocean Township Board of Education.

6. Removal of Personal Property. Ms. Boodaghians may have certain personal property on Board premises. She and her designated representative shall be permitted on notice to school administration and at a mutually convenient day and time during non-school hours, such as after school or on the weekend to come onto school property and, if deemed necessary, meet with a representative of school administration and accompanied by a representative, designate which property belongs to her and remove her personal property. The Board will cooperate in this regard and facilitate the return of his property. Ms. Boodaghians will communicate with the Superintendent of Schools in this regard.

7. Entire Agreement. This Agreement sets forth the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the Parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

8. No Admission of Liability. Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

9. Binding Nature. This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the Parties hereto, as well as their respective successors and assigns.

10. Choice of Law. This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

11. Voluntary Agreement. The Parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

12. Drafting. The terms of this Agreement are the product of good faith negotiations between the Parties and their respective counsel, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

13. Opportunity to Consult With Counsel. Ms. Boodaghians understands and acknowledges that she has had the opportunity to consult her attorney, has been advised of her right to take at least twenty-one (21) days to consider whether or not to execute this Agreement and Ms. Boodaghians has decided to waive this right and sign this

Agreement in less than twenty-one (21) days. Ms. Boodaghians further agrees that she has had the opportunity to review this Agreement in its entirety with her attorney, Michael Barrett, Esq.

14. Revocation of Signature. Ms. Boodaghians may revoke her signature on this Agreement within seven (7) calendar days of signing it by delivering written notice of revocation to Robert A. Muccilli, Esq., Capehart Scatchard, 8000 Midlantic Drive, Suite 300 South, Mt. Laurel, NJ 08054. If Ms. Boodaghians has not revoked her signature of this Agreement by written notice received within the seven (7) day period, it becomes effective immediately thereafter.

Intending to be legally bound hereby, Ms. Boodaghians and the Board execute the foregoing Agreement as indicated below.

WITNESS:

Michael T. Barrett, Esq.
8/18/20

Valerie Boodaghians
VALERIE BOODAGHIANS
DATED: 8/18/2020

RECEIVED
2020 SEP -8 A 8:21
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

WITNESS:

8/26/20

OCEAN TOWNSHIP BOARD OF EDUCATION

Amy McGovern
AMY MCGOVERN
BOARD PRESIDENT

Valerie Boodaghians
33 Hillside Terrace.
Ocean Township, NJ 07712

Kenneth Jannarone
Board Secretary/School Business Administrator
Ocean Township Board of Education
163 Monmouth Road
Oakhurst, NJ 07755

Re: Resignation Effective June 30, 2021

Dear Mr. Jannarone:

I, Valerie Boodaghians, hereby submit this letter of resignation from my employment in the Ocean Township School District by virtue of my retirement. My resignation is effective on June 30, 2021. This letter of resignation is not revocable.

Respectfully yours,

Valerie Boodaghians

Valerie Boodaghians

EXHIBIT "A"

RECEIVED
2020 SEP -2 A 8:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

228-20

THE STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION
BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTICT

----------X

In the Matter of Tenure Hearing

between

BURLINGTON INSTITUTE OF TECHNOLOGY

Petitioner

and

LARRY TISDALE

Respondent

CONSENT AWARD

DOCKET NO. 91-5/20

----------X

Before **LISA C. CHARLES**
Arbitrator

APPEARANCES:

For the Petitioner
Mark A. Tabakin, Esq.
Weiner Law Group LLP

For the Respondent
Matthew B. Wieliczko, Esq.
Zeller & Wieliczko

BACKGROUND

On March 9, 2020, the Burlington County Institute of Technology, (Petitioner or School District) instituted sworn tenure charges against Larry Tisdale (Respondent), a tenured teacher. The Respondent was charged with Unbecoming Conduct, Inappropriate Behavior and Other Just Cause. By letter dated March 27, 2020, the Respondent, aside from acknowledging his employment with the School District, denied all the charges and filed an answer opposing the charges.

Pursuant to N.J.A.C. 6A:3-5-1 (c)(5), Mark A. Tabakin, Counsel for the Petitioner, by letter dated April 30, 2020, and a corrected letter dated May 4, 2020, submitted the following documents to the Commissioner of Education:

1. A Statement of Tenure Charges and a Statement of Evidence;

2. A cover letter notifying Larry Tisdale of his rights to submit an opposing written Statement of Position, and Statement of Evidence

The Commissioner of Education, having reviewed the charges and the Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation. By letter dated May 19, 2020, the charges were referred to the undersigned Arbitrator pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, C-26 and P.L. 2015, C. 109 to "review those charges, which are not dismissed as the result of a Motion under the preponderance of the evidence standard," as well as "Respondent's defenses and any Motion which may be filed with the arbitrator" in order to render a decision on the merits.

On August 12, 2020, the Arbitrator conducted a mediation session between Petitioner, Burlington County Institute of Technology and Respondent, Larry Tisdale (collectively, the Parties). A tentative agreement was reached, and the hearing scheduled to begin on August 18, 2020 was cancelled.

On September 26, 2020, the Parties submitted final documents to the Arbitrator entitled Settlement Agreement and General Release (Settlement), and an Irrevocable Letter of Resignation, which indicated that the Parties had voluntarily resolved all disputed matters and fully disposed of all issues in controversy between them. The Parties also informed the Arbitrator that the School District passed a Resolution approving the Settlement, with respect to the tenure charges filed against the Respondent. The Arbitrator, pursuant to her authority under N.J.S.A. 18A:6-9 "to hear and make a final determination on a controversy and dispute arising under sub article B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes (C.18:6-10 et seq.)" reviewed the terms of the Settlement submitted by the Parties. The Arbitrator finds that the terms and conditions of the Settlement set forth herein (attached) meet the standards established by the Commissioner of Education for settlement of tenure matters *In re Cardonick,* State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) (842, 846).

CONSENT AWARD

Accordingly, I approve the terms of the Settlement and General Release and memorialize its terms and conditions in a Consent Award.

By: Lisa Charles Date: 9/29/20

Lisa C. Charles
Arbitrator

State of New Jersey
County of Mercer

Sworn to and affirmed before me on September 29, 2020

Notary Public

BINOY M. PATEL
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 19, 2023

230-20

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Erin Davidove, Board of Education of the Township of Long Hill, Morris County.

Synopsis

The petitioning Board sought the suspension of the teaching certificates of the respondent – a tenured special education teacher – after she submitted a letter of resignation on November 25, 2019 in which she stated that her last day on the job would be December 6, 2019. Subsequently, the superintendent met with respondent to clarify that sixty days' notice of resignation was required. The superintendent also cautioned respondent that terminating her duties without the required notice would result in legal action to suspend her teaching certificates. Nonetheless, respondent did terminate her duties on December 6, 2019. Upon receipt of an Order to Show Cause from the Commissioner in January 2020 – requiring respondent to show cause why an order should not be entered suspending her teaching certificates for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning her position without giving the notice required by her contract – the respondent submitted an undated letter stating that her resignation had been for personal reasons related to a difficult work environment and its effect on her health and wellbeing. The matter was subsequently transmitted to the Office of Administrative Law for a hearing. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact here, and the Board is entitled to prevail as a matter of law; the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8 because she resigned without providing the Board with the requisite statutory notice; a one-year suspension of the respondent's certificates is the appropriate penalty for such unprofessional conduct; and respondent's efforts to assist in the transition during her two week notice period do not constitute mitigating circumstances. Accordingly, the ALJ ordered that respondent's certificates should be suspended for a period of one year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision of the OAL as the final decision in this matter. Respondent's certificates were suspended for one year from the filing date of this decision, a copy of which has been forwarded to the State Board of Examiners for implementation of the suspension.

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

230-20
OAL Dkt. No. EDU 01563-20
Agency Dkt. No. 20-1/20

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Erin Davidove, Board of Education of the Township of Long Hill, Morris County.

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons outlined in the Initial Decision – that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8 because she resigned without providing the Board with the requisite statutory notice. The Commissioner is also in accord with the ALJ's determination that a one-year suspension of the respondent's certificates is the appropriate penalty.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 9, 2020
Date of Mailing: October 9, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01563-20
AGENCY DKT. NO. 20-1/20

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ERIN DAVIDOVE, BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY.

Nicholas Celso, Esq., for petitioner (The Busch Law Group, LLC, attorneys)

Erin Davidove, respondent, pro se

Record Closed: July 17, 2020 Decided: August 31, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Long Hill Township Board of Education, seeks the suspension of the teaching certificates of Erin Davidove, for failure to provide a 60-day notice of resignation to the District. Respondent contends there were mitigating circumstances and that she was compelled to resign due to the difficult work environment and the impact on her health and well-being. The State Board of Examiners (Board), issued an Order to Show Cause (OTSC) as to why the teaching certificates of respondent Erin Davidove (Davidove or

respondent) should not be suspended, contending that she resigned from her teaching position with inadequate notice. The OTSC was issued on January 15, 2020, and mailed to respondent on January 22, 2020, and respondent filed a letter reply to the OTSC which was received by the Department on January 30, 2020. The Commissioner transmitted the case to the Office of Administrative Law (OAL) for hearing, where it was filed on February 3, 2020. A hearing was scheduled for June 15, 2020, and adjourned due to the COVID-19 office closure. The District filed a Motion for Summary Decision. Respondent submitted a letter reply, and thereafter submitted an additional letter reply.

FINDINGS OF FACT

The underlying facts are largely uncontroverted. Davidove commenced her employment on approximately September 1, 2014, as a special-education teacher. In due course, she acquired tenure.

On November 25, 2019, respondent submitted her resignation letter indicating she wished "to explore different career opportunities outside of education." The letter also noted respondent's final date of employment would be December 6, 2019. On November 26, 2019, Dr. Edwin Acevedo, the superintendent of schools for the Long Hill Township Board of Education, met with respondent to clarify that sixty days' notice of resignation was required. He explained that her continued services were necessary to minimize the disruption of a mid-year departure while a replacement was secured. Moreover, he cautioned that terminating her duties without such adequate notice or consent by the Board of Education would result in legal action to suspend her teaching certificates. On December 5, 2019, Dr. Acevedo sent a letter to respondent confirming their previous conversation. On December 6, 2019, respondent followed up and stated that despite her acknowledgment of the correspondence, her final date of employment with the Board would remain December 6, 2019.

With Dr. Acevedo's recommendation, petitioner approved and accepted respondent's resignation, effective January 24, 2020; this was the sixtieth day from her initial notice of resignation.

Petitioner moved before the Commissioner of Education for an Order to Show Cause, which was entered on January 15, 2020. The Order directed that Davidove show cause before the Commissioner why an Order should not be entered suspending her teaching certificates for unprofessional conduct pursuant to N.J.S.A. 18A:28-8. Respondent replied by (undated) letter to Dr. Lamont Repollet, the Commissioner of Education, which was received on January 30, 2020. Her letter indicated that her resignation was "due to personal reasons regarding the difficult work environment and impact on [her] health and well-being."

On February 24, 2020, respondent moved to withdraw from the case; however, as the matter had been transmitted by the Commissioner for hearing following the entry of an Order to Show Cause, respondent did not have the ability to withdraw.

On April 16, 2020, petitioner moved for summary decision to suspend respondent's certificates for one year. On April 28, 2020, nearly five months after she left her position, respondent submitted correspondence wherein she indicated that she had learned that her position (from which she resigned) had been eliminated, and that she likely would have been laid off regardless.

LEGAL DISCUSSION

The first issue is whether respondent may simply withdraw from the case. N.J.A.C. 1:1-19.2(a) states:

> A party may withdraw a request for a hearing or a defense raised by notifying the judge and all parties. Upon receipt of such notification, the judge shall discontinue all proceedings and return the case file to the Clerk. If the judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition.

Although respondent attempts to withdraw, the matter was transferred to the OAL for hearing by the Commission of Education following issuance of the Order to Show

Cause. That is, it was not the respondent who requested a hearing. When the Commissioner becomes aware of violations of school laws in school districts, he may allow any party subject to his jurisdiction an opportunity to present its views before imposing any sanction by issuing an order directing the party to show cause why the sanction should not be imposed. N.J.A.C. 6A:3-3.1(a). In fact, "This procedure shall not be deemed to be in lieu of a contested case hearing, and the right to a contested case hearing is independent of, and in addition to, this step." Ibid. This explicitly includes a circumstance suspending a teacher's certificates for wrongful cessation of duties. N.J.A.C. 6A:3-3.1(a)(4).

Since respondent may not withdraw from a matter that arises from an Order to Show Cause, the matter continued as an uncontested case.

I. Petitioner's Motion for Summary Decision

a. Summary-Decision Standard

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits that may have been filed with the application, show that 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). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Even if the non-moving party comes forward with some evidence, summary decision must be granted if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted). The opposing party "who offers no substantial or

material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cty. Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622 (App. Div. 1987).

The issue presented here is whether respondent's teaching certificates should be suspended for up to one year for failure to perform her duties prior to the expiration of the employment period, in accordance with N.J.S.A. 18A:26-10, which provides in pertinent part that

> [a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

The procedure by which a teaching staff member must provide notice of resignation is set forth in N.J.S.A. 18A:28-8, as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

By using the term "may" and not "shall," the Legislature did not intend for there to be an automatic suspension, rather, it determined to invest the Commissioner with discretion predicated on the facts and circumstances individual to the case. Thus, the Commissioner may suspend, in his or her discretion.

The purpose of these statutes is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students," and thereby protect students. Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407. The decision as to whether to suspend a teaching staff member's certificate is a

discretionary determination vested in the Commissioner, and historically all attendant circumstances specific to each case have been evaluated. Generally, this evaluation results in suspension of certificates for the maximum one-year period, especially when the facts demonstrate that "individuals violated the sixty day notice requirement for strictly personal reasons, putting their own self interest above the interests of students and their professional obligation to provide adequate notice to the Board." In re Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007), https://njlaw.rutgers.edu/collections/oal/; see also Bd. of Educ. of Alpine v. Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Comm'r (September 23, 2008), https://njlaw.rutgers.edu/collections/oal/, stating that, generally, a full one-year suspension of a teaching certificate for leaving a district without adequate notice is imposed, with the rare exception of compelling reasons.

The Commissioner imposed a three-month suspension in In re Suspension of the Teaching Certificate of Rogers, 1989 S.L.D. 1962 (May 16, 1989), adopted, 1989 S.L.D. 1968 (June 21, 1989), where a non-tenured teacher of the handicapped resigned to take a position in a State facility, switching employment for more "noble" reasons, to work with more severely handicapped children. Another matter in which less than a one-year suspension was imposed is In re the Suspension of the Teaching Certificate of Borden, School District of Edison, Middlesex County, Commissioner Decision 247-16, where a non-tenured teacher resigned following a debilitating injury that left her unable to drive or climb stairs. The Commissioner determined that while Borden's conduct was unprofessional within the meaning of N.J.S.A. 18A:26-10, her resignation was motivated by a medical crisis, supported by medical records, and not personal gain, and imposed a three-month suspension.

In In re the Teaching Certificate of Burgess, 1983 S.L.D. 183, adopted, 1983 S.L.D. 195, the board accepted a two-week resignation predicated on its plan to find a replacement by Burgess's termination date. The board failed to follow through on its promise, and so the Commissioner declined to impose a suspension.

In Board of Education of Black Horse Pike Regional School District v. Mooney, 1984 S.L.D. 810, adopted, 1984 S.L.D. 821, a teacher made considerable efforts to assist

the board with a smooth transition; developed a program through the end of the year; met with her successor to put the program in place; and left final grades. The Commissioner determined to impose no suspension.

In the matter In re Suspension of the Teaching Certificate of Savino, EDU 11688-04, Initial Decision (July 28, 2005), modified, Comm'r (August 30, 2005), affirmed, State Bd. (February 3, 2006), https://njlaw.rutgers.edu/collections/oal/, Savino asserted that she was uncomfortable being reassigned from elementary school to middle school, and felt "unfit" to teach middle school even though she was fully certified to do so. The superintendent had warned her that the process for suspension would be commenced, as here, should she not comply with the advance-notice requirement. While the ALJ concluded that Savino's fear of unfitness constituted a mitigating factor warranting a shorter suspension, the Commissioner disagreed, and reversed the proposed sixty-day suspension in favor of a one-year suspension. No mitigation was found, nor were compelling reasons, unlike in Mooney and Rogers. Indeed, the compelling reasons found in Rogers nevertheless resulted in the imposition of a three-month suspension.

The Board submits that there are no material facts in dispute and that the Board is entitled to summary decision pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Respondent has not denied the allegations, and contends that she did not provide the required notice because of the "difficult work environment and impact on [her] health and well-being." Thus, respondent's desire for early release from her professional obligations was based upon personal motives and convenience. She asserts that she provided other teachers with materials she had created and used, and also made students aware of her impending departure. She also offers as mitigating circumstances the fact that another teacher replaced her when she left, and that some months later, certain classes were combined, and that she "likely would have been laid off regardless."

In the instant case, no genuine issues of material fact exist. Respondent agrees to the facts outlined by petitioner, including in her response to the Commissioner's Order to Show Cause and her answers, dated March 6, 2020, to the Board's Request for Admissions. Respondent also does not raise objections to any assertions put forth by petitioner. Thus, the matter is ripe for summary decision.

It is clear and undisputed that respondent fell short of providing the requisite sixty days' notice prior to resigning, and, as such, is guilty of unprofessional conduct as defined in N.J.S.A. 18A:28-8. She was reminded of the sixty-day-notice requirement both in a meeting with Superintendent Acevedo on November 26, 2019, and by follow-up letter on December 5, 2019, and of the possible consequences if she did not honor her professional obligations. The issue, therefore, is what constitutes an appropriate term for the suspension of respondent's certificates. The penalty assessed in many similar matters is a one-year suspension. There have been situations where less than a one-year suspension was deemed appropriate due to mitigating circumstances. Respondent did not resign her position for what were determined to be noble reasons, as in Rogers. Rather, respondent resigned to pursue a career outside of education, alleging that "[her] mental and emotional states were being compromised by the severely troubled students [she] was challenged with this year and the lack of support provided by the Administration despite numerous attempts to bring this to their attention and requests for assistance." Although respondent does make mental-health claims, she does not provide medical records to support the posture (as distinguished from Borden, where the teacher had a significant, physical medical crisis that was supported by medical documentation).

Respondent did make efforts to ensure a smooth transition. Unlike in Rogers, however, no "noble" reason existed for leaving her position prematurely. Respondent left to pursue different work because she found the work environment difficult, and impacting her health and well-being. There was no well-founded reason why she could not continue performing her duties a while longer, until the required termination date, other than her desire to be elsewhere. She was on notice that the Board had not approved her early departure and that it would move to suspend her certificates should she choose to leave as indicated, which she did ultimately do.

CONCLUSION

There is no dispute that respondent failed to provide the requisite timely notice of resignation, did not continue to report for work even though directed to do so, and is guilty of unbecoming conduct as defined in N.J.S.A. 18A:28-8. The assertions that she

behaved professionally during the two weeks between her resignation letter of November 25, 2019, and her departure on December 6, 2019, and that she helped where she could, do not constitute mitigating circumstances. I **CONCLUDE** that a one-year suspension is appropriate.

ORDER

It is therefore **ORDERED** that respondent's teaching certificates be and hereby are suspended for a period of one year commencing August 31, 2020 and ending on August 30, 2021.

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

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

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

August 31, 2020
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: August 31, 2020

Date Mailed to Parties: August 31, 2020

dr

231-20 R

OAL Dkt. No. EDU 04896-20
(EDU 16045-18 On Remand)
Agency Dkt. No. 253-9/18

New Jersey Commissioner of Education

Decision

N.U., on behalf of minor child, M.U,

Petitioner,

v.

Board of Education of the Town of Mansfield, Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file a reply.

This matter stems from the Board's finding that M.U. committed an act of harassment, intimidation, and bullying (HIB). On April 24, 2020, the ALJ issued an Initial Decision finding that the Board was not arbitrary, capricious, or unreasonable in making its HIB determination. Upon review, the Commissioner remanded the matter because the Initial Decision only addressed one element of the HIB test set forth at *N.J.S.A.* 18A:37-14. On remand, the ALJ advised the parties of a telephone prehearing conference scheduled for August 26, 2020. Petitioner did not participate in the telephone prehearing conference, so the ALJ dismissed the matter based on petitioner's abandonment of this matter.

In her exceptions, petitioner argues that her due process rights were violated when her matter was dismissed. Petitioner explained that the email notice of the telephone prehearing

conference was sent to her junk mail folder, and the ALJ did not send the notice in another method that would have ensured she received it, nor did anyone attempt to call her when she did not call in for the conference. Petitioner points out that the Board's attorney did not appear for a prior conference, and the ALJ did not dismiss the case even after he called the attorney's office and could not reach anyone. Furthermore, petitioner maintains that she did not abandon her appeal as she had recently submitted a written response following the Commissioner's remand of this matter. Accordingly, petitioner urges the Commissioner to reject the Initial Decision and determine that the Board's HIB determination was arbitrary and capricious.

Upon review, the Commissioner finds that petitioner did not abandon this matter. Petitioner offered a reason why she failed to appear for the August 26, 2020 telephone prehearing conference, namely that the email notice was filtered to her junk mail folder rather than her email inbox. Additionally, despite her failure to participate in the telephone conference, petitioner has otherwise continued to participate in this matter since it was filed in 2018.

Accordingly, this matter is remanded to the OAL for further proceedings necessary to reach a determination on the merits.

IT IS SO ORDERED.



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 9, 2020
Date of Mailing: October 9, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 04896-20
AGENCY DKT. NO. 253-9/18

N.U., ON BEHALF OF MINOR CHILD, M.U.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN
OF THE TOWN OF MANSFIELD, BURLINGTON,
Respondent.

N.U. on behalf of minor child M.U., petitioner, pro se

Marc G. Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: August 26, 2020 Decided: August 31, 2020

BEFORE **JEFFREY R. WILSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 28, 2020. The parties were advised that a prehearing telephone conference was scheduled for August 26, 2020. Petitioner did not participate in the scheduled prehearing telephone conference and did not call the OAL to explain why she was unable to do so.

Petitioner never called or forwarded a letter to the OAL explaining her failure to appear for the prehearing conference. Accordingly, I **CONCLUDE** that petitioner has abandoned her appeal, and that dismissal is therefore appropriate.

ORDER

It is hereby **ORDERED** that this appeal be **DISMISSED**.

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

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

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

August 31, 2020
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

tat

232-20E

OAL Dkt. No. EDU 08537-20
Agency Dkt. No. 178-8/20

New Jersey Commissioner of Education

Order on Emergent Relief

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

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to each of the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 9, 2020
Date of Mailing: October 9, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 08537-20
AGENCY DKT. NO. 178-8/20

S.B. ON BEHALF OF D.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY
Respondent.

Brian Rans, Esq. for petitioner (Northeast New Jersey Legal Services, attorneys)

Kyle Ulscht, Esq., for respondent (The Machado Law Group, attorneys)

Record Closed: September 22, 2020 Decided: September 23, 2020

BEFORE **NANCI G. STOKES**, ALJ:

FACTUAL DISCUSSION

Petitioner, S.B. on behalf of her minor child, D.B. brings this action seeking to reverse the Board of Education of the City of Jersey City's ("Board") seven-day suspension, and disenrollment from McNair Academy High School ("McNair"), to a neighborhood comprehensive high school, Dickinson High School ("Dickinson"). Petitioner's emergent motion seeks an order compelling the Board to allow D.B. to

complete his educational coursework at McNair, pending the resolution of claimed violations of the Fourteenth and the First Amendments of the United States Constitution by the Board's disciplinary actions. U.S. Const. amend. XIV, § 1, amend. I.

On September 11, 2020, the Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case and resolution of the petitioner's motion for emergency relief.

On September 15, 2020, I conducted a telephone status conference, and scheduled oral argument on the motion for September 17, 2020. I adjourned oral argument to September 22, 2020, to accommodate petitioner's request for an interpreter. The Board submitted its initial reply to the motion on September 15, 2020, and a supporting certification on September 21, 2020.

On September 22, 2020, oral argument proceeded via Zoom due to the COVID-19 health crisis, and the record closed.

D.B. is sixteen years old and is a rising junior at Dickinson in the Jersey City Public School District ("District"). From September 2018 until the Board's disenrollment and transfer decision of July 22, 2020, D.B. attended McNair.

The District founded McNair because of litigation claiming the District did not correctly implement desegregation. McNair's students must include twenty-five percent of African American descent, twenty-five percent of Asian descent, twenty-five percent of Hispanic descent, and twenty-five percent of "other" ancestry.

In or around March 2020, D.B. posted a video on his private TikTok account that showed him pointing to an emoji of a black person as equal to three-fifths of an emoji of a white person. D.B. took and posted the video outside of the school, unaffiliated with any school-sponsored activity, and did not direct the video at a person or student.

Various individuals made the Board aware of D.B.'s racially insensitive post. On June 2, 2020, respondent called S.B. to advise her McNair was suspending D.B. for

seven days. At that point, education services at McNair were remote due to the COVID-19 health crisis.

Petitioner later received a written notice from McNair's principal stating the suspension related to the racially motivated TikTok video. Specifically, D.B. disrupted class or created a disturbance in the building and engaged in a violent or criminal act. Respondent suspended D.B. pending the outcome of a harassment, intimidating and, bullying ("HIB") investigation because of the incident's sensitive nature.

On July 2, 2020, the Board sent written notice to S.B. that the HIB investigation was complete. Further, the Board advised that a formal hearing would occur on July 9, 2020, and the Board would determine the appropriate consequences. The notice also identified the violations as follows:

> **NOTICE OF CHARGE**
>
> Violating the Student Code of Conduct, Board Policy 5131 (Conduct/Discipline), and N.J.S.A. 18A:37-2(a), (c), (i), and (k), by exbibitiing, communicating, encouraging, and disseminating, verbally and electronically, inappropriate, offensive, derogatory, and racist behavior targeting, demeaning, and harming fellow Black students. Said misconduct negatively impacted fellow students' physical and emotional safety, security, and well-being. Said misconduct substantially disrupted or interfered with the orderly operation of the school, education environment, and the rights of other students. Said misconduct created a hostile educational environment for students. Said misconduct warrants the imposition of appropriate consequences, interventions, or loss of privileges, including, but not limited to, removal from McNair Academic High School with enrollment in your child's neighborhood school; or said misconduct warrants disciplinary action, including, but not limited to, a long-term suspension or expulsion provided documents and identified witnesses upon which respondent intended to rely. Further, respondent advised S.B. of the right to counsel, right to cross-examination, and the right to present a defense.
> [Ibid.]

Moreover, the letter advised petitioner of the Board's intended witnesses to support the charges, petitioner's right to counsel, cross-examination, and the ability to

present a defense through documents and witnesses. Also, the Board supplied contact information for legal assistance.

On July 9, 2020, petitioner and the Board agreed to adjourn the hearing until July 15, 2020.

On July 15, 2020, the hearing took place with multiple witnesses presented on behalf of both parties, including numerous character witnesses in support of D.B. D.B had counsel at the hearing, admitted posting the video, and was remorseful about the video.

On July 22, 2020, the Board issued a final decision with the following factual findings:

> 1) An HIB investigation was opened and conducted by AntiBullying Coordinator Paula Christen. The conduct of D.B. in posting the Tik Tok video was founded to be a HIB violation, and will be presented at the next regular Board meeting.
>
> 2) While this incident is not of a physical nature, the emotional well-being of all students is inextricably tied to the District's responsibility to educate and ensure the safety of the whole child.
>
> 3) There exists a climate and culture at McNair that makes Black students feel marginalized and excluded which is detrimental to their emotional well-being. It appears that this same climate makes students comfortable using racial slurs and posting demeaning comments and language on social media.
>
> 4) McNair students saw D.B.'s post/video on Tik Tok comparing a black person to a white person. The post's graphic caption depicted that a black person equals 3/5 of a white person.
>
> 5) Current and former McNair students were very upset by D.B.'s post and reported this post along with several other racist posts by Other McNair students.
>
> 6) An anonymous character witness for D.B. wrote in her statement on behalf of D.B., "As an African American, black young woman, I discern that D.B. has posted a video with an insensitive joke on Tik Tok . . . A few weeks ago, I came across the video . . . many of my peers . . . including myself were perturbed. The video seemed to make a joke about the Three-Fifths Compromise, a

constitutional amendment that was passed regarding the representation of my people during enslavement."

7) D.B. has admitted to his mistake and promises that he has learned from his mistake. DB. is working with the community to share his story and to prevent other youth from making the same mistake.

8) According to the suspension form, D.B. received a 7-day suspension (3 days in-school / 4-days out of school) in June 2020 pending the outcome of the investigation.

The decision concluded that D.B. violated the Student Code of Conduct, including making inappropriate and offensive comments under "Level 2," and bullying under "Level 3." Moreover, the Board found that D.B. violated statutory provisions N.J.S.A. 18 A: 37-2(c), for conduct constituting a continuing danger to the physical well-being of other students, and (k), for harassment, intimidation, and bullying. Also, D.B.'s conduct substantially disrupted or interfered with the school's orderly operations or other students' rights.

The Board imposed the following consequences: 1) no expulsion of D.B. from the school district; 2) and 3) no modification, reduction, or extension of the seven-day suspension; (4) revocation of D.B.'s privilege of attendance at McNair Academic High School with dis-enrollment, and D.B.'s eligibility to attend his neighborhood comprehensive high school, Dickinson High School; and (5) community service completed before the last day of school for the 2020–2021 school year with attendance at all programs related to the harmful effects and consequences of misusing social media.

LEGAL ANALYSIS AND CONCLUSION

The New Jersey Anti-Bullying Act under N.J.S.A. 18A-13, et seq., the District Code of Conduct, and District Policy 5131.1- Harassment, Intimidation and Bullying, prohibit "exhibiting inappropriate, offensive, and racist behavior" targeting a student or group of students. Indeed, under N.J.S.A. 18A-14, "Harassment, Intimidation and Bullying" includes electronic communications on or off school grounds "that is reasonably perceived as motivated either by an actual or perceived characteristic, such as race . . .

that substantially disrupts or interferes with the orderly operation of the school or the rights of other students."

In support of the motion for emergent relief, petitioner asserts deficiencies in the notices for the seven-day suspension and the Board hearing that violates due process protections afforded by the Fourteenth Amendment of the United Sates Constitution. U.S. Const. amend. XIV, § 1. Further, petitioner asserts that the video is speech protected by the First Amendment of the United States Constitution. U.S. Const. amend. I.

The Board disputes any lack of notice, maintains that its actions were not arbitrary, capricious, or unreasonable given the admitted violation of the School Code of Conduct, and that the First Amendment does not protect racially motivated speech.

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs that:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Indeed, the moving party must demonstrate each element "clearly and convincingly." Waste Management of N.J. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008).

Petitioner urges that a less rigid view of the Crowe factors is appropriate given the request to maintain the "status quo," which "may permit the court to place less emphasis

on a particular Crowe factor if another greatly requires the issuance of the remedy." Id. at 520 (citing Bancroft & Sons Co. v. Shelley Knitting Mills, Inc., 268 F.2d 569, 573 (3d Cir.1959)).

Irreparable harm

Irreparable harm is a "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). An injunctive relief award requires a "clear showing of irreparable injury" or a "presently existing actual threat." Cont'l Grp. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). More than a risk of irreparable harm must be demonstrated. Id.

Here, D.B. is not entitled to the privilege of attending McNair, and his right to a free education does not include a right to attend the school of his choosing. Indeed, the Board has the authority to provide D.B. a free education at his neighborhood comprehensive high school and is doing so. Moreover, petitioner has not demonstrated that D.B. will suffer irreparable harm if he cannot remain at McNair for remote instruction instead of remote instruction at Dickinson. There is no evidence that the Dickinson program is inappropriate, not comparable, or will affect his education trajectory. Although D.B. maintains that he cannot socialize with his friends at McNair, D.B. would not attend in-person coursework due to COVID-19.

Right to the underlying claim must be settled

Each school district is obligated to provide a thorough and efficient education system to all children residing in its school district. N.J. Const. art. VIII, § 4, ¶ 1; N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have discretionary authority at N.J.S.A. 18A:11-1C. The boards adopt rules for the management of the district's public schools and perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

A board of education's actions are entitled to a presumption of lawfulness and good faith. In challenges to board actions, the challenger bears the burden of proving that such acts were unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions, and is defined as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, EDU 1839-98, Initial Decision, (January 22, 1999) http://lawlibrary.rutgers.edu/oal/search.html (citing Bayshore Sewage Co. v. Dent. of Envir. Protection,122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

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, 1 965 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."

Here, D.B. admitted that he posted a racially insensitive video on his TikTok account in violation of the School Code of Conduct. The Board maintains that the consequences imposed were reasonably necessary for other students' emotional safety, security, and well-being. While the legal right to challenge a Board's action as being

"arbitrary, capricious and unreasonable" may be settled, the petitioner presented no proof that the Board's actions were without rational basis or induced by improper motives.

Also, there is no dispute that the Board must afford D.B. due process relative to the discipline imposed, including notice provisions under N.J.A.C. 6A:16-7.2 (suspensions less than ten days), and 7.3 (suspensions of eleven or more days). See U.S. Const. amend. XIV, § 1; R.R. v. Bd. of Educ., 109 N.J. Super. 337, 346 (Ch. Div. 1970). Yet, the parties dispute the facts concerning due process provided in this case. Petitioner failed to establish the right to relief in the absence of a full evidentiary hearing showing that the Board's actions violated D.B.'s due process rights.

Regardless, petitioner's First Amendment claim seeking protection for off-campus speech is not settled in favor of petitioner because D.B.'s TikTok video was racially motivated speech that the Board found amounted to bullying and harassment. See U.S. Const. amend. I. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 512-513 (1969), the U.S. Supreme Court explained that:

> [C]onduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.
>
> [Ibid.]

Respondent relies upon Dunkley v. Bd. of Educ., 216 F.Supp.3d 485 (D.N.J. 2016). In Dunkley, the court emphasized that the New Jersey Legislature "made it clear . . . that the First Amendment does not protect student speech that amounts to harassment, intimidation or bullying [(HIB)] of other students," and upheld the suspensions because the online out-of-school speech constituted a HIB. Ibid. at 496. Also, [i]f a school can point to a well-founded expectation of disruption . . . the restriction may pass constitutional muster." Id. at 489 (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001)).

Moreover, a school district's HIB policy must prohibit such conduct that "occurs off school grounds, in cases in which a school employee is made aware of such actions." N.J.S.A. 18A:37-15.3; See also N.J.A.C. 6A:16-7.5 (under the code of student conduct, school boards have the authority to impose discipline for a student's conduct away from school grounds).

Petitioner relies upon B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020)[1], where the court concluded that an off-campus post stating "Fuck school fuck softball fuck cheer fuck everything" is protected by the First Amendment and that Tinker does not apply to off-campus student speech. Id. at 186. Yet, the court noted other circuits hold differently and reserved on "the First Amendment implications of off-campus speech that threatens violence or harasses others." Id. 186-88. Indeed, B.L. did not overturn Dunkley and did not involve bullying or harassment. The concurring opinion noted that the holding represented the first Circuit Court to determine that Tinker did not apply categorically to off-campus student speech. Id. at 196. Moreover, the holding did not guide how its new rule applies, or what speech would constitute "harassment" in the social media context. Id. at 195.

Likelihood of prevailing on the merits

In an appeal of a HIB or disciplinary finding, the burden of proof rests with the petitioner. Emergent relief requires petitioner to demonstrate a likelihood of prevailing on the merits of the underlying claim, and when significant factual issues exist, petitioner cannot.

Here, there are factual issues as to whether the district afforded petitioner proper due process concerning the initial seven-day suspension and the hearing resulting in D.B.'s dis-enrollment from McNair. Petitioner claims inappropriate notice while the Board asserts it complied with all notice requirements.

[1] On August 28, 2020, the U.S. Supreme Court received a petition for certiorari (No.20-255).

Further, petitioner asserts that D.B.'s conduct did not disrupt the school's operations and cannot be considered a HIB. Yet, the Board maintains it did, and that the publicity surrounding the incident was detrimental to school operations.

Balancing of the Equities

The Board asserts its interest is significant and that it must address the climate and culture at McNair that made students, such as D.B., feel comfortable posting demeaning racial materials on social media.

Further, the Board must protect the emotional well-being of the McNair student body.

Petitioner must demonstrate that D.B. will suffer more significant harm than the Board if this tribunal does not grant D.B. the requested relief. D.B. admitted to posting the Tik Tok video in violation of the School Code of Conduct and is receiving educational services. Under the circumstances, the Board's interests outweigh D.B.'s interest in retaining the privilege of attending McNair.

Based on the above discussion, I **CONCLUDE** that petitioner has failed to establish the existence of irreparable harm, that petitioner is likely to prevail on the merits, or that the equites favor petitioner. Athough I **CONCLUDE** that petitioner's request for emergent relief may, in part, rely upon law that is settled, petitioner does not satisfy the remaining requirements under N.J.A.C. 6A:3-1.6 and must be **DENIED**.

ORDER

Therefore, I **ORDER** that petitioner's request for emergency relief be and is hereby **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



September 23, 2020

DATE

NANCI G. STOKES, ALJ

Date Mailed to Parties: September 23, 2020

ljb/sej

240-20

Agency Dkt. No. 138-6/20

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the Teaching Certificates of Ammie Dumalagan, Board of Education of the Township of Wayne, Passaic County.

For petitioner, John G. Geppert, Jr., Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on June 25, 2020, by way of an Order to Show Cause served by petitioner (Wayne Township Board of Education) upon respondent (Ammie Dumalagan), requiring respondent to show cause why an order should not be entered suspending her teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her teaching contract and *N.J.S.A.* 18A:28-8 for resigning without giving the 60-day notice required for tenured employees. By notice dated June 29, 2020, the Office of Controversies and Disputes (Office) sent an e-mail acknowledging proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on August 20, 2020, the Office sent respondent a second notice, via e-mail and certified mail, directing that she file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted and might result in summary decision by the Commissioner. The certified mail tracking indicates that the notice sent by

certified mail was delivered on August 27, 2020 and left with an individual. No answer to the Order to Show Cause had been filed as of this date.

The certification and supporting exhibits submitted by petitioner in this matter indicate that: the respondent has been employed by petitioner as a full-time teaching staff member since the 2015-16 school year, and subsequently acquired tenure; the respondent entered into a contract for the 2018-19 school year that required a 60-day notice of resignation; on or about September 3, 2019, the respondent provided notice of her resignation, effective September 13, 2019, giving only a 10-day notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED. [1]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2020
Date of Mailing: October 20, 2020

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

241-20L

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

KEVIN DEHMER
Interim Commissioner

October 19, 2020

Anthony P. Sciarrillo, Esq
Sciarrillo, Cornell, Merlino,
McKeever & Osborne, LLC
238 St. Paul Street
Westfield, New Jersey 07090

Jaclyn M. Frey, DAG
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

Re: *In the Matter of Maureen Sherlock, Board of Education of the Village of Loch Arbour, Monmouth County, Agency Dkt. No. 118-5/20, SEC Dkt. No. T28-19, Commissioner's Decision No. 139-20*

Dear Counsel:

I have reviewed the materials filed in connection with respondent Maureen Sherlock's Motion for Reconsideration of the Commissioner's decision, dated June 30, 2020, removing respondent from her position as a school official for violating the School Ethics Act by failing to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)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 could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I have determined to grant respondent's request for reconsideration of the Commissioner's decision given the unique circumstances present in New Jersey during the public health emergency caused by the COVID-19 pandemic. For the same reason,

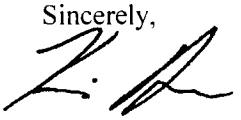
while respondent's motion for reconsideration was filed out of time,[1] I will exercise my discretion to relax the rules, pursuant to *N.J.A.C.* 6A:3-1.16.

In her papers, petitioner describes the technical difficulty she experienced while attempting to complete the board member training. She alleges that she completed the training on March 23, 2020 – after the December 31, 2019 deadline but prior to the issuance of the Order to Show Cause by the School Ethics Commission (SEC) – but due to a glitch in the system, she could not submit her "knowledge check." She further contends that she reached out several times to the New Jersey School Boards Association to troubleshoot, but they were unable to resolve the problem. Petitioner argues that a penalty of removal is unwarranted due to her good faith attempts to complete the training.

While I acknowledge that this information could have been submitted as exceptions, I am sympathetic to the challenges respondent experienced during the COVID-19 public health emergency, including navigating telecommuting, remote learning, and new health and safety mandates. Given the unprecedented circumstances present in the State, I will reconsider my decision with respondent's arguments in mind. The SEC will have five business days from receipt of this letter to file a response to respondent's arguments. If respondent has completed the training, she should submit proof to the SEC and the Office of Controversies and Disputes.

Accordingly, the Motion for Reconsideration is hereby granted, and an amended final decision will be issued.

Sincerely,



Kevin Dehmer
Interim Commissioner

KD/JKH/BCM
Via E-mail
c: School Ethics Commission

241-20L

[1] *N.J.A.C.* 6A:3-1.15(b) provides that a motion for reconsideration must be filed within 10 days of the filing of the Commissioner's decision. Petitioner's motion to reconsider the June 30, 2020 Commissioner's decision was filed on August 27, 2020.

242-20L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

KEVIN DEHMER
Interim Commissioner

October 19, 2020

Daniel M. Perez, Esq.
93 Spring Street, Suite 505
Newton, NJ 07860

Barbara Holstein
P.O. Box 1467
Montague, NJ 07827

Amna Toor, DAG
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

Re: *Barbara Holstein v. Tacia Raftopoulos-Johnson, Montague Board of Education, Sussex County* and *In the Matter of Tacia-Raftopoulos-Johnson, Montague Board of Education, Sussex County*, Commissioner Appeal Dkt. No. 2-3/20A.

Dear Parties:

I have reviewed the materials filed in connection with appellant[1] Tacia Raftopoulos-Johnson's Motion to Settle the Record. Following the School Ethics Commission's (SEC) filing of an amended Statement of Items Comprising the Record (SICR) on May 20, 2020, there are three items which appellant seeks to have added to the record.

First, appellant seeks the inclusion of two emails dated August 10, 2015, sent to and/or from various employees of the Department of Education (DOE). The SEC's opposition to appellant's motion does not address the first email, sent by Scott Ripley, Superintendent of High Point Regional High School, to DOE employee Rosalie Lamonte. A review of the file demonstrates that this email was entered into evidence during the OAL proceedings as exhibit R-17. The SICR does not itemize the documents entered into evidence during the OAL proceedings, but it does refer to them generally. Therefore, it is unnecessary for the Commissioner to add the email from Mr. Ripley to Ms. Lamonte to the record, as it is already part of the record.

[1] At the time of filing of certain documents referred to in this decision, Tacia Raftopolous-Johnson would be more appropriately referred to as the respondent to the SEC complaints. However, for ease of understanding, she will be referred to herein solely as the appellant.

The SEC opposes the inclusion of the second August 10, 2015 email, from Ms. Lamonte to other DOE employees, arguing that it was neither attached to any filing in the case nor entered into evidence at the OAL. Appellant did not respond to this argument in her reply brief. A review of the file supports the SEC's argument. While the email may have been maintained somewhere in the DOE, there is no evidence that it was "on file with" the SEC as part of the docketed matters. Accordingly, pursuant to *N.J.A.C.* 6A:4-2.5(a), it is not part of the record on appeal and appellant's motion is denied as to this email.

Finally, appellant seeks the inclusion of "[a]ny records, such as minutes or notes, related to the subcommittee formed by Robert Bender to 'settle the procedural issues raised" by appellant's counsel, as described in a letter from then-Acting Executive Director of the SEC, Joanne Restivo, dated June 2, 2016. Those "procedural issues" relate to an alleged failure by the SEC to provided appellant with a copy of the complaint, as well as the dating of the complaint and amended complaint, in docket number C08-16.

In opposition, the SEC argues that these documents were not part of the record in the proceedings at the OAL, and therefore they should not be considered part of the record. However, the procedural issues were the subject of a motion to dismiss filed by appellant and decided by the SEC prior to the transmittal of the complaint to the OAL. Therefore, documents related to those issues are "on file with" the SEC even if they were not part of the OAL proceedings.

The SEC also argues that the documents are protected by the work product and deliberative process privileges. The Commissioner has conducted an *in camera* review of the subcommittee document in order to assess whether these privileges apply. Those documents consist of:

> 1) Memorandum from Jesse Landon, Legal Specialist, School Ethics Office, to Ellen Polaner, Commissioner, School Ethics Commission, dated June 3, 2016, enclosing a statement of items outlining the filings in Complaint C08-16 and copies of the listed items.
>
> 2) Memorandum from Jesse Landon, Legal Specialist, School Ethics Office, to Dennis Roberts, Commissioner, School Ethics Commission, dated June 14, 2016, enclosing a statement of items outlining the filings in Complaint C08-16 and copies of the listed items.[2]

The Commissioner finds the SEC's argument that these documents are privileged to be unpersuasive. The SEC first argues that the documents are protected by the work product doctrine. The work product doctrine, which is explained in detail in the portion of the New Jersey Rules of Court related to discovery, is intended to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" concerning litigation or anticipated litigation. *N.J. Ct. R.* 4:10-2(c). A review of the documents related to the subcommittee demonstrates that they do not contain any impressions,

[2] The file contains a single copy of each of the enclosed items. Based on the memoranda, it appears that identical documents were sent to both Commissioners (with the exception of Items #24 and #25, which were filed after the date of the memorandum to Commissioner Polaner and were only sent to Commissioner Roberts).

conclusions, opinions, or legal theories, and therefore they cannot be considered to be work product.

The memoranda are largely procedural, asking the Commissioners to review the material and report back to the SEC, and describing the documents. The only arguably privileged information in the memoranda is an instruction regarding the scope of the review, indicating that the review should be limited to the procedures followed by the School Ethics office, and not the merits of the case. However, that information has already been disclosed by the SEC in its decision on the motion to dismiss. The SEC can have no interest in withholding information that has already been included in a public decision.

The statements of filings in the case consists of dates and descriptions of documents. The documents themselves are primarily copies of filings in the case, which cannot be privileged. The small number of documents that are not filings are message slips containing only factual information about contact between the School Ethics office and the parties. None of these documents include impressions, conclusions, opinions, or legal theories that would qualify them as work product.

Moreover, the work product privilege may be pierced "upon a showing that the party seeking discovery has substantial need of the materials" and is unable to obtain them by other means. *N.J. Ct. R.* 4:10-2(c). Appellant argues that the documents are needed because she has no knowledge of what the subcommittee reviewed, and that knowledge is critical to her ability to advance her jurisdictional arguments related to the complaint. It is clear to the Commissioner that there is no way for appellant to determine what the subcommittee reviewed other than through the inclusion of these documents in the record, and that the documents are relevant to appellant's arguments regarding alleged procedural issues in her case.

The SEC next argues that the documents would be exempt from release under the Open Public Records Act (OPRA) based on the deliberative process privilege. As the documents are not requested pursuant to OPRA, this argument is unavailing. Moreover, the deliberative process privilege protects records that contain "opinions, recommendations, or advice about agency policies." *Ciesla v. N.J. Dep't of Health & Senior Svcs.*, 429 *N.J. Super.* 127, 138 (App. Div. 2012). The records at issue do not contain any such content, as described above.

The SEC is ordered to file a revised SICR that includes the items pertaining to the subcommittee's review, and to provide copies of the records to counsel for appellant, within two weeks from the date of this letter.

Sincerely,

Kevin Dehmer
Interim Commissioner of Education

c: State Law Library
KD/JKH/JS
VIA EMAIL ONLY

233-20E

OAL Dkt. No. EDU 08054-20
Agency Dkt. No. 184-8/20

New Jersey Commissioner of Education

Order on Emergent Relief

Michael Conway,

Petitioner,

v.

New Jersey State Department of Education,
State Board of Examiners,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 9, 2020
Date of Mailing: October 9, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 08054-20
AGENCY DKT. NO. 184-8/20

MICHAEL CONWAY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Corinne Mullen, Esq., for petitioner (The Mullen Law Firm, attorneys)

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

Record Closed: September 24, 2020 Decided: September 28, 2020

BEFORE **SARAH H. SURGENT**, ALJ:

STATEMENT OF THE CASE

Petitioner Michael Conway ("Conway") filed this action seeking emergent relief from respondent New Jersey State Department of Education, State Board of Examiners'

("Board") declination to issue school teacher and principal certificates based upon Conway's alleged conduct unbecoming a teacher. Conway seeks to reverse that decision, or "to maintain the status quo," until a full plenary hearing before the OAL.

PROCEDURAL HISTORY

On August 28, 2020, the Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law ("OAL") for hearing as a contested case and resolution of Conway's motion for emergent relief.

On September 4, 2020, a telephonic status conference with the parties was conducted, and a briefing schedule was set, with an emergent hearing to be held on September 9, 2020. Immediately after the status conference, both parties requested via email an adjournment of the hearing, which was then rescheduled to September 24, 2020. On September 21, 2020, the Board electronically submitted its brief and exhibits to this tribunal.[1] (Rb; R-1 through R-4). On September 23, 2020, Conway electronically submitted his brief, certification, and exhibits via counsel, (Pb; P-1 through P-3), in addition to an exhibit previously submitted by Conway himself on September 3, 2020, (P-4). On September 24, 2020, the parties' oral arguments on the motion were heard remotely via a video-teleconference due to the current Coronavirus pandemic, and the record closed.

FACTUAL DISCUSSION

Conway was a teacher for approximately twenty-four years in Arizona, before recently relocating to New Jersey, to become a teacher at the Beloved Charter School in Jersey City. (Rb at 6; P-1 at 2). He is presently employed there, and is said to be doing very well, (Rb at 6-8), teaching eighth-grade students remotely via computerized virtual means, due to the current pandemic. Also due to the pandemic, while still residing in Arizona, Conway was instructed by the Board to submit his New Jersey teaching and principal certificate applications electronically. (P-1 at 2; R-3 at 2). In his submissions to

[1] Without any discussion or leave from this tribunal, the Board also moved for summary decision in its papers, (Rb at 13-17), which Conway opposed, citing "genuine issues of material fact," (Pb at 9-11). This tribunal advised the parties on the record that it declined to entertain that motion, which was filed in contravention of N.J.A.C. 1:1-12.5(a).

the Board, Conway included a requisite criminal/offense information form dated May 12, 2020, which he admittedly photographed and emailed, and which plainly depicts his legs and lap, clothed only in underwear, and containing the outline of his genitalia. (P-1 at 2-3; P-4; R-1).

By letter dated August 11, 2020, the Board denied Conway's application, stating, in relevant part:

> The photograph of the criminal history information form you submitted to the Board via email contained inappropriate content. Specifically, the image contained male anatomy in underwear. Upon receipt of the image, the Board sent an email permitting you to provide an explanation. Your response to the request was that you were "sorry the emailed version has inappropriate content." There was no explanation for the content or how the image was sent with the content.
>
> Pursuant to N.J.A.C. 6A:9B-4.2, "Notwithstanding that a candidate may meet all requirements for certification, the Board of Examiners may refuse to issue a certificate to that candidate if, based on the record before it, the Board of Examiners determines that, for reasons set forth in N.J.A.C. 6A:9B-4.5, the candidate is not suitable for employment as a teaching staff member in the public schools." One of the reasons stated in N.J.A.C. 6A:9B-4.5 for the revocation of a teaching certificate, or, in this case, the refusal to issue one, is "conduct unbecoming a teacher."
>
> In reviewing your application, the Board considered, among other factors, your lack of judgment and/or carelessness in submitting an image with such content. Such poor judgment and/or carelessness is conduct unbecoming an educator. Accordingly, the Board finds that the level and nature of your conduct provide sufficient reason to block your application for certification. Thus, at its July 30, 2020 meeting the Board of Examiners voted to block your application for a Teacher of Social Studies and Principal certificate.
>
> [(R-2).]

Conway filed a pro se petition of appeal seeking emergent relief dated August 26, 2020, with the Commissioner of Education, then retained private counsel, who represented that she recently filed a petition with the Commissioner of Education to

overturn the Board's decision. He now maintains that including his underclothed lap in the photographs of his two-page criminal history form was unintentional, that he is near-sighted, that he is in his late fifties, and that he is not technologically savvy. (P-1 at 2-4; P-2). He maintains that if his teaching certificate is not granted, he will be immediately fired from his current teaching position, and that "he will be unemployable as a teacher in any district in the United States based on his refusal of certification," because every teaching job application will necessarily ask whether he has ever been denied a teaching certification in any state. (Pb at 1, 5). He also notes that teaching is his second career, one that he lives for and yearns to continue, and that he will be unable to pay his bills if he cannot teach. (P-1 at 1-2).

The Board maintains that, assuming arguendo Conway's conduct was inadvertent, it still demonstrates conduct unbecoming a teacher through Conway's "severe lack of judgment and carelessness" outside of a classroom, which is a valid ground for finding conduct unbecoming a teacher. (Rb at 11). The Board also notes that Conway may be able to teach in a private school without a teacher's certification, and, if not, may be able to find another occupation, such as his first career, or otherwise. (Rb at 7-8).

LEGAL ANALYSIS AND CONCLUSION

The Board of Examiners is entrusted with the issuance and revocation of certificates to teach pupils in public schools. N.J.S.A. 18A:6-38. N.J.A.C. 6A:9B-4.1 governs the Board's authority to refuse to issue certificates, and provides:

> Notwithstanding that a candidate may meet all requirements for certification, the Board of Examiners may refuse to issue a certificate to the candidate if it determines based on the record before it that the candidate is not suitable for employment as a teaching staff member in the public schools for reasons set forth in N.J.A.C. 6A:9B-4.4.
>
> [N.J.A.C. 6A:9B-4.1.]

Thus, the Board may refuse to issue an applicant's teaching certificate for "conduct unbecoming a teacher." N.J.A.C. 6A:9B-4.4.

Pursuant to N.J.A.C. 6A:4-4.1:

> (a) In determining appeals from decisions of the State Board of Examiners . . . , the Commissioner shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law.
>
> (b) In determining motions for stay or emergency relief, the Commissioner shall apply the following standards, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The moving party will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the moving party's claim is settled;
>
> 3. The moving party has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the moving party will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:4-4.1.]

In order to prevail on an emergent appeal from the Board's decision, the moving party must demonstrate each of the above four elements "clearly and convincingly." Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Although not argued by Conway, his request to "maintain the status quo" (Pb at 6, 9), until a plenary hearing means that this tribunal may necessarily "place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy." Ibid. Alternatively, "in some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant." Ibid.

Irreparable Harm

Irreparable harm is a "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). An injunctive relief award requires a "clear showing of irreparable injury" or a "presently existing actual threat." Cont'l Grp. v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980) (internal quotation marks and citations omitted). "[M]ore than a risk of irreparable harm must be demonstrated." Ibid. The irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). In addition, "[i]n order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." Waterfront Comm'n of New York Harbor v. Philip Murphy, in his official capacity as Governor of New Jersey, et al., 2018 AMC 2222, 2242 (D.N.J. June 1, 2018).

Here, Conway does not have a protected right to a New Jersey teaching certificate. The mere expectation of obtaining a professional license is not a property interest in that license—that would only come into existence once the license had been obtained. See Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 136 (1987). Moreover, Conway's assertion that he will be fired immediately if his application for emergent relief is not granted, as well as his assertion that "he will be unemployable as a teacher in any district in the United States based on his refusal of certification," are merely speculative, and do not demonstrate immediate irreparable harm. He is currently teaching at the charter school without a certificate, and has indicated that the school's administrators are quite pleased with his performance, and have kept him in their employ, pending the outcome of this motion.

As this tribunal is only ruling on whether emergent relief should be granted at this juncture, rather than proceeding to a full plenary hearing on the merits in due course, Conway can explain to the charter school administrators that this decision is not a ruling on the merits of whether the Board's decision should ultimately be upheld or overturned. Alternatively, if the charter school should refuse to continue Conway's employ as a result of a denial of emergent relief, Conway may find employment elsewhere, whether that be

in a private school, his first occupation, or another field. Conway's speculation that he will be immediately fired and will not be able to pay his bills could be adequately addressed by monetary damages, and therefore does not rise to the level of imminent irreparable harm.

Right to the Underlying Claim Must be Settled

Conway must also establish clearly and convincingly that the legal right underlying his claim is settled. He has not done so. As noted above, he has no established legal property right to professional certificates that were never issued, and his appeal from the Board's decision in due course is still pending.

Likelihood of Prevailing on the Merits

Emergent relief requires Conway to demonstrate a likelihood of prevailing on the merits of the underlying claim. Although the merits of this case have not yet been reached, in light of the Board's broad discretion in determining what constitutes conduct unbecoming a teacher, N.J.A.C. 6A:9B-4.1, N.J.A.C. 6A:9B-4.4, and the Commissioner's limited ability to overturn the Board's decision, N.J.A.C. 6A:4-4.1, Conway has not demonstrated "clearly and convincingly" that there is a likelihood of prevailing on the merits of his underlying claim that teaching and principal certificates should have been issued by the Board.

Balancing of the Equities

In balancing of the equities and interests of the parties, Conway must clearly and convincingly demonstrate that he will "suffer greater harm than the respondent will suffer if the requested relief is not granted." N.J.A.C. 6A:4-4.1(b)4. He has not done so. Although he speculates that he will "lose his teaching job, his home, his livelihood," and that "[t]he School District and its students will lose a teacher already performing well under exceedingly difficult circumstances," (Pb at 8), the Board rightly points out that it is tasked with the responsibility of ensuring that public schools are staffed only by teachers and

administrators who meet its standards for certification, in the public interest of protecting school students from potentially inappropriate or unqualified individuals, (Rb at 13).

In this case, the public interest in protecting public school students from interactions with a potentially inappropriate teaching or principal candidate vastly outweighs Conway's speculative harm. That is particularly so where, as here, Conway admittedly inadvertently conveyed inappropriate electronic images to the Board, which he attributes to his age, eyesight, and unfamiliarity with technology, and he is now teaching an eighth-grade class remotely, via video-telephonic means, where another inadvertent mistake could have grave social and psychological consequences for the pupils in his virtual classroom.

Based on the foregoing, I **CONCLUDE** that Conway has failed to clearly and convincingly establish any of the Crowe factors required by N.J.A.C. 6A:4-4.1(b) to obtain emergent relief, and I therefore **CONCLUDE** that his motion must be **DENIED**.

ORDER

I, therefore, **ORDER** that Conway's motion for emergent relief be and is hereby **DENIED.**

This order on application for emergent relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 28, 2020
DATE

Sarah H. Surgent
SARAH H. SURGENT, ALJ

Date Mailed to Parties:
jb

APPENDIX

EXHIBITS

For Petitioner:

P-1 Certification of Conway (undated)

P-2 Ophthalmic Prescription for Conway dated September 19, 2020

P-3 Thumbnail Images from Conway's cell phone

P-4 Conway's "Specific Allegations" received on September 3, 2020; Pro Se Petition of Appeal

For Respondent:

R-1 Conway's photographs of his Criminal Offense/Information Form and lap

R-2 Board's letter denying certificates dated August 11, 2020

R-3 Certification of Rani Singh dated September 21, 2020

R-4 Certification of Sydney Finkelstein dated September 21, 2020

238-20

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

Synopsis

Pro se petitioner challenged the Board's visitor identification policy, promotion policy, and suspension policy. The matter was transmitted to the Office of Administrative Law and filed on December 9, 2019. The respondent Board subsequently filed a motion for summary decision, contending that the within petition is time-barred under the 90-day rule, *N.J.A.C.* 6A:3-1.2(i) and should be dismissed; there was no response to the motion from the petitioner.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the case is ripe for summary decision; under *N.J.A.C.* 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency that is the subject of the case; and it is undisputed that petitioner was aware of the Board's promotion, visitor identification and suspension policies well in excess of ninety days prior to the filing of the instant matter. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition with prejudice.

Upon an independent review of the record of this matter and the ALJ's recommended decision, the Commissioner concurred with the ALJ's determinations and adopted the Initial Decision of the OAL as the final decision in this case. The petition was 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.

238-20

OAL Dkt. No. EDU 17293-19
Agency Dkt. No. 291-11/19

New Jersey Commissioner of Education

Decision

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

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

Petitioner challenges the Board's visitor identification policy, promotion policy, and suspension policy. The Administrative Law Judge (ALJ) found that the petition was filed outside of the 90-day filing deadline, set forth in *N.J.A.C.* 6A:3-1.3(i), because petitioner was aware of the relevant Board policies well in excess of 90 days before filing the instant matter. Accordingly, the ALJ dismissed the petition.[1]

Upon review, the Commissioner agrees with the ALJ that this matter is out of time. Petitioner's dispute with the visitor identification policy stems from an incident in November 2018, in which the school security guard asked for petitioner's identification.

[1] Petitioner did not file a response to the Board's motion for summary decision, so the facts set forth in the Board's motion were deemed to be undisputed.

Regarding the promotion policy, petitioner had previously challenged the Board's decision not to promote her son to the eighth grade for the 2017-18 school year in petitions filed in July 2018 and February 2019, which were dismissed as untimely. *C.B., on behalf of minor child, J.B. v. Board of Education of the City of Newark, Essex County*, Commissioner's Decision No. 69-20, dated February 20, 2020. Finally, with respect to the suspension policy, petitioner's son had been suspended multiple times in December 2018. As such, the petition, which was received on November 4, 2019, was filed well outside of the 90-day limitations period. In her exceptions, petitioner argues that she was entitled to a hearing on the merits. The Commissioner notes that petitioner did not oppose the motion for summary decision and finds that this matter was appropriately dismissed as it was filed out of time.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED. [2]



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2020
Date of Mailing: October 20, 2020

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 17293-19
AGENCY DKT. NO. 291-11/19

C.B. ON BEHALF OF J.B.,
Petitioner,

vs.

CITY OF NEWARK BOARD OF EDUCATION,
Respondent.

C.B., parent of **J.B.**, Petitioner pro se

Bernard Mercado, Esq., Senior Associate Counsel, for respondent Newark Board of Education

Record Closed: September 1, 2020 Decided: September 2, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenged the respondent board of education's visitor identification policy, promotion policy and suspension policy. The contested matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 9, 2019.

A prehearing conference was held on January 22, 2020, and a prehearing Order was entered by the undersigned on the same date.

Respondent filed a motion for summary decision, dated July 24, 2020, and filed July 27, 2020 with the OAL. Petitioner filed no response thereto. The time within which to file a response has expired. Respondent then filed a letter brief, dated August 28, 2020, and filed September 1, 2020 with the OAL.

The record closed on September 1, 2020.

FACTUAL BACKGROUND

Petitioner failed to respond to respondent's motion for summary decision. Accordingly, the facts set forth in respondent's brief in support of the motion are adopted herein as undisputed, as follows:

Petitioner, C.B., is the parent of J.B., a student who attended Lincoln School during the 2016-2017 school year.

Petitioner, in the instant petition, challenges the Board's suspension, promotion and ID policies.

Petitioner previously filed two prior petitions of appeal with the Department of Education (DOE) on or about July 19, 2018 (OAL Dkt. No. EDU 14526-18, Agency Ref. No. 251-10/18, which was eventually withdrawn, and a second petition on February 20, 2019 (OAL Dkt. No. EDU 04507-19, Agency Ref. No. 315-12/18) wherein petitioner essentially repeated the allegations from the first petition: that J.B. was wrongfully retained in the seventh grade and was not promoted for the 2017-2018 school year. The matter was then forwarded to the OAL.

A dispositive motion was filed by respondent regarding the second petition to dismiss it for being filed beyond the ninety day time limit. The ALJ granted the motion finding that petitioner knew of the retention on September 12, 2017, even counting from

the time the first petition was filed, petitioner was required to file her petition no later than December 11, 2017. Petitioner failed to timely file and was therefore out of time to do so. The ALJ went on to confirm the second petition was filed seven months after the ninety day time limit and was time barred pursuant to N.J.A.C. 6A:3-1.3(i), and that the remainder of the petition failed to state a cause of action. On February 20, 2020, the Commissioner of Education adopted the ALJ's Initial Decision and dismissed the second petition for being out of time.

During the pendency of the second petition petitioner filed a third petition, the instant matter, on November 4, 2019, broadly challenging respondent's retention and promotion policy for eighth grade students as well as respondent's visitor ID policy. Petitioner also included a reference to J.B.'s suspension from May 7, 2017. In the petition petitioner notes that J.B. was suspended "multiple times" in December 2018.

Respondent served interrogatories upon petitioner in the instant matter wherein petitioner confirmed she was aware of the point system underlying respondent's promotion and retention policy from September 2016 and February 2017, respectively. Petitioner also knew of the ID policy in November 2018.

LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

> The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged

> disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

The are no disputed facts in the instant matter, petitioner having filed no response, or a request for an extension to file a response. See N.J.A.C. 1:1-12.5. Accordingly, the matter is ripe for summary decision.

N.J.A.C. 6A:3-1.3(i) states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

New Jersey courts have strictly construed the ninety day requirement. See Riely v. Board of Education of Hunterdon Central Regional High School District, 173 N.J. Super. 109 (App. Div. 1980).

It is undisputed herein that petitioner was aware of the promotion, ID and suspension policies of respondent well in excess of ninety days prior to the filing of the instant matter.

Based upon the foregoing I **CONCLUDE** that Respondent's motion for summary decision be **GRANTED**; and that the petition should be **DISMISSED** with prejudice.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **GRANTED**; and,

It is further **ORDERED**, that Petitioner's petition is dismissed with prejudice; and,

It is further **ORDERED** that the hearing date of September 23, 2020 is canceled.

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

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

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

September 2, 2020
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency 9-2-20

Date Mailed to Parties: 9-8-20

APPENDIX

List of Moving Papers

For Petitioner:

None

For Respondent:

Notice of Motion for Summary Decision

Brief in Support of Motion for Summary Decision

Certification of Bernard Mercado, Esq. with Exhibits A through D

Letter brief

243-20

OAL Dkt. No. EDU 06771-19
Agency Dkt. No. 53-3/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Middle Township, Cape May County,

Petitioner,

v.

Board of Education of the Township of Lower Township, Cape May County, and K.P. on behalf of minor child, D.R.,

Respondents.

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

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. In so doing, the Commissioner notes that Paragraph Fifteen of the Agreement states that the Agreement is "subject to final approval by the Administrative Law Judge (Judge) pursuant to *N.J.A.C.* 1:1-19.1, and will become effective only upon approval by the Judge." The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the above, the case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2020
Date of Mailing: October 23, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 06771-19
AGENCY DKT. NO. 53-3/19

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE TOWNSHIP, CAPE MAY COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LOWER TOWNSHIP, CAPE MAY COUNTY AND K.P, ON BEHALF OF MINOR CHILD, D.R.,

Respondents.

Camille L. McKnight, Esq., for petitioner (Cooper Levenson, attorneys)

Emily Schrank, Esq., for respondents (Comegno Law Group, P.C., attorneys)

Record Closed: July 1, 2020 Decided: September 10, 2020

BEFORE **JEFFREY R. WILSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 17, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

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

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

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

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

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

September 10, 2020
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: 9/16/2020

Date Mailed to Parties: 9/16/2020

JRW/tat

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement and Board Resolution received by the Office of Administrative Law on July 1, 2020.

Ltr 7/1/20

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057-3209
856-234-4114
[illegible]@comegnolaw.com
Attorneys for Respondent,
Lower Township Board of Education
By: R. TAYLOR RUILOVA, ESQUIRE

Middle Township Board of Education, Petitioner, v. Lower Township Board of Education and K.P. o/b/o D.R., Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU 06771-2019S Agency Docket No. 53-3/19 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

Middle Township Board of Education, Cape May County, whose address is 216 South Main Street, Cape May Court House, New Jersey 08210, and its successors, assignees, officers, employees, agents and representatives (collectively "Middle") and Lower Township Board of Education, whose address is 905 Seashore Road, Cape May, New Jersey, 08204, and its successors, assignees, officers, employees, agents and representatives (collectively "Lower") have voluntarily resolved all disputed matters in controversy between them and enter into the following Settlement Agreement and General Release ("Settlement") in full and complete settlement of all outstanding issues as detailed below:

WHEREAS, Middle and Lower (together, the "Parties") are public school districts established under the laws of the State of New Jersey with the responsibility of providing a thorough and efficient public education to students residing within their respective townships;

BACK-UP P. 2

WHEREAS, a dispute arose between the Parties as to the district of residence of the minor child D.R. and the attendant financial responsibility for said child's public education (the "Subject Dispute"); and

WHEREAS, the Parties agree that the evidence exchanged in the above-captioned matter establishes that D.R.'s residency in Middle Township within the meaning of N.J.S.A. § 18A:7B-12 and N.J.A.C. § 6A:17-2.2. began on or about March 11, 2019: and

WHEREAS, the Parties do hereby intend and seek to resolve all outstanding issues relating to the apportionment of financial responsibility for D.R.'s education, and do so in a confidential manner in furtherance of the Parties' respective interests, and

WHEREAS, the Parties are entering into this Settlement, by way of compromise and accord, for the purposes of amicably resolving this matter and to avoid the unnecessary incurrence of any additional and unnecessary legal expenses by the Parties; and

WHEREAS, this Settlement is being entered into by the Parties without any admission of liability or wrongdoing, and shall not be considered as evidence of liability on, or defenses to, claims by any of the Parties against another;

NOW THEREFORE, in consideration of the foregoing and of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties mutualy agree as follows:

1. **Payment.** In full and complete settlement of this matter, Lower shall remit payment in the amount of Ten-Thousand Dollars ($10,000.00) to the "Middle Township Board of Education" following (1) receipt of a completed W-9 form from Middle, and (2) approval and

execution of this Settlement by both Parties during their next respective regularly scheduled meetings following initial approval of this Settlement by the Parties' respective counsel. Lower will use its best efforts to remit the aforementioned payment to Middle within thirty (30) days of satisfaction of the above conditions.

2. **No Admission of Liability.** The Parties agree and understand that this Settlement does not constitute an admission of liability.

3. **Taxes.** Lower makes no representation regarding the tax treatment of the payment made under this Settlement. Middle shall have sole responsibility for any tax consequences associated with the payments made under this Settlement.

4. **Release of Claims, Indemnification, and Hold Harmless.** In consideration of the conditions and terms contained herein, Middle hereby completely releases and forever discharges Lower, and its respective officers, members, employees, and agents, as well as its successors and assigns, of and from any and all manner of actions and causes of actions, suits, debts, claims, and demands, whatsoever, in law or in equity, which it ever had, now has, or hereafter may have in connection with the Subject Dispute, whether known or unknown, including, without limitation, the following:

- All claims arising under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 to 1482.
- All claims arising under the New Jersey education statues, Title 18A and the New Jersey education regulations, Title 6A.
- All claims that were or could have been raised in the administrative action bearing OAL Docket No. EDU 06771-2019S and Agency Docket No. 53-3/19.

However, nothing contained in this section is intended, nor shall be construed, to: (i) waive or release any claim arising following execution of this Settlement; or (ii) limit Middle's right to enforce the terms of this Settlement.

5. **Successors and Assigns.** This Settlement shall bind and inure to the benefit of each Party, its officers, attorneys, agents, insureds, servants, representatives, employees, subsidiaries, affiliates, partners, executors, administrators, managers, predecessors-in-interest, successors-in-interest, and assigns, separately and collectively.

6. **Warranties.** The parties acknowledge, represent, warrant, affirm and confirm the following:

a. Each party has read and understands the effect and scope of this Settlement, has relied and is relying solely upon either his/her/its own judgment, belief, and knowledge or upon the advice of his/her/its independent legal counsel, or both, as to the nature, extent, effect and consequences relating thereto.

b. This Settlement is being made without reliance upon any statement or representation by any other Party hereto, except those expressly set forth herein.

c. No promise, inducement, or settlement not herein expressed has been made to any Party hereto.

d. Each individual signing this Settlement on behalf of a Party has the right, power, and authority to sign and enter into this Settlement on behalf of that Party.

e. The Parties each execute and deliver this Settlement as a free and voluntary act, without any duress, coercion, or undue influence exerted by or on behalf of any other party.

f. This Settlement is a valid, binding, and enforceable Settlement and does not violate any law, rule, or regulation, or any contract or Settlement to which any individual or entity on whose behalf this Settlement is executed is a party.

7. **Warranty Against Prior Assignment.** Each Party represents and warrants that it is the exclusive owner of the rights, claims, and causes of action herein released, and that as of the effective date of this Settlement, it is free of any pledges, charges, equities, claims, covenants, liens, or encumbrances in favor of any other person, firm, or institution, and it has not heretofore assigned or transferred or purported to assign or transfer to any other person or entity any obligations, rights, claims, or causes of action asserted by any person which, if established, would be a breach of the above warranties and representations and any and all losses, expenses, or liabilities arising directly or indirectly out of the breach of any of the foregoing representations or warranties. If any action is brought which, if established, would be a breach of any of the above warranties or representations, the Party making the warranty or representation shall appear in and defend the action on behalf of the affected beneficiary or beneficiaries of the warranty or representation, at the maker's own sole cost and expense.

8. **Interpretation of Settlement.** This Settlement shall not be construed against any party on the basis that he/she/it or his/her/its attorney drafted it, nor shall it constitute a precedent in any matters.

9. **Entire Agreement / Amendment.** This Settlement constitutes the entire Settlement between the Parties with respect to its subject matter and there are no representations, warranties, or Settlements between the Parties not expressed herein. This Settlement supersedes and replaces all prior understandings and Settlements between the Parties hereto, whether written or oral, express or implied, with respect to its subject matter. This Settlement may be amended or modified at any time or times only by a writing executed by all Parties.

10. **Execution in Counterparts.** This Settlement may be executed simultaneously in several counterparts, each of which shall be deemed to be one and the same instrument.

11. **Illegality, Validity, and Enforceability.** If any term, provision, covenant, or condition of this Settlement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

12. **Choice of Law and Forum Selection.** This Settlement is entered into under and shall be governed by and construed in accordance with the laws of the State of New Jersey without regard to such jurisdiction's principles of conflicts of law. The parties agree that the Commissioner of Education shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Settlement.

13. **Necessary Documents.** Prior to and at all times following the date of this Settlement, the Parties agree to execute and deliver, or to cause to be executed and delivered, such documents and to do, or cause to be done, such other acts and things as might reasonably be requested by the Parties, to assure that the benefits of this Settlement are realized by the Parties.

14. **Confidentiality.** The Parties agree that the terms of this Settlement are confidential to the maximum extent permitted by law. None of the Parties shall initiate or respond to oral or written communications about the terms of this Settlement to any person or entity about its terms unless compelled by subpoena or order of a court of competent jurisdiction. This restriction, however, does not prevent the Parties from discussing the terms of this Settlement with their respective counsel. In the event that either party violates this term, that Party may take appropriate action, with the prevailing party being entitled to its reasonable counsel fees and costs.

15. **Final Approval.** Settlement is subject to final approval by the Administrative Law Judge ("Judge") pursuant to N.J.A.C. 1:1-19.1, and will become effective only upon

approval by the Judge. Counsel for the Parties shall jointly request the Judge's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Petition of Appeal.

16. THE UNDERSIGNED HAVE CAREFULLY READ THIS "SETTLMENT AGRLEMENT AND GENERAL RELEASE"; THEY HAVE READ, KNOW, AND UNDERSTAND ITS CONTENTS; THEY FREELY AND VOLUNTARILY AGREE TO ABIDE BY ITS TERMS, AND ARE FULLY AUTHORIZED TO SO AGREE AND BE BOUND; AND THEY HAVE NOT BEEN COERCED INTO SIGNING THIS SETTLEMENT.

Dated: 3-19-20

Dennis Roberts
Board President
Middle Township Board of Education

WITNESS:

Dated: 3 19 20

Diane Fox
Board Secretary
Middle Township Board of Education

Dated: 4/30/20

Gary Douglass
Board President
Lower Township Board of Education

WITNESS: 4/31/20

Dated:

John Hansen
Board Secretary
Lower Township Board of Education

244-20

OAL Dkt. No. EDU 10945-19
Agency Dkt. No. 162-7/19

New Jersey Commissioner of Education

Final Decision

Joyce Caine,

Petitioner,

v.

Board of Education of the Township of Hillside, Union County,

Respondent.

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

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

IT IS SO ORDERED.

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2020
Date of Mailing: October 23, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10945-19
AGENCY DKT. NO. 162-7/19

JOYCE CAINE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,
Respondent.

Andrew S. Berns, Esq., for petitioner (Einhorn Harris, attorneys)

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

Record Closed: September 16, 2020 Decided: September 24, 2020

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 9, 2019 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof. A copy of the Stipulation of Settlement is attached and fully incorporated herein.

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

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

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

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

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

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

September 24, 2020
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: September 24, 2020

Mailed to Parties:

/sej

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement") is made and entered into as of this 17th day of March, 2020, by and between JOYCE CAINE ("Caine") on the one hand, and THE HILLSIDE PUBLIC SCHOOLS, BOARD OF EDUCATION ("Hillside"), who shall be referred to collectively as the "Parties".

RECITALS:

WHEREAS, Caine filed a Petition with New Jersey Commissioner of Education, c/o the Director, Office of Controversies and Disputes on July 8, 2019;

WHEREAS, Hillside filed an Answer to the Petition on or about July 26, 2019;

WHEREAS, the Parties desire, without any admission of liability by any party, to resolve their differences and settle the disputes by and between them in accordance with the terms set forth below without the need for expending the time and expense of further litigation; and

WHEREAS, the Parties now seek to put the terms of their Agreement in this writing to fully and finally settle all such claims, disputes, and controversies;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth below, as well as for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each signatory hereto, intending to be legally bound, the Parties agree as follows:

1. **Recitals**. The foregoing recitals are an integral part of this Agreement, and are incorporated herein by reference.

2. **Acknowledgement of Amounts Due**. Caine and Hillside acknowledges and agrees that the Settlement Amount represents the amount due and owing to Caine.

3. **Settlement Terms**.

A. **Payment**

The parties hereby agree that Hillside shall have the following payment obligations, totaling the amount of the Settlement Amount, to Caine as consideration for the mutual promises and covenants herein, which shall be, collectively and in the aggregate, hereinafter referred to as the "Payment Obligation". Said Payment Obligation shall be by checks made payable to *Joyce Caine c/o the Einhorn, Barbarito, Frost, Botwinick attorney trust account* and delivered to Einhorn, Barbarito, Frost & Botwinick, 165 East Main Street, Denville, New Jersey 07834. The amount of the Payment shall be $15,457.00.

B. **Personnel File**

The most recent Performance Evaluation of Caine, dated April 9, 2019 and authored by Dr. Debra Sheard as Acting Superintendent of the Hillside Public Schools shall be retracted and stricken permanently from Caine's permanent Hillside personnel file. The Hillside agrees that with respect to any future employment inquiries relating to Caine, the information provided shall solely include dates of employment, position/s/ held and salary in the position. If additional information is requested by a prospective employer, Caine shall be notified and reserves the right in writing to provide consent to approve the content of any additional information requested and intended to be provided to a prospective employer.

C. **Event of Default**.

In the event that the Hillside fails to timely pay Caine the amount set forth in paragraph 3(A), *supra*., Caine (through counsel) shall provide written Notice to the Hillside (through counsel), in accordance with paragraph 16, below, to inform the Hillside of such default and provide the Hillside with five (5) business days to cure. If the Hillside does not cure the alleged default within five (5) business days of the Notice, such failure shall constitute a Default under the terms of this Agreement. Upon the occurrence of a Default, Caine may, in her sole discretion, file a Consent Judgment in the amount of Fifteen Thousand, Four Hundred Fifty-Seven Dollars ($15,457.00) and may seek reasonable attorneys' fees and costs in connection with such filing to be determined by the Court.

4. **Mutual Releases**. The Parties hereby exchange mutual releases as follows:

A. The Parties, on behalf of themselves and their affiliates, employees, agents, successors and assigns and any person or entity claiming by or through any or all of them, hereby release and forever discharge each other and their respective insurers, reinsurers, managers, members, affiliates, related entities, parents, subsidiaries, employees, directors, officers, shareholders, agents, trustees, attorneys, predecessors, successors and assigns, from and against any and all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, representations, damages, judgments, liens, extents, executions, claims, counterclaims, defenses and demands whatsoever, in law, admiralty or equity whether then known or unknown, past or present, asserted or unasserted, contingent or unliquidated which they ever had, now have or hereafter can, shall or may have, upon, or by reason of, any matter, cause or thing whatsoever from the beginning of the world to the date of this release. The Parties hereby represent and warrant that they have not assigned, pledged, encumbered, hypothesized and/or otherwise

devised themselves of all or any part of the claims released herein. Notwithstanding any provision or term in this paragraph to the contrary, nothing stated herein shall release or waive the Hillside's obligations relating to the Payment Obligation.

5. **Dismissal With Prejudice and Without Costs.** Upon the execution of this Agreement and the additional conditions of settlement having been fulfilled, the Petition shall be dismissed with prejudice and without costs by counsel for the Parties. The Parties hereby authorize their respective counsel to execute on their behalf and file a Stipulation of Dismissal with Prejudice with the Court.

6. **Authority**. Each of the Parties hereto warrants and represents that it is fully empowered to enter into this Agreement on behalf of the entities named herein along with their respective principals, shareholders and/or representatives. The Parties further represent that they have each consulted with legal counsel of their choice before entering into this Agreement. This provision shall survive the expiration or termination of this Agreement.

7. **No Admission of Liability**. This Agreement and its terms do not constitute an admission of liability by any party and shall not be interpreted to imply an admission of liability by any party.

8. **Entire Agreement**. This Agreement shall constitute the entire and sole agreement among the Parties with respect to the subject matters hereof. None of the Parties are relying upon any promise, representation, understanding, undertaking, or agreement, whether oral or in writing, not set forth in this Agreement and attachments, all of which shall be deemed to have been superseded by this Agreement and merged herein, and each party expressly disclaims any reliance on any other promise, representation, understanding, undertaking, or agreement, whether oral or in writing. This Agreement may not be amended, changed, altered, modified or terminated except in a writing signed by all the Parties hereto.

9. **Governing Law and Jurisdiction**. This Agreement shall be governed by the laws of the State of New Jersey without regard to conflict of law rules. The Parties further consent to jurisdiction of the Officer of Administrative Law with respect to any disputes arising from this Agreement.

10. **Drafting**. Each of the Parties and their respective counsel have participated in the drafting and negotiation of this Agreement, and for all purposes this Agreement shall be deemed to have been drafted jointly by each of the Parties. No ambiguity shall be resolved against any party based upon authorship.

11. **Headings**. The headings contained in this Agreement are for convenience and reference purposes only and shall not be deemed to be a part of the Agreement or to offer the meaning or interpretation of this Agreement.

12. **Severability**. If any term or covenant of this Agreement shall to any extent be invalid or unenforceable, the remaining terms and covenants shall nevertheless be valid, enforceable, and carried into effect to the fullest extent permitted by law, unless to do so

would clearly violate the present legal and valid intentions of the Parties or otherwise deprive any party of the benefit of its bargain.

13. **Further Assurances**. The Parties agree to perform any and all lawful additional acts, including without limitation, execution of additional stipulations, agreements, documents and instruments, as are reasonably necessary or as reasonably requested by any party at any time to effectuate the intent of this Settlement Agreement, to satisfy the conditions herein contained, or to give full force and effect to this Settlement Agreement.

14. **Date of Execution**. The date of execution of this Agreement shall be the date upon which the last of the Parties signs this Agreement.

15. **Counterparts**. This Agreement may be executed in any number of counterparts and via facsimile or electronic signature and PDF, and all such counterparts taken together shall be deemed to constitute one and the same original instrument. Signature pages may be detached from counterpart documents and reassembled to form duplicate executed originals.

16. **Notice**. Any notices and communications under this Agreement ("Notice"), unless otherwise specified, must be in writing and delivered by overnight mail, signature of recipient required:

A. If to Hillside:

Via Counsel
Raymond L. Hamlin, Esq.
Hunt, Hamlin & Ridley
Military Park Building
60 Park Place, 16th Floor
Newark, New Jersey 07102

B. If to Caine

Via Counsel
Andrew S. Berns, Esq.
Einhorn, Barbarito, Frost & Botwinick, PC
165 East Main Street
Denville, New Jersey 07834

17. **Confidentiality**. To the full extent permitted under governing law in New Jersey, each Party understands that the confidentiality of the amount and terms of the Agreement forms a portion of the consideration for the settlement. Toward that end, the Parties agree that they and their counsel will neither disclose nor reveal to any person or entity or directly or indirectly publish, publicize, disseminate or communicate to any person the terms of this Agreement, with the exception of a Party's agents, employees and/or representatives who have a need to know. Moreover, nothing in the Agreement shall be deemed to interfere with each Party's obligation to accurately report transactions with any entity to whom it is required by law or contract

to report, including, for example, appropriate governmental, taxing and/or registering agencies.

In the event that any Party receives a subpoena or other legal request for this Agreement or for information regarding its terms or that could reasonably be interpreted to require the production of such confidential documents or information, Notice shall be provided to all Parties within five (5) business days, in accordance with paragraph 16, *supra.*, so that the Parties are provided the opportunity to object to the production of this Agreement or of any information regarding the terms of this Agreement.

18. **Non-disparagement**. The Parties further understand and agree that neither they, nor their agents, successors and assigns will, directly or indirectly, disparage any other Party or make any statements, oral or written, which have the purpose of, or effect of, injuring or in any way detracting from a Party's reputation or cause any person or entity to refrain from, or cease, any employment or business with a Party. The Parties acknowledge and agree this non-disparagement clause is a material term of this Agreement. The Parties further acknowledge and agree that if they directly or indirectly breach, violate, or fail to abide by the terms of this non-disparagement agreement (hereinafter referred to as "Default"), each Default shall cause immediate and irreparable harm to the non-defaulting, affected Party, in a manner which cannot be adequately and solely compensated in monetary damages. The Parties agree that the prevailing Party shall be entitled to reimbursement of all of their costs, expenses, and attorneys' fees incurred in any enforcement proceeding and/or in any lawsuit for damages under this paragraph. Nothing contained herein shall restrict or limit in any manner a Party's right to obtain any form of relief, legal or equitable, in an action brought to enforce their rights.

19. **No Third Party Beneficiaries**. Nothing contained in this Agreement, express or implied, is intended to or shall be construed to confer upon any third party any rights or remedies under or by reason of this Agreement other than as set forth herein.

20. **Binding On Successors:** This Agreement binds and benefits the Parties' respective successors, assigns, parents, subsidiaries, transferees, legatees, heirs, and personal representatives.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]

IN WITNESS WHEREOF, the Parties hereto caused this Settlement Agreement and Release to be duly executed on the day and year first above written:

JOYCE CAINE, Petitioner By: Joyce Caine Title: N/A Dated: March 17, 2020	**WITNESSED BY:** By: Andrew Berns Name: Andrew Berns Dated: 3/17/20
THE HILLSIDE PUBLIC SCHOOLS, BOARD OF EDUCATION, Respondent By: [signature] Title: Board President Dated: 3/26/2020	**WITNESSED BY:** By: [signature] Name: Raymond L. Hamlin Dated: 3/26/2020

245-20

OAL Dkt. No. EDU 1408-20
Agency Dkt. No. 46-2/20

New Jersey Commissioner of Education

Final Decision

N.A.-T, on behalf of minor children, K.A.N. and K.A.N.,

Petitioner,

v.

Board of Education of the Township of Union, Union County,

Respondent.

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

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

IT IS SO ORDERED.



INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2020
Date of Mailing: October 23, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04640-20
AGENCY DKT. NO. 46-2/20

N.A.-T. ON BEHALF OF MINOR CHILDREN,
K.A.N. AND K.A.N.
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

N.A.-T., petitioner, pro se

Afshan Ajmiri Giner, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, attorneys)

Record Closed: September 16, 2020 Decided: September 21, 2020

BEFORE **SARAH H. SURGENT**, ALJ:

On February 24, 2020, petitioner N.A.-T. on behalf of her minor grandchildren, K.A.N. and K.A.N., filed a petition with the Commissioner of Education seeking reversal of respondent Board of Education of the Township of Union's February 4, 2020

determination that K.A.N. and K.A.N. did not reside in the Union Township School District, and were therefore ineligible to attend the Township's schools. On March 16, 2020, respondent filed an answer and counter-claims to the petition with the Commissioner of Education. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on January 23, 2020, for determination as a contested case. Due to the Coronavirus pandemic and related shut downs, the transmittal was not filed with the OAL until May 13, 2020, and was not transmitted to this Judge until June 2020. Following several telephone conferences with the parties, a settlement was placed on the record, on July 31,2020, with the parties waiving any exceptions. On September 16, 2020, the OAL received the attached parties' fully executed settlement agreement and the Board's resolution approving the settlement, which is incorporated herein as J-1.

I have reviewed the record and the terms of the Settlement Agreement and I **FIND**:

1. The parties have voluntarily agreed to the Settlement as evidenced by their signatures or their representatives' signatures, and have voluntarily waived the filing of any exceptions.

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 21, 2020
DATE

Sarah H. Surgent
SARAH H. SURGENT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

R-4. APPROVE SETTLEMENT AGREEMENT

Approve Settlement Agreement for K.A.N. and K.A.N., in accordance with the non-public information appended to the minutes.

I certify that the foregoing resolution was adopted by the Township of Union Board of Education at its workession meeting on September 8, 2020

Manuel E. Vieira
Board Secretary

Afshan Ajmiri Giner, Esq.
FLORIO PERRUCCI STEINHARDT CAPPELLI
TIPTON & TAYLOR, LLC
218 Route 17 North, Suite 410
Rochelle Park, NJ 07662
Phone: (201) 843-5858
Email: aajmiriginer@floriolaw.com
Attorneys for Union Township Board of Education

N.A.T., on behalf of minor children, K.A.N. and K.A.N., Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DEPARTMENT OF EDUCATION OAL DOCKET NO.: 04640-2020 AGENCY REF. NO.: 46-2/20 **SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is entered into by and between the Union Township Board of Education ("Board") for the Union Township School District ("District"), with its offices located at 2369 Morris Avenue, Union, New Jersey 07083 and N.AT., on behalf of K.A.N. and K.A.N. ("Petitioner").

WHEREAS, K.A.N. and K.A.N. are students enrolled in the District; and

WHEREAS, the District conducted an investigation and determined that K.A.N. and K.A.N. were not domiciled in the District, nor residing in District; and

WHEREAS, following a hearing before the Board, further investigation was conducted and the Board determined that K.A.N. and K.A.N. were residing in Newark, NJ, and therefore, not entitled to attend school in the District; and

WHEREAS, on or about February 24, 2020, N.A.T. filed the underlying Petition of Appeal ("Appeal") with the Commissioner of Education ("Commissioner"), challenging the Board's determination; and

WHEREAS, on or about March 16, 2020, the Board filed its Answer and Counterclaim for tuition in the amount of $96,604.25 for K.A.N. and K.A.N. for the 2019-2020 school year; and

WHEREAS, the Parties are now desirous of resolving all outstanding issues raised in the Petition and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. Petitioner shall disenroll K.A.N. and K.A.N. from the District's schools no later than August 7, 2020. If Petitioner fails to disenroll K.A.N. and K.A.N. from the District's schools by August 7, 2020, the District shall administratively disenroll K.A.N. and K.A.N. on August 10, 2020.

2. Neither Petitioner nor any other person acting on behalf of K.A.N. and K.A.N. shall seek enrollment of K.A.N. and K.A.N. in the District, unless K.A.N. and K.A.N. are domiciled in the District.

3. The Parties agree to withdraw their respective claims, with prejudice. Specifically, Petitioner represents that neither Petitioner nor any person acting on behalf of K.A.N. and K.A.N. will challenge the Board's residency determination, and the Board represents that it will not seek tuition reimbursement for K.A.N. and K.A.N. for the 2019-2020 school year.

4. This Agreement resolves all issues between the Parties. The Parties expressly agree not to file a petition of appeal, or cause any suit, demand, administrative, judicial or other proceeding, claim, complaint or other action of any kind against the Board or its officers, agents, employees or assigns, with regard to the residency.

5. The Parties recognize that each has the option of representing themselves or being represented by legal counsel or a representative of their own choosing, that they sign the within Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein, and, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised, or which could have been raised in any litigation relating to the residency of K.A.N. and K.A.N. and/or eligibility to attend school in the District

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

7. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable, only if made in writing and executed with the same formality as this Agreement.

8. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

9. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party.

10. This Agreement shall be subject to ratification by the Board, and is without prejudice to any party if the terms are not agreed upon.

11. The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth.

WITNESS:

MANUEL VIEIRA
Business Administrator/Board Secretary

DATE: 9/9/2020

UNION TOWNSHIP BOARD OF EDUCATION

BY: _____
NANCY MINNECI
Board President

DATE: 9/7/2020

WITNESS:

DATE: 8/7/2020

_____
N.A.T., on behalf of K.A.N.

DATE: 9/7/2020

WITNESS:

DATE: 8/7/2020

_____
N.A.T., on behalf of K.A.N.

DATE: 9/7/2020

246-20

SEC Dkt No. C48-18
OAL Dkt. Nos. EEC 017338-18
Agency Dkt. No. 3-3/20A

New Jersey Commissioner of Education

Final Decision

James Smith,

Complainant,

v.

Emmanuel Capers,

Appellant.

This matter involves an appeal of the School Ethics Commission's (Commission) March 17, 2020 decision that appellant Emmanuel Capers, a member of the Paterson Board of Education, violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members (Code) when he attended an all-expenses-paid conference offered by a potential vendor of the school district. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-1.1(a). However, the Commissioner finds that a six-month suspension is the appropriate penalty in this case.

The complaint in this matter alleged that appellant violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) when he attended a conference presented and paid for by Woz U – an entity that offers coding programs to school districts – and brought Woz U to the attention of the district as a possible vendor. The

Commission dismissed the allegation that appellant violated *N.J.S.A.* 18A:12-24.1(a) and transmitted the remainder of the matter to the Office of Administrative Law (OAL). Following a hearing, the Administrative Law Judge (ALJ) concluded that appellant did not violate any of the provisions of the Code that were alleged in the complaint. In its March 17, 2020 decision, the Commission adopted the ALJ's factual findings, but rejected her legal conclusions. The Commission found that appellant violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) of the Code and recommended a penalty of removal.

In his appeal and exceptions, appellant argues that the conclusion that he violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) is not supported by the record. Regarding *N.J.S.A.* 18A:12-24.1(c), appellant notes that the ALJ found that his actions in providing information about Woz U's programs were consistent with his position on the curriculum committee and did not constitute an impermissible framing of policies or plans. In reversing the ALJ's conclusion, the Commission found that his "advocacy" for the program was "problematic" given his "pre-existing – yet not completely defined" relationship with a representative of Woz U. Appellant argues that the Commission does not explain how this relationship was sufficient to support a finding that he took board action to effectuate policies or plans without consulting those affected by those policies or plans, or that he took action that was unrelated to his duties. Furthermore, according to appellant, the Commission erred in concluding that there was no legitimate reason for a board member to accept an all-expenses paid trip to the conference and claims that he attended not only to learn about Woz U's offerings, but to gain a broader understanding of effective education techniques related to technology in low-income schools. Appellant indicates that he was transparent about his attendance at the conference and recused himself from the eventual vote taken on Woz U. He further argues that he did not hold

himself out to be speaking for the Board or acting in his capacity as a Board member when he accepted the trip and, therefore, his actions were private actions, not Board actions.

Regarding *N.J.S.A.* 18A:12-24.1(e), appellant argues that the record demonstrates that he made no personal promises to anyone connected to Woz U, and that his attendance at the conference was not conditioned on Woz U eventually becoming a vendor for the district. Appellant contends that the Commission's conclusion that his actions had the potential to compromise the Board was unsupported. According to appellant, he engaged in private actions that were not of the type that the Code is intended to proscribe. Appellant further notes that the superintendent's recommendation that he not attend the conference is irrelevant, because he is not an employee of the district and the superintendent does not have the authority to order a Board member to do – or to refrain from doing – anything.

Regarding *N.J.S.A.* 18A:12-24.1(f), appellant argues that the Commission improperly found that he accepted the trip in his capacity as a Board member, because that conclusion is unsupported by the record. Appellant contends that there is no evidence that he "used the schools" for personal gain.

With respect to the penalty, appellant argues that it is unduly harsh and is based on a mischaracterization of his actions. Appellant notes that removal is reserved for the most egregious cases in which a board member's actions render him unfit to continue to serve, citing to cases in which removal was the appropriate penalty and contrasting the actions of board members in those cases with his own. According to appellant, censure would be a more appropriate remedy if he is found to have violated the Code, because there is no indication that he was acting in bad faith or that he repeatedly acted in violation of the Code.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission that appellant violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) is supported by sufficient credible evidence, and appellant has not met his burden of establishing that the Commission's decision is arbitrary, capricious, or contrary to law.

The evidence and testimony at the hearing demonstrates that appellant took action unrelated to his duties as a board member, which is sufficient evidence under *N.J.A.C.* 6A:28-6.4(a)(3) to demonstrate a violation of *N.J.S.A.* 18A:12-24.1(c). The ALJ based her conclusion that appellant did not violate this provision on the fact that he was on the curriculum committee, and she inferred that bringing a program to the district's attention was consistent with appellant's duties as a member of that committee. However, the ALJ's conclusion failed to address the appellant's action in accepting a trip from Woz U. The Commission was not arbitrary, capricious, or unreasonable in concluding that there is no legitimate reason for an individual board member to accept an all-expenses-paid trip to a conference in order to learn about a product.[1] There are certainly means of learning about such programs that do not include accepting a trip from a potential vendor; in fact, Woz U had already provided at least one live presentation about its programs to district representatives prior to Appellant's acceptance of the trip. Notably, the district's administrators, who are responsible for implementing the curriculum, declined the offer to attend the conference, demonstrating that the type of "research" appellant conducted at the conference was unnecessary to a decision regarding the district's possible future use of Woz U programs. Moreover, appellant himself recognized the conflict resulting from his attendance at the conference, indicating at the time he accepted the trip that he would recuse

[1] The Commissioner does not find appellant's arguments regarding the other offerings at the conference to be persuasive. It defies common sense to suggest that the primary purpose of a conference presented and paid for by a vendor was not to sell that vendor's product.

himself from any vote related to Woz U. Research into a program that was appropriate and consistent with appellant's position on the curriculum committee would not result in his being unable to vote on the district's implementation of that program.

Furthermore, appellant's actions went beyond the scope of his duties as a board member and had the potential to compromise the Board, which is sufficient evidence under *N.J.A.C.* 6A:28-6.5(a)(4) to demonstrate a violation of *N.J.S.A.* 18A:12-24.1(e). The Commission was not arbitrary, capricious, or unreasonable in concluding that appellant's acceptance of the trip could have compromised both the Board's ability to contract with Woz U and the public's opinion of the Board's integrity. While the appellant argues that he made no personal promises to Woz U, such is not required by *N.J.A.C.* 6A:28-6.4(a)(5), which provides that evidence of a violation of *N.J.S.A.* 18A:12-24.1(e) may include that "respondent made personal promises or took action beyond the scope of his or her duties" (emphasis added); *see also Persi v. Woska*, 2017 *N.J. Super.* Unpub. LEXIS 625, *7 (App. Div. Mar. 10, 2017) (finding that action taken by a board member that is beyond the scope of his authority and duties as a board member meets the definition of "private action" and is sufficient to demonstrate a violation of the Code). Moreover, the fact that appellant apparently did not attempt to influence the votes of the other Board members does not counteract the appearance of impropriety resulting from his acceptance of an expensive trip from a vendor that had the potential to do business with the Board. Members of the public who were aware of the gift would rightly question the Board's integrity regarding any vote related to Woz U.

Finally, these actions clearly show that appellant used the schools in order to obtain a benefit – a trip – for himself, which is sufficient evidence under *N.J.A.C.* 6A:28-6.5(a)(6) to demonstrate a violation of *N.J.S.A.* 18A:12-24.1(f). The trip was offered to board

members and school personnel, and thus was clearly related to those individuals' positions relative to the schools.

With respect to the appropriate penalty, the Commissioner finds that removing the appellant from the board is an unduly harsh penalty for the proven violations. Notably, the Commissioner disagrees with the Commission that removal is the only penalty sufficient to deter board members from accepting gifts from vendors. The Commissioner also disagrees with the appellant's assertion that the lack of bad faith makes censure the appropriate penalty. Appellant was well aware of the impropriety of his decision to accept the trip. Although he was not an employee of the district and therefore not required to follow the directive of the superintendent that staff not attend the conference due to ethical concerns, he was aware of those concerns and nonetheless chose to reap a benefit worth several thousand dollars from his position as a board member.

Looking to other matters, the Commissioner finds a similar level of misconduct in *Yafet v. Smith, Hillside Board of Education, Union County*, SEC Dkt. No. C24-01 (Oct. 27, 2008), *affirmed*, Commissioner Decision No. 156-09A (May 15, 2009), in which a board member (Smith) sent multiple memoranda criticizing a school principal, despite having a conflict of interest because that principal supervised the board member's wife. Finding four violations of the Code, including *N.J.S.A.* 18A:12-24.1(e) and (f), Smith received a six-month suspension. In setting that penalty, the Commission reviewed other cases and concluded that Smith's conduct was not as egregious as that of board members in other cases who had been removed from their positions, because the violations did not occur on multiple occasions or through a variety of acts. However, the Commission also found that censure was not appropriate, because the conflict of interest was clear, and Smith had notice that his actions were

improper. The Commission therefore concluded that a six-month penalty was appropriate. *See also, In the Matter of Jan Rubio, Matawan-Aberdeen Regional School District Board of Education, Monmouth County*, SEC Dkt. No. C16-08, *affirmed*, Commissioner Decision No. 494-10, decided November 15, 2010 (Six-month suspension imposed on a board member resulting from Code violations for soliciting – via the school email system – and receiving campaign contributions from school employees.).

Here, while appellant has violated three provisions of the Code rather than the four provisions at issue in *Smith*, *supra*, his conduct in accepting a gift from a potential vendor had significant potential to compromise the public's opinion of the Board's integrity. Balancing these factors, the Commissioner finds that a six-month suspension is the appropriate penalty in this case.

Accordingly, appellant is hereby suspended for six months as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2020
Date of Mailing: October 23, 2020

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

Before the School Ethics Commission
OAL Docket No.: EEC-017338-18
School Ethics Commission Docket No.: C48-18

Final Decision

James Smith,
Complainant

v.

Emmanuel Capers,
Paterson Board of Education, Passaic County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on July 24, 2018, by James Smith (Complainant), alleging that Emmanuel Capers (Respondent), a member of the Paterson Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 et seq. More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members (Code).

After being served with the Complaint, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On September 12, 2018, Complainant filed a Response to Respondent's Motion to Dismiss and allegation of frivolous filing.

Thereafter, and at its meeting on October 30, 2018, the Commission voted to grant the Motion to Dismiss in part (as to the alleged violation of *N.J.S.A.* 18A:12-24.1(a)); deny the Motion to Dismiss as to all other allegations in the Complaint; find the Complaint not frivolous; deny Respondent's request for sanctions; direct the filing of an Answer to Complaint (Answer) as to the remaining allegations (*N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f)); and to transmit the matter to the Office of Administrative Law (OAL) following receipt of the Answer. On November 21, 2018, Respondent filed an Answer as directed, and the matter was transmitted to the OAL.

At the OAL, the above-captioned matter was assigned to the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss). *Initial Decision* at 1. Following hearings on October 3, 2019, November 4, 2019, and December 5, 2019, and as more fully detailed *infra*, ALJ Moss issued an Initial Decision detailing her findings of fact and legal conclusions. *Id.* at 2.

On December 23, 2019, the Commission acknowledged receipt of ALJ Moss's Initial Decision; therefore, the forty-five (45) day statutory deadline for the Commission to issue a Final

Decision was February 6, 2020. Prior to February 6, 2020, the Commission requested a forty-five (45) day extension of time to issue its final decision. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until March 23, 2020.[1]

On January 6, 2020, Complainant filed his Exceptions to the Initial Decision and, on January 13, 2020, Respondent filed his reply to Complainant's Exceptions.

Following the filing of Exceptions, and at the Commission's meeting on January 21, 2020, Complainant appeared and made statements during the public comment portion of the meeting regarding the Initial Decision issued by ALJ Moss. Complainant also provided the Commission with a written statement, along with related exhibits,[2] in connection with his public statements. As a result of Complainant's attendance and statements during the public comment portion of its meeting, the Commission voted to adjourn its continued review of the above-captioned matter, and to extend to Respondent, as a matter of fairness, the opportunity to provide public statement. Consequently, and in correspondence dated January 22, 2020, Respondent was advised that, pursuant to its statutory authority as set forth in *N.J.S.A.* 18A:12-28, Respondent was compelled to attend the Commission's meeting on February 25, 2020.[3] The Commission also sought, and received, a second extension until April 10, 2020, to issue its final decision.

After receipt of correspondence from the Commission, Respondent (through counsel) requested a summary of Complainant's public statements from the meeting on January 21, 2020. In lieu of a summary, counsel for Respondent was provided with a copy of the written statement, and related exhibits, that Complainant provided to the Commission.

Consequently, and at its meeting on February 25, 2020, Respondent appeared, as did Complainant on his own initiative. Prior to receiving additional public comments regarding the above-captioned matter from either Complainant or Respondent, the Commission advised the parties that: the record was closed; because the record was closed, the Commission would neither be taking nor receiving testimony from either Complainant and/or Respondent; the Commission would not consider any comment(s) made by Complainant or Respondent and/or any document(s) submitted by Complainant or Respondent in its review of the above-captioned matter *unless* the comment(s) or document(s) was already memorialized in the record as developed during the underlying OAL hearing; and the Commission compelled Respondent's attendance so that he could avail himself, as Complainant did, of the opportunity to offer public statement about the above-captioned matter should he so desire. Following these advisements, Respondent (through counsel) provided a public statement, as did Complainant.

After Respondent (through counsel) and Complainant offered their respective public comments, the Commission adjourned to executive session to consider the full record in this matter. To reiterate, and because the record was closed by ALJ Moss on December 5, 2019, the Commission did not include any comment(s) made by and/or or any document(s) submitted by

---

[1] Forty-five (45) days after February 6, 2020, was, technically, Sunday, March 22, 2020.

[2] Unless the substance of the written statement and/or the exhibits were part of the record, the information was not considered by the Commission.

[3] Notwithstanding the language in its correspondence, the Commission was not compelling Respondent to testify, but rather affording him the opportunity to appear and offer public comment because Complainant had done so.

Complainant or Respondent during the public comment/statement of its meetings on January 21, 2020, or February 25, 2020, unless it was already part of the record. Thereafter, and at a special meeting on March 17, 2020, the Commission voted to adopt ALJ Moss's findings of fact; to reject the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c); to reject the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e); to reject the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(f); and to recommend that Respondent be removed from his position as a Board member.

II. Initial Decision

In the Initial Decision dated December 23, 2019, and based on the documentary evidence as well as the testimony of Eric Crespo (Crespo), Joann Tsimpedes (Tsimpedes), William Gaurlich (Gaurlich), Jose Correa (Correa), Complainant, Oshin Castillo (Castillo), and Eileen Shaffer (Shaffer), ALJ Moss issued the following **findings of fact**:

1) Respondent is an elected member of the Board. He was a Board member in 2017, and served as a member of the curriculum committee. *Initial Decision* at 8.

2) Crespo was the Associate Chief Academic officer for the Paterson School District (District) in 2017-2018. *Id.*

3) In July 2017, there was a conference call involving Respondent, Crespo, and Tsimpedes, the Assistant Superintendent of Academic and Special Services, during which "Respondent brought to their attention a possible vendor ... that would provide free coding courses for juniors and seniors."[4] *Id.* This "possible vendor" also sold educational and drone programs. *Id.*

4) On January 31, 2018, Respondent, another Board member (Jonathan Hodges (Hodges)), Crespo, Correa (the Director of Instructional Technology in the District), Gaurlich (a social studies teacher and Supervisor of College and Career Readiness), and Tsimpedes met with "a Woz U representative," Billy Garner (Garner). *Id.* at 2, 4, 5, and 8.

5) Garner "had previously known" Respondent. *Id.* at 8.

6) At the meeting on January 31, 2018, Garner "did a marketing presentation of Woz U's programs," including "programs that were not free which included coding for first to tenth grades." *Id.* at 8-9.

7) Woz U was also "concerned that the [District] juniors['] and seniors['] coding skills were not up to par," and "offered a program to get their skills up to par but that program was not free." *Id.* at 9.

8) Also, at the meeting on January 31, 2018, "Gardner (sic) mentioned that there would be a seminar in Arizona that they could attend, which would be fully paid for by Woz U." *Id.*

---

[4] At the time Respondent brought the "possible vendor" to the attention of the District's administration, the vendor was known as Accelerated Learning Pathways (ALP), but would later become Woz U. *Initial Decision* at 2, 8.

9) Prior to the January 31, 2018, meeting, Respondent sent Crespo a flyer regarding the seminar. *Id.*

10) Shaffer, the District Superintendent, directed Correa "to look into the seminar." *Id.*

11) The District's "legal department" informed Correa "that there might be a conflict," informed Correa "to not let Woz U pay for the airfare and hotel," and advised Correa "that Board members should follow the same protocol." *Id.*

12) Shaffer advised Crespo "not to go to the seminar because [the District] did not have a relationship with Woz U and Woz U was a potential vendor." *Id.*

13) Correa told Respondent that he (Correa) was not going to the seminar. *Id.*

14) Respondent told Correa "that he was going to the seminar and that if a vote came up on Woz U at the Board, he would recuse himself." *Id.*

15) Shaffer spoke with Respondent "recommending that he not go to the seminar because Woz U could become a vendor for the Board." *Id.*

16) No employee of the District went to the all-expense-paid seminar in Arizona. *Id.*

17) Respondent is not an employee of the District; he is an elected official. *Id.*

18) Shaffer told Castillo (Board President) that Respondent went to the all-expense-paid seminar sponsored by Woz U. *Id.*

19) After consulting with Shaffer and the Board attorney, Castillo requested an investigation. *Id.*

20) Complainant, a then "investigator" for the District, was contacted by Castillo and Shaffer and asked to "investigate [Respondent] going on the all-expense-paid seminar to Arizona sponsored by Woz U." *Id.*

21) Respondent attended the seminar in Arizona from February 20, 2018, to February 23, 2018. *Id.*

22) Respondent declined to be interviewed by Complainant as part of his (Complainant's) investigation. *Id.*

23) Complainant's investigation included checking Respondent's residency and voting record, although Shaffer told Complainant not to check Respondent's voting records or to go to Respondent's house. *Id.*

24) Complainant completed his investigation on March 27, 2018, and forwarded his report to Castillo, Shaffer, and Melissa Pierce (sic), the Passaic County Interim Executive County Superintendent (ECS). *Id.*

25) Castillo submitted Complainant's report to "the State Ethics Office, the Commissioner of Education, and other Board members." *Id.*

26) Complainant was "contacted by the ethics office because it needed a charge form." *Id.* at 9-10.

27) Complainant "completed and sent the charge form to the ethics office without consulting Castillo or Shaffer." *Id.* at 10.

28) The report completed by Complainant "was sent to the ethics office to determine if charges should be brought against [Respondent]." *Id.*

29) On August 28, 2018, "there was a resolution approved by the legal and business departments for the free use of the Woz U program," and Respondent recused himself from the vote. *Id.*

30) Woz U did not complete the vendor contract. *Id.*

31) Respondent "was not told by Castillo that a resolution was necessary for him to go to the seminar in Arizona." *Id.*

Based on the findings of fact as set forth above, ALJ Moss noted that Respondent brought Woz U to the attention of the District, ostensibly because Woz U had a program "that would offer free coding services to high school juniors and seniors." *Id.* According to ALJ Moss, as a member of the curriculum committee, Respondent's actions in "bringing to the District's attention a coding curriculum program" is "consistent with being a member of the curriculum committee." *Id.* The fact that Respondent brought Woz U "to the attention of the District is not framing policy or plans," but rather "providing information regarding a program that the District could consider using." *Id.* ALJ Moss also indicated that, "[t]here was no documentation or admission by Gardner (sic) or [Respondent] that [Respondent] and Gardner (sic) had a previous business relationship." *Id.*

In addition, Respondent "sent out a flyer regarding the all-expense-paid seminar in Arizona" and also "spoke to Correa and Crespo about whether they would attend the seminar." *Id.* at 11. However, ALJ Moss **concluded** that "[t]he flyer and the conversations do not violate *N.J.S.A.* 18A:12-24.1(c)."

As for the alleged violation of *N.J.S.A.* 18A:12-24.1(e), ALJ Moss noted that there was no testimony or evidence that Respondent made any personal promises to anyone connected to Woz U; Respondent's attendance at the "all-expense-paid seminar could have been done to gain a clearer understanding of the programs that Woz U offered"; Woz U was not a vendor of the Board at the time the seminar took place; Respondent's attendance at the seminar did not compromise the Board; and there was no testimony or evidence that Respondent "attempted to sway the other Board members to vote on a resolution to have Woz U become a vendor for the

District." *Id.* at 11. In fact, the only Board member who testified was Castillo, and she "did not testify that [Respondent] tried to persuade her to vote for Woz [U] as a vendor." *Id.* In addition, Respondent was not informed by Castillo that a resolution was necessary for him to attend the seminar in Arizona. *Id.* Finally, when a vote was held to determine whether Woz U should be a vendor, Respondent recused himself. *Id.* For these reasons, ALJ Moss **concluded** that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e).

Finally, and regarding the alleged violation of *N.J.S.A.* 18A:12-24.1(f), ALJ Moss found that "[t]here was no evidence or documentation that Respondent had a prior business relationship with Woz U or anyone related to Woz U." *Id.* at 12. Although Respondent and Garner "knew each other," there was "no testimony as to how they knew each other or the extent of their relationship." *Id.* There was also no evidence offered to show that Respondent surrendered his independent judgment to Woz U. *Id.* According to ALJ Moss, "[g]oing to the all-expense-paid seminar in Arizona and recusing himself on the vote to determine if Woz U would be a vendor to the Board without more evidence is not enough to show that [Respondent] surrendered his independent judgement to anyone." *Id.*

ALJ Moss also noted that although the all-expense-paid seminar was offered to Respondent "and others in the District," and that Respondent was "the only one from [the District] who went" to the all-expense-paid seminar, there is "no evidence that [Respondent] used the school to get the all-expense-paid seminar in Arizona." *Id.* Therefore, ALJ Moss **concluded** that Respondent did not violate *N.J.S.A.* 18A:12-24.1(f).

Based on the above, ALJ Moss **ordered** that "the petition that [Respondent] violated *N.J.S.A.* 18A:12-24.1(c), [*N.J.S.A.* 18A:12-24.1](e), and [*N.J.S.A.* 18A:12-24.1](f) be **denied**."

III. Exceptions

In **Complainant's Exceptions to the Initial Decision** filed on January 6, 2020, he disputes ALJ Moss's summary of the testimony provided by witnesses at the hearing. More specifically, Complainant disagrees with the summary of Crespo's testimony, namely, "[Respondent] sent [Mr.] Crespo a flyer about the conference in Arizona prior to the January 31, 2018, meeting stating, 'you should go to this.'" *Initial Decision* at 3. According to Complainant, "What was actually said in an email from [Respondent] dated January 30, 2018 at 8:46 pm to Mr. Eric Crespo 'you guys need to be on this.'" Complainant maintains that "you should do this implies" that it is a recommendation, but how it was actually stated, in the email, does not suggest it is a recommendation.

Also, with regard to Crespo's testimony, ALJ Moss found that "Crespo did not initially believe the free program was offered as a hook for the Board to buy other programs from Woz U that were not free." *Id.* Complainant argues that in Crespo's report, which is included in P-1, Crespo notes, "the additional products offered were at a cost and the focus of our January 31 meeting." Complainant further notes that Crespo's report states, "On February 2[], I received a phone call from Jose Correa inquiring about my availability to attend the conference in Arizona. I declined any interest ... I communicated with, my Deputy Superintendent ... She informed both myself and Jose that the conference was a conflict of interest." Complainant maintains that after reading Crespo's report and speaking with him, Crespo believed that the "free program eventually would be used as a hook for offering a paid program."

Regarding Gaurlich's testimony, Complainant disputes ALJ Moss's summary that "Gaurlich was not offered an expense-free trip to the Arizona Seminar." *Id.* at 4. Complainant contends contrary to what ALJ Moss found, Gaurlich's official report (P-3) contains a statement which reads, "[Respondent] mentioned being interested in attending the Arizona conference and asked if I would be interested." *See*, P-3.

As for the summary of his own testimony, Complainant disputes ALJ Moss's statement that "[Complainant] does not know if Shaffer is Capers's boss." *Id.* at 6. Complainant notes that the District was a "State run district and in the process Superintendent Shafer would have the final say." Complainant asserts that "it is also ridiculous to think after being told by Superintendent Shafer to cooperate with all State agencies I would somehow decide to bring charges against [Respondent] on my own."

Finally, Complainant maintains "If this recommendation is allowed to stand without any penalty, it will virtually open up Pandora's Box to allow board members to accept free expense paid trips for vendors or potential vendors. Also, what chance would a private citizen have going up against top law firms."

In **Respondent's reply to Complainant's Exceptions** filed on January 13, 2020, he contends that "[a]lthough [C]omplainant purports to contest many of [ALJ] Moss's findings of fact, he actually takes issue with the testimony memorialized in [ALJ] Moss's opinion." Respondent further contends that ALJ Moss did not "find any facts with which [C]omplainant takes issue," and even if she did find such facts, "her legal analysis does not rest on or even mention them." Respondent argues that ALJ Moss's findings of fact and legal conclusions are "fully supported by the record" and, therefore, Respondent requests that the Commission adopt the Initial Decision.

IV. Analysis

For the reasons more fully detailed below, and following a careful, thorough, and independent review of the complete record, including all of the testimonial and documentary evidence in the record, the Commission **adopts** ALJ Moss's findings of fact, but **rejects** ALJ Moss's legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), or *N.J.S.A.* 18A:12-24.1(f). In rejecting ALJ Moss's legal conclusions, the Commission finds that Complainant has proven, by a preponderance of the credible evidence, that Respondent's conduct violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f).

Summary of the Remaining Allegations in the Complaint

Complainant, then "Executive Director of School Security, Internal Investigations, Fleet Management, and Transportation" for the District, asserts that, in Respondent's capacity as a Board member, he (Respondent) attended an "unauthorized" conference in Scottsdale, Arizona, and all costs were paid by a District vendor or a potential District vendor. In the course of Complainant's investigation, he learned that the District's "security department" had transported Respondent to the airport because it was believed to be an "authorized" and Board approved trip; however, when it was discovered to be an "unauthorized" trip, Respondent was told he would

need to arrange for his own transportation from the airport. Complainant further states that Respondent had prior "business dealings" with the sales team of the vendor that were unrelated to the District. Complainant's investigation also revealed that the Superintendent and Deputy Superintendent emailed several members of the District's staff and specifically advised them not to attend the conference. When one of the recipients of this e-mail, Mr. Jose E. Correa (Director of Instructional Technology and Media Services), informed Respondent that he (Mr. Correa) was not attending the conference, Respondent purportedly replied, "I'm still going." When Mr. Correa then advised Respondent that the District was "considering purchasing Woz U coding platform," Respondent allegedly replied, "I will recuse myself from voting." Ultimately, Respondent was the only District employee who chose to attend the conference without any formal approval by the Board.

Based on this information, Complainant alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(c) because he had prior business with the sales team of the vendor and, as a result, had a conflict of interest which precluded him from attending the conference in his capacity as a Board member, and with all costs paid by the vendor; *N.J.S.A.* 18A:12-24.1(e) because due to his conflict of interest, his attendance (private action) compromised the Board; and *N.J.S.A.* 18A:12-24.1(f) because his independent judgment was compromised due to his prior business dealings and relationship with the vendor.

Violation of N.J.S.A. 18A:12-24.1(c)

N.J.S.A. 18A:12-24.1(c) requires a school board member to abide by the following: "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." As set forth in *N.J.A.C.* 6A:28-6.4(a)(3), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(c) shall include evidence that Respondent took Board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to Respondent's duty to (i) develop the general rules and principles that guide the management of the school district or charter school, (ii) formulate the programs and methods to effectuate the goals of the school district or charter school, or (iii) ascertain the value or liability of a policy.

Based on the testimonial and documentary evidence in the record, it is clear that, in his capacity as a Board member, Respondent took actions that were unrelated to his duties and responsibilities as a Board member in violation of *N.J.S.A.* 18A:12-24.1(c). Even if, as indicated by ALJ Moss, Respondent's action in "bringing to the District's attention a coding curriculum program [is] consistent with being on the curriculum committee," his ensuing advocacy for the potential vendor, especially when Respondent had a pre-existing - yet not completely defined - relationship with a representative of the company is problematic. In this regard, and after alerting certain members of the District's administration about the "free" courses that could be provided, Crespo reported that Respondent "encouraged the implementation of the product in [the District's] schools in fall," which was only a few months later. P-1 at 1. Crespo advised Respondent that, before any product could be implemented, a thorough analysis, among other things, would need to be completed. *Id.* Several months later, and immediately following a telephone conference between District administrators and the "potential vendor," and which did not include Respondent, he (Respondent) "appeared at [Crespo's] office," "discussed the conference call," and "requested [that District administrators] inquire about a presentation at the Board Workshop meeting." *Id.* In addition, and before members of the District's administration

could again meet with the potential vendor, Respondent "wanted to provide the rest of the [B]oard exposure to the product." *Id.* at 2. Because this request was not made by the Department of Academic Services, but rather by Respondent, Crespo alerted the Chief of Staff about the request. *Id.*

It is also not reasonable to conclude that, even if "bringing to the District's attention a coding curriculum program [is] consistent with being on the curriculum committee," Respondent's subsequent acceptance of and attendance at an all-expense-paid seminar in Arizona, at the expense of a "potential vendor," falls within the scope of his duties and responsibilities as a Board member. There is no legitimate reason for an individual Board member to accept and attend an all-expense-paid seminar in order to learn about a product(s), especially when every other individual to whom the offer was extended, including the District administrators who are ultimately the ones responsible for identifying and implementing such products, relied on the advice of the legal department, or the Superintendent, and declined to accept and attend the all-expense-paid seminar. *Initial Decision* at 3-5, and 9. Individual Board members do not have a role in vetting potential vendors in this way, or recommending educationally-related products or services to the very people, namely the District's educational professionals, who chose not to attend the all-expense-paid seminar. District administrators, and even Board members, who are interested in learning more about the services, courses, or program that a potential vendor can provide can do so in a myriad of ways, none of which, and critically important, require traveling across the country to attend a seminar that is paid for by the "potential vendor" at an estimated cost of several thousand dollars. P-6. Importantly, and although not admitted by Respondent, he recognized that his acceptance of, and attendance at, the all-expense-paid seminar constituted a conflict because he conceded he would recuse from any vote(s) regarding Woz U in the future. If acceptance of and attendance at the seminar was not a conflict, Respondent would not have acknowledged the need to recuse.

In short, by requesting that a course/program be implemented before it was fully analyzed by the District's administration; requesting that a course/program be presented to the Board *before* the Department of Academic Services believed it was appropriate to do so; and accepting and attending an all-expense-paid-seminar in Arizona with the foresight that such acceptance and attendance would preclude him from being involved in any vote(s) regarding Woz U, Respondent took actions unrelated to his duties and responsibilities as a Board member. Accordingly, Commission **rejects** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c).

Violation of N.J.S.A. 18A:12-24.1(e)

N.J.S.A. 18A:12-24.1(e) requires a school board member to comply with the following: "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." Pursuant to *N.J.A.C.* 6A:28-6.4(a)(5), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(e) shall include evidence that Respondent made personal promises or took action beyond the scope of his duties such that, by its nature, had the potential to compromise the Board.

For all of the reasons more fully enumerated above, Respondent's request that a course/program be implemented before it was fully analyzed by the District's administration; request that a course/program be presented to the Board *before* the Department of Academic

Services believed it was appropriate to do so; and acceptance of and attendance at an all-expense-paid-trip to Arizona *after* he was told that at least one other District administrator was not attending; and recognition that his acceptance and attendance of the all-expense-paid seminar constituted a conflict (because he knew he would have to, and did, recuse from a vote(s) involving Woz U), constituted action beyond the scope of his duties as a Board member. Moreover, Respondent's actions could have compromised the Board's ability to contract with Woz U for free and/or cost-based programs, services, or courses, and could have compromised the public's opinion about the ethics and integrity of the Board when it comes to the appropriateness of accepting gifts from vendors, potential vendors, or from any entity which may provide or offer to provide goods or services to the Board. Because Respondent accepted and attended the all-expense-paid seminar in his capacity as a Board member, it could appear as if the Board had authorized or sanctioned his attendance when, in fact, the chief school administrator specifically recommended that Respondent not attend. *Initial Decision* at 9.

Therefore, the Commission **rejects** the ALJ's conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e).

Violation of N.J.S.A. 18A:12-24.1(f)

N.J.S.A. 18A:12-24.1(f) requires a school board member to abide by the following: "I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends." As set forth in *N.J.A.C.* 6A:28-6.4(a)(6), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(f) shall include evidence that Respondent took action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause; or evidence that Respondent used the schools in order to acquire some benefit for himself, a member of his immediate family, or a friend.

Because (1) Respondent was offered the opportunity to attend an "all-expense-paid" seminar in Arizona from a potential vendor to the Board, (2) the offer was extended to Respondent because of his membership on the Board, and (3) Respondent, in his capacity as a member and representative of the Board, accepted and attended an all-expense-paid seminar that, as estimated by Complainant, cost several thousand dollars, it is beyond dispute that Respondent used his position as a member of the Board to acquire a benefit for himself, namely a "free" trip to Arizona. P-6.

Consequently, Commission **rejects** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(f).

V. Decision

For the reasons more fully detailed above, the Commission determines to **adopt** ALJ Moss's findings of fact; to **reject** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c); to **reject** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e); and to **reject** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(f).

VI. Penalty

Based upon the conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f), the Commission must now turn to the issue of penalty. Pursuant to *N.J.S.A.* 18A:12-29, the Commission is authorized to recommend a penalty which ranges from reprimand, a non-public admonishment, to removal. The Commission recognizes that removal is the harshest form of penalty and, as such, reserves it for the most extreme of cases. In this case, the Commission believes that removal is the only penalty that can be recommended to the Commissioner of Education (Commissioner).

In its review of the record, it is clear to the Commission that Respondent was overly involved in ensuring that the District used a service(s) or program(s) offered by Woz U. As discussed in greater detail above, it was Respondent who recommended the "free" course/program to the District's administrators; it was Respondent who asked for the course/program to be implemented before it had been analyzed by the appropriate District's administrators; it was Respondent who asked for the course/program to be presented to the full Board *before* District's administrators thought it appropriate to do so; it was Respondent who had a "relationship" with the representative from Woz U; it was Respondent, and only Respondent, who accepted and attended an all-expense-paid seminar in Arizona to learn more about products and services that could be implemented in New Jersey; and it was Respondent who recognized that his acceptance and attendance at the all-expense-paid seminar created a conflict requiring recusal. It is also worth noting that at the time Respondent accepted and attended the all-expense-paid seminar in Arizona, he had already vigorously lobbied for the courses/programs offered by Woz U to be implemented in the District and, therefore, there was no justifiable reason for him to accept and attend the seminar to "learn more" – Respondent had already been convinced that the courses/programs were needed in the District and, as such, had already made his decision.

Moreover, acceptance of anything that is of any value, whether a good, product, or service, from any entity that is currently providing, could provide, or may theoretically provide a good, product, or service to the board of education on which an individual serves is the epitome of unethical. In this case, Woz U was not unknown to the Board or the members of its administrative staff, as it had already provided, *as a result of* Respondent's referral, at least one live presentation in the District about the service(s) it could provide. In addition, and following this presentation, members of the District's administration (Crespo and Graulich) were actively communicating with Woz U, via e-mail, about how, and if, the company could serve the needs of the District's students. P-3. Of particular importance, these communications occurred prior to the start of the all-expense-paid seminar.

Respondent's acceptance of and attendance at the all-expense-paid seminar in Arizona is exacerbated by the fact that the chief school administrator specifically recommended that Respondent not attend the seminar; at least one other administrator advised Respondent he would not attend the seminar; and Respondent recognized that his acceptance and attendance at the all-expense-paid seminar created a conflict because he agreed to, and did, recuse from any vote(s) involving Woz U. Furthermore, Respondent had ample time between the time the all-expense-paid seminar was offered (January 31, 2018), and the date of the seminar (February 20, 2018), to fully vet and receive clearance to attend (which he ultimately did not receive). Instead, and when the chief school administrator recommended that he not attend, Respondent blatantly disregarded

her recommendation, and created a self-serving solution, namely recusal after acceptance of a gift.

If the Commission does not recommend the harshest form of penalty available, namely removal, neither board members nor administrators would be deterred from accepting a gift, of whatever value, from a current vendor, prospective vendor, or hypothetical vendor. Instead, board members and administrators would merely have to weigh the cost associated with a reprimand, censure, or even a suspension, with the benefit of receiving a gift. In other words, if school officials are permitted to accept even a nominal gift without the threat of removal, there is nothing which would prohibit the unethical acceptance of gifts. Consequently, the Commission recommends a penalty of ***removal***.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

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

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

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: March 17, 2020

Resolution Adopting Decision in Connection with C48-18

Whereas, at its meeting on October 30, 2018, and following its ruling on Respondent's Motion to Dismiss in Lieu of Answer, the School Ethics Commission (Commission) voted to transmit the remaining allegations to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, following hearings on October 3, 2019, November 4, 2019, and December 5, 2019, the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss), issued an Initial Decision dated December 23, 2019; and

Whereas, in the Initial Decision, it was determined that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), or *N.J.S.A.* 18A:12-24.1(f); and

Whereas, on January 6, 2020, Complainant filed Exceptions; and

Whereas, on January 13, 2020, Respondent filed a Reply to Complainant's Exceptions; and

Whereas, at its meeting on January 21, 2020, the Commission voted to table continued discussions; and

Whereas, at its meeting on February 25, 2020, the Commission discussed adopting ALJ Moss's findings of fact; rejecting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), or *N.J.S.A.* 18A:12-24.1(f); and recommending a penalty of removal; and

Whereas, at a special meeting on March 17, 2020, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on February 25, 2020; and

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

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting on March 17, 2020.

Kathryn A. Whalen

Kathryn A. Whalen, Director
School Ethics Commission



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EEC 17338-18
AGENCY DKT. NO. C48-18

JAMES SMITH,

Petitioner,

v.

EMMANUEL CAPERS, PATERSON BOARD OF EDUCATION, PASSAIC COUNTY,

Respondent.

James Smith, pro se

John C. Whipple, Esq., for respondents (Whipple Azzarello, attorneys)

Record Closed: December 5,2019 Decided: December 23, 2019

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioner James Smith (Smith) asserts that Emmanuel Capers (Capers), an elected member of the Paterson Board of Education (Board) and Paterson Township Board, violated the rules of ethics for school board members.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) and filed on December 4, 2018. The matter was heard on October 3, 2019, November 4, 2019, and December 5, 2019.

TESTIMONY

Eric Crespo

Eric Crespo (Crespo) has certificates from the State of New Jersey for supervisor, principal, and administrator. He is presently the Superintendent of Weehawken. He was the Associate Chief Academic Officer for Paterson in 2017. As Assistant Chief Academic Officer he oversaw program content and materials in class. At that time Capers was a member of the Board. Capers was on the curriculum committee.

In July 2017, Capers informed Crespo about Accelerated Learning Pathways (ALP) courses for junior and senior high school students. The courses were for coding. The services for the juniors and seniors would be free. Capers wanted the program implemented. A telephone conference was held on October 25, 2017. Crespo, William Gaurlich, Capers, and Billy Gardner (Gardner), the director of community outreach for ALP, were on the call. At that time ALP merged with Coder Campus. Both of which merged into Woz U. Capers advocated for Woz U to do a presentation before the Board. Crespo never heard of ALP until Capers mentioned them.

On January 31, 2018, a meeting was held with Crespo, Gaurlich, Capers, Hodges, Joanna Tsimpedes, and representatives from Woz U. Woz U discussed all of its programs. It made a marketing presentation. Some of its programs were not free. Prior to the meeting Woz U representatives had visited Eastside High School. A conference in Arizona was discussed at the meeting. It would be fully paid for by Woz U.

Capers sent Crespo a flyer about the conference in Arizona prior to the January 31, 2018, meeting stating, "you should go to this." Crespo did not fill out the papers for the conference. He told Capers that he could not go. Crespo was advised by Eileen Shaffer (Shaffer), the Superintendent of Paterson, not to go to the conference because there was no relationship with Woz U at that time and Woz U was a potential vendor. Crespo was not going to go on the trip because he did not want to be away from his family.

Woz U was concerned that the juniors and seniors in Paterson's coding skills were not up to par. There was a program to get the skills up to par, but it was not free. The Board did not contract with Woz U. Crespo did not initially believe the free program was offered as a hook for the Board to buy other programs from Woz U that were not free.

Woz-U offered prices for coding kits for first to tenth grade. The cost was $5,500 for the first thirty kits and ten dollars for students after thirty. They also offered prices for drone kits for third to tenth grade. The costs were the same: $5,500 for the first thirty kits and ten dollars for kits over thirty. Teaching coding to students is important.

Correa, Capers, Crespo, and Gaurlich were offered the trip to the Arizona conference.

Joann Tsimpedes

Tsimpedes is the Assistant Superintendent of Academic and Special Services in Paterson. There was a conference call on July 27, 2017, with ALP, Crespo, Capers, and herself. At that time there was no cost attached to the program. Capers brought ALP to their attention. She was present at the January 31, 2018, meeting with Woz U. Woz U provided a coding and drone program demonstration. She was not offered an expense-paid trip to Arizona by Woz U. The conference was mentioned at the end of the presentation. The policy is not to take free trips from vendors. No one from the district went to the conference in Arizona.

William Gaurlich

Gaurlich is a social studies teacher and supervisor of college and career readiness in Paterson. On February 26, 2018, Tsimpedes and Crespo were his supervisors. He was told that people were coming from Arizona—Woz U—to discuss computer curriculum. A presentation by Billy Garner of Woz U took place at the central office of the District. The presentation included free-online coding modules for juniors and seniors in high school. Woz U had coding kits for first to tenth grades. Those kits cost $5,500 for the first thirty and ten dollars for each additional student. Gardner stated that he had met Capers in Arizona. Gaurlich was not offered an expense-free trip to the Arizona Seminar. He never told Capers that he could not go on the trip.

After the presentation, Capers asked Gaurlich if he knew about the Arizona seminar. Gaurlich said no and Capers forwarded him the information. Gaurlich does not recall being told that he could not attend the conference. He received the price menu from Woz U.

Gaurlich was charged by Crespo to find ways to bring computer programing programs to the District. On August 28, 2018, there was a resolution signed by Gaurlich as well as the business department and legal department representative that approved the free online use of the Woz U program. Woz U did not complete the vendor contract. Gaurlich was interested in pursuing the free and paid content of Woz U. The resolution only addressed the free content. The District never used the free content from Woz U. He intended to use Woz U but the vendor agreement was not completed.

Gaurlich spoke with Pamela Powell, the school's liaison with the Board. He received permission to contact Capers to determine if Capers wanted to be included in meetings and updated about Woz U. Woz U wanted to do a presentation before the Board. This did not occur. Capers asked him about that proposed presentation. Gaurlich thought it was strange for Woz U to fly in from Arizona to do a presentation.

Gardner was the contact person for Woz U. There were emails between Gaurlich and Gardner discussing the products and services Woz U provided. Capers was not part of those emails.

Jose Correa

Correa is the director on instructional technology at Paterson. He was present at the January 31, 2018 conference, with the representatives from Woz U. Computer coding programs were discussed at the meeting. A seminar in Arizona, all expense paid, was discussed at the meeting. There were four all-expense-paid spots at the Arizona Seminar. Crespo, Gaurlich, Correa, and Capers were offered the spots. He received an email from Shaffer to look into the Arizona seminar. The legal department stated that it might be a conflict therefore do not attend. He was told do not let the vendor pay for airfare and hotel, and the individual Board members should follow the same protocol.

Correa told Capers that he was not going to the seminar in Arizona. Capers stated that he was still going. Correa asked Capers if a vote on Woz U came up what would he do. Capers said that he would recuse himself.

James Smith

Smith was a police officer for twenty-six years. Since he retired, he became executive director of security and internal investigation for the District. He held that position for twelve years.

Smith was contacted by Superintendent Shaffer on February 20, 2018, to determine if Capers went on an unauthorized trip to Arizona. He also spoke to Oshin Castillo (Castillo) about the investigation. He contacted Correa on February 23, 2018. Correa stated that Capers encouraged him to go to the seminar in Arizona when they met on February 5, 2018, at the Board of Education offices. Correa informed Capers that he was not going to the all-expense-paid seminar in Arizona.

Capers went to the all-expense-paid seminar in Arizona from February 20, 2018, to February 23, 2018. Smith checked to see if there was a Board resolution allowing Capes to go the seminar. There was no resolution. Smith was asked by the Superintendent to interview Capers, but Capers declined. At the time Capers went to the seminar, Woz U was not a vendor of the Board. Employees of the Board were directed not to go to the all-expense-paid seminar in Arizona. Capers is an elected official. He is not an employee of the Board. Smith does not know if Shaffer is Capers's boss.

As part of an investigation, Smith determines if the subject resides in Paterson. He checks the voting record to determine if the subject voted in Passaic or Bergen County. Shaffer became aware of Smith checking the voting record of Capers. He received a letter of reprimand and was told not to check Capers voting record or go to Capers's home. The letter of reprimand was retracted.

All of the Board members were offered to go to the seminar in Arizona, all expense paid. The Board Secretary and Superintendent told Capers not to go to the seminar. Smith received threats during the investigation. He reported the threats to Shaffer.

Smith can bring charges if he is directed by the Board or the Superintendent. Smith signed charges against Capers. Smith did not receive any document from the Board or the Superintendent to institute the charges. The Board sent the charges to the State in an incomplete form. On March 27, 2018, Smith did the complete report and forwarded copies to the Board President Castillo, Melissa Peirce, and Shaffer. He was told by Shaffer that the report would be sent to the ethics office in Trenton. Shaffer told him if he was contacted by the State to cooperate. The ethics panel contacted Smith stating that it needed a charge form. He filled out a charge form for the ethics office. Smith did not inform the Board or Shaffer that he filled out the charge document for the ethics office. The report states that Capers committed a violation. The report did not specify which part of the statute Capers violated. The decision to bring charges is a Board decision. Smith stated that his report was sent to the State to determine if charges should be brought.

Gardner had previously worked with Capers. Woz U became a vendor of the Board on August 29, 2018. They were a vendor for free services. When the Board voted on the Woz U resolutions, Capers did not vote. Capers is on the Board's curriculum committee, which makes recommendations to the full Board. Capers had Woz U fly in to Paterson to give the District free software. Smith did not investigate Woz U or its products.

Board Members and Commissioners approach vendors and are approached by vendors. Smith feels that it is improper. The Board determines which vendors give presentations.

Catherine Whalin spoke to a male investigator in Trenton. She informed Smith that for the complaint to continue, it needs to be on a complaint form. Whalin did not tell Smith to contact the Board or Shaffer.

Oshin Castillo

Oshin Castillo is a member and president of the Board. On February 20, 2018, she asked Smith to investigate Capers's trip to Arizona. Prior to this she spoke to Shaffer and the Board attorney asking how she should proceed. She was told by Shaffer of Capers going to Arizona while Capers was in Arizona.

Castillo was not offered the all-expense-paid trip to the seminar in Arizona. She does not know of any other Board member that was invited to go other than Capers. Castillo does not recall Capers asking for Woz U to do a presentation to the Board. She did not tell Capers that a resolution was needed for him to go to the seminar.

Castillo submitted Smith's report to the ethics office, the Commissioner of Education, and the other Board members to make sure the laws and policies were being followed. She requested advise on how to move forward. Castillo spoke to Capers after receiving Smith's report to know what was going on. She did not know that Woz U flew in for a presentation.

Eileen Shaffer

Shaffer is the Superintendent of the Paterson School system. On February 20, 2018, she spoke to Castillo and the Board's general counsel regarding Capers going on an all-expense-paid seminar to Arizona. She asked Smith to investigate and contact Castillo. Prior to February 20, 2018, Shaffer spoke to other Board members regarding Capers all-expense-paid seminar in Arizona. Castillo brought the issue to her attention.

Shaffer knew that Correa was offered the all-expense-paid trip to the seminar. She does not know the requirement for receiving all expense paid to the seminar in Arizona. She did not know that Capers asked for Woz U to do a presentation prior to the trip, she did not have anyone look into the seminar since it was free. She spoke to Capers and recommended that he not go to the seminar because Woz U could be a vendor. Woz U became a vendor of the Board for free services. Shaffer knew that Woz U came to Paterson to discuss the services they provided.

FACTUAL DISCUSSION

I **FIND** the following **FACTS** in this case.

Capers is an elected member of the Paterson School Board. He was a member in 2017. He was on the curriculum committee. Crespo was the Associate Chief Academic officer in Paterson in 2017-2018. In July 2017, there was a conference call with Capers, Crespo, and Tsimpedes, the Assistant Superintendent of Academic and Special Services in Paterson. Capers brought to their attention a possible vendor which at that time was the ALP, which later became WOZ U, that would provide free coding courses for juniors and seniors. Woz U also sold educational programs and drone programs.

On January 31, 2018, Capers, Commissioner Hodges, Crespo, Correa, Gaurlich, and Tsimpedes met with a Woz U representative, Billy Gardner. Gardner had previously known Capers and did a marketing presentation of Woz U's programs. Woz U also had programs that were not free which included coding for first to tenth grades.

Woz U was concerned that the Paterson juniors and seniors coding skills were not up to par. It offered a program to get their skills up to par but that program was not free.

Gardner mentioned that there would be a seminar in Arizona that they could attend, which would be fully paid for by Woz U. Prior to the meeting Capers sent Crespo a flyer regarding the seminar. Correa was advised by Shaffer to look into the seminar. The legal department informed him that there might be a conflict. He was also informed to not let Woz U pay for the airfare and hotel. He was advised that Board members should follow the same protocol.

Crespo was advised by Superintendent of Paterson Shaffer not to go to the seminar because Paterson did not have a relationship with Woz U and Woz u was a potential vendor. Correa told Capers that he was not going to the seminar. Capers stated that he was going to the seminar and that if a vote came up on Woz U at the Board, he would recuse himself. Shaffer spoke with Capers recommending that he not go to the seminar because Woz U could become a vendor for the Board. No employee of the District went to the all-expense-paid seminar in Arizona. Capers is not an employee of the District, he is an elected official.

President of the Paterson Board of Education Castillo was told by Shaffer that Capers went to the all-expense-paid seminar sponsored by Woz U. She consulted with Shaffer and the Board Attorney and requested an investigation. Smith is an investigator for Paterson. He was contacted by Castillo and Shaffer investigate Capers going on the all-expense-paid seminar to Arizona sponsored by Woz U.

Capers went to the seminar from February 20, 2018, to February 23, 2018. Capers declined to be interviewed by Smith. Smith's investigation included checking if Capers resides in Paterson and checking his voting records. Smith was told by Shaffer not to check Capers's voting records or go to Capers's house.

Smith completed his investigation on March 27, 2018. He forwarded the report to Castillo, Pierce, and Shaffer. Castillo submitted Smith's report to the State Ethics Office, the Commissioner of Education, and other Board Members. Smith was

contacted by the ethics office because it needed a charge form. Smith completed and sent the charge form to the ethics office without consulting Castillo or Shaffer. The report was sent to the ethics office to determine if charges should be brought against Capers.

On August 28, 2018, there was a resolution approved by the legal and business departments for the free use of the Woz U program. Capers recused himself from the vote. Woz U did not complete the vendor contract.

Capers was not told by Castillo that a resolution was necessary for him to go to the seminar in Arizona.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:12-24.1(c) provides:

> A school board member shall abide by the following Code of Ethics for School Board Members:
>
> . . .
>
> c. 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.

In this matter Capers brought Woz U to the District's attention. Woz U had a program that would offer free coding services to high school juniors and seniors. Being a member of the curriculum committee, Capers bringing to the District's attention a coding curriculum program would be consistent with being on the curriculum committee. Capers bringing Woz U to the attention of the District is not framing policy or plans. It is providing information regarding a program that the District could consider using. There was no documentation or admission by Gardner or Capers that Capers and Gardner had a previous business relationship.

Capers sent out a flyer regarding the all-expense-paid seminar in Arizona. He spoke to Correa and Crespo about whether they would attend the seminar. The flyer and the conversations do not violate N.J.S.A. 18A:12-24.1(c).

I **CONCLUDE** Capers did not violate N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(e) provides:

> A school board member shall abide by the following Code of Ethics for School Board Members:
>
> . . .
>
> e. 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.

There was no testimony or evidence that Capers made any personal promises to anyone connected to Woz U. Capers going to the all-expense-paid seminar in Arizona could have been done to get a clearer understanding of the programs that Woz U offered. Woz U was not a vendor of the Board at the time of the seminar. Capers going to the seminar did not compromise the Board. There was no testimony or evidence that Capers attempted to sway the other Board members to vote on a resolution to have Woz U become a vendor for the District. The only testimony from a Board member was from Castillo. She did not testify that he tried to persuade her to vote for Woz u as a vendor. Capers was not informed by Castillo that a resolution was necessary for him to attend the all-expense-free seminar. When the vote to determine if Woz U should be a vendor for Paterson was held, Capers recused himself.

I **CONCLUDE** Capers did not violate N.J.S.A. 18A:12-24.1(e).

N.J.S.A. 18A:12-24.1(f) provides:

> A school board member shall abide by the following Code of Ethics for school Board Members
>
> . . .
>
> f. I will refuse to surrender my independent judgement to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

There was no evidence or documentation that Capers had a prior business relationship with Woz U or anyone related to Woz U. Capers knew Gardner, but there was no testimony as to how they knew each other or the extent of their relationship. There was no evidence that Capers surrendered his independent judgment to Woz U. Going to the all-expense-paid seminar in Arizona and recusing himself on the vote to determine if Woz U would be a vendor to the Board without more evidence is not enough to show that Capers surrendered his independent judgement to anyone.

The seminar was offered to Capers and others in the District. Capers is the only one from Paterson who went to the seminar. There is no evidence that Capers used the school to get the all-expense-paid seminar in Arizona. Woz U offered four slots to the all-expense-paid seminar.

I **CONCLUDE** Capers did not violate N.J.S.A. 18A:12-24.1(f).

ORDER

Based on the foregoing, it is **ORDERED** that the petition that Capers violated N.J.S.A. 18A:12-24.1(c), (e), and (f) be **DENIED**.

I hereby **FILE** my Initial Decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, P.O. Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12-23-19

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: Dec. 23, 2019

Date Mailed to Parties: Dec. 23, 2019

ljb

WITNESSES

For Petitioner:

Oshin Castillo

Eileen Shaffer

For Respondent:

Eric Crespo

Joanna Tsimpedes

William Gaurlich

Jose Correa

EXHIBITS

For Petitioner:

P-1 Memorandum from Eric Crespo to Smith dated February 23, 2018

P-2 Memorandum of Joanna Tsimpedes

P-3 Memorandum from William Gaurlich to Smith dated February 26, 2018

P-4 Paterson Public School District Resolution dated July 19, 2018

P-5 Letter from Jose Correa to Smith dated February 23, 2018

P-6 Letter from Smith to Oshin Castillo dated March 27, 2019

P-7 Text Between Smith and Oshin Castillo dated February 23

For Respondent:

247-20

NEW JERSEY DEPARTMENT OF EDUCATION

Agency Docket No.: 23-1/20
Ralph H. Colflesh, Jr., Esq.
Arbitrator

IN THE MATTER of TENURE CHARGES by

THE PISCATAWAY TOWNSHIP SCHOOL DISTRICT in the COUNTY OF MIDDLESEX,

Petitioner,

against

JENNIFER RESIL-JOHNSON,

Respondent.

Appearances
For Petitioner:
David B. Rubin, Esq.
David B. Rubin, P.C. Attorney at Law
Metuchen, New Jersey
For Respondent:
Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, P.C.
Newark, New Jersey

DECISION AND AWARD

Pursuant to NJSA 18A:6-10 and NJSA 18A:6-16, the undersigned Arbitrator was appointed to hear and determine the above captioned matter which was appealed to arbitration by tenured staff member Jennifer Resil-Johnson ("Respondent") after the Piscataway Township Board of Education ("Petitioner") terminated her employment.

Over Petitioner's objections, hearings were conducted using the ZOOM video conferencing platform on August 20 and 21, 2020 due to concerns about the COVID19 pandemic. During those hearings, both parties had an opportunity to call and confront witnesses, produce non-testimonial evidence, and make arguments. At the conclusion of the hearings, the

parties elected to submit post-hearing briefs in lieu of oral summations. The briefs have been received, and there being no procedural objections material to the substance of the case, this matter is ready for adjudication on its merits.

Background:

Respondent was employed by Petitioner as a substitute English teacher beginning late December 2004 at Petitioner's Conackamack Middle School and was eventually appointed as a permanent Language Arts/Literacy teacher, acquiring tenure in that position. That status is protected by what is known as the TEACHNJ Act adopted by the New Jersey legislature in 2012.

At some point Petitioner gauged her to be only a partially effective teacher,[1] an evaluation that caused her to be placed on Professional Growth Plans for the 2017-2018. Effective September 1, 2018, Respondent was moved from Conackamack to the Piscataway High School as an English teacher in a remedial behavior program called "Piscataway Students Seeking Success" (hereinafter "PS3"). Following similar evaluations of marginal effectiveness in subsequent years, Petitioner placed Respondent on such Plans for the 2018-2019, and 2019-2020 school years. Additionally, Respondent was subject to a salary increment withholding for the 2018-2019 school year and faced a threatened increment withholding for the 2019-2020 school year. Supporting all those actions were not only evaluations of poor teaching effectiveness but reprimands regarding deportment and classroom management in the 2017-2018 and 2018-2019 school years.

On or about December 19, 2019 Petitioner moved to end Respondent's employment and tenure based on her alleged conduct in the 2019-2020 school year. The claimed conduct included disregard for both Petitioner's cell phone use policy and its medication administration policy as well as making misrepresentations to Petitioner about such behavior, misuse of a sick day on November 15, 2019, and transporting a student in Respondent's personal vehicle that same day school day. Formal tenure charges were filed certified against her on December 20, 2019 and filed with the Commissioner of Education on January 22, 2020.

[1] Prior to the hearings in this matter, the undersigned granted Respondent's Motion in Limine to exclude evidence of any teaching ineffectiveness as that accusation was not cited as grounds for her removal. Those grounds only included conduct unbecoming both generally and by virtue of policy violations.

Respondent challenges Petitioner's allegations as unsupportive of removal.

Issue to be Determined:

Do Petitioner's charges justify Respondent's termination and removal as a tenured staff member under the TEACHNJ Act; and if not, what shall the remedy be?

Factual Contentions of Petitioner:

Petitioner called four witnesses at hearing, beginning with its Director of Human Resources, **Catherine Sousa**. Ms. Sousa's job responsibilities include personnel investigations and discipline, the latter of which involves recommending personnel penalties to upper level administration. (NT 12).

Ms. Sousa introduced B-5[2], an exhibit which she described as the "Conduct" section of the Petitioner's Employee Handbook, and Petitioner's Exhibit B-24. The latter bears the signature of Respondent signaling receipt of the Handbook and by implication, the "Conduct" rules. (NT 15-16). Ms. Sousa asserted the Handbook and Conduct rules are available throughout the District and on the District's website. (NT 17). As for B-4, Ms. Sousa testified that in Policy 5141.21 Petitioner's rules on the administration of medication to students is explained (NT 19). She pointed out that those rules cover prescription as well as non-prescription drugs (NT 20) and that a set of regulations that follow are more specific than the medication policy. Ms. Sousa testified that Respondent had admitted to her that she had administered medication to two students in school year 2019-2020. (NT 125-126). Petitioner's dictates do not authorize teachers to give drugs to students.

Ms. Sousa further identified B-2 and B-3. The former defines "conduct unbecoming" of a school employee and gives the Petitioner authority to take appropriate action in response to such behavior. The latter which lays out Petitioner's rules on the use of electronic communication by school staff. (NT 22). She contended the latter has been part of the Petitioner's conduct code since 2014. (NT 22, 23).

[2] References to exhibits herein are designated as "B_____" for Board (Petitioner) exhibits and "R_____" for Respondent Exhibits.

Turning to Petitioner's history with Respondent, which began with Respondent's hire in 2004 (NT 13), Ms. Sousa related that Respondent had been transferred from her job as a language arts/literacy teacher at Conackamack Middle School in June 2018 to a position in Petitioner's PS3 program at Piscataway High School.[3] (NT 24-25, 41, 111; B-12). Part of Respondent's duties there included motivating students to attend and stay in school. (NT 111). In addition, Ms. Sousa referenced B-11 which informed Petitioner that her salary increment raise was being withheld, *i.e.*, denied, for school year 2018-2019. (NT 124-125). Importantly, Ms. Sousa introduced a Professional Growth Plan for Respondent which was effective in the 2017-2018 school year that stated, *inter alia*, "Curtail all use of your cell phone or other personal business to your designated lunch/prep periods in the faculty room or in an area which will reliably be free from student use." (NT 45; B-29).

On cross-examination, Ms. Sousa agreed that the policy does not contain an absolute prohibition against communicating with students by cell phone and that pupil transportation to and from school is "most definitely" a *bona fide* matter of school business as is pupil health and safety. (NT 113, 115, 118-119, 130; *c.f.*, 116)[4]. She said she was unaware of any teacher having their tenure revoked for a "singular" use of a cell phone during the school day. (NT 121, 122, 123-124). However, she contended that she knew of staff members who had been disciplined for cell phone use during the school day. (NT 122).

In addition to the foregoing,, Ms. Sousa recounted that at the beginning of the 2017-2018 school year Petitioner sent Respondent a memorandum which Ms. Sousa characterized as a "written reprimand" (NT 45; B-9) for allegedly tolerating egregious student misbehavior in her room at Conackamack.

In the 2018-2019 school year, Ms. Sousa stated, Respondent was chastised in a memo for leaving her classroom allegedly unattended for a period of just under one minute. (NT 49; B-14). About five weeks later, according to Ms. Sousa, a meeting was held with Respondent, Superintendent of Schools Frank Ranelli, Ms. Sousa, and a union representative named Ted

---

[3] Ms. Sousa described the PS3 program as a self-contained classroom for problem students with attendance, high-risk behavior, and conduct issues in which the lead teacher, in this case Respondent, works with an aide and subject matter specialists who circulate in and out of the room to actually instruct pupils. (NT 42).

[4] Summarizing notes recorded at an interview with Respondent which Ms. Sousa did not attend, the latter said Respondent had told Petitioner that she gave her cell phone number to students for transportation and emergency usage. (NT 127). In connection with the latter use, a student had informed Respondent via cell phone text that he had seriously assaulted another student. (NT129). As for the former, Ms. Sousa noted a text to and from Respondent relating to bussing to school. (NT 128).

Simonitis. (NT 51; B-16). A memorandum of that meeting (B-16) indicates that although the Petitioner was on the verge of again withholding a salary increment from Respondent for the 2019-2020 school year, Superintendent Ranelli refrained "in the interest of providing [Respondent] the opportunity to be successful in [her] relatively new assignment," i.e., the PS3 self-contained classroom. (B-16; NT 59).

That brought the parties to the 2019-2020 school year when, in November, Ms. Sousa said, she became aware of another problem with Respondent. This issue involved the review by Petitioner's Director of Administrative Services, Colleen Pongratz, of text messages sent to and from Respondent and some of her students in the PS3 program. (NT 60). That discovery resulted in Respondent being suspended, apparently with pay, for two days (NT 61) and two interviews of Respondent with administrators.

Ms. Sousa attended the first of those on November 26 and took notes. (B-16). Ms. Sousa testified about the portions of her notes that were admitted into testimony, namely the questions asked of and answers proffered by Respondent. Among the dialog between Respondent and Ms. Pongratz, Ms. Sousa recalled, was Respondent's claim that she only communicated with her students via cell phone about difficulties they were having with transportation to school.[5] But Ms. Sousa testified that she had since discovered that the claim was untrue. (NT 71, 85, 89). For instance, she testified to having seen a text from a student identified herein as "KP" that was given to her by Ms. Pongratz which Ms. Sousa indicated that KP and Respondent had exchanged texts about whether Respondent had Advil or not. (NT 86). Further, Ms. Sousa said the text messages indicated Respondent had given KP Advil and asked her not to tell anyone. (NT 87). Petitioner reported the administration of Advil to public agencies, but the agencies neither investigated nor took any action on the matter. (NT 132-133, 135, 136).

Further, Ms. Sousa contended she was present when Respondent was asked during an interview about test messages indicating she had taken one of her students, identified herein as "TW" shopping on a day Respondent had taken off on sick leave. (NT 89; B-21). Ms. Sousa noted on cross-examination that teacher sick leave use can be subject to a showing of medical excuse, but none was required by Petitioner for the day in question. (NT 119-120). Ms. Sousa averred that Respondent explained in an interview with administrators that she had learned TW was claiming she had no appropriate school clothes and therefore Respondent picked her up in

[5] Pupils in the PS3 program are brought to school each day on a dedicated bus used only for them.

Respondent's private vehicle, took TW to breakfast, and then took her shopping . (B-17; NT 91-94). Ms. Sousa said Petitioner's policy regarding unbecoming conduct did not specifically proscribe transporting students in teacher's private vehicle. (NT 130).

In concluding her direct testimony, Ms. Sousa summarized the basis of Petitioner's tenure removal action as based on "the major issues." She described those as the administration of medication to students, sharing of Respondent's cell phone with students, theft of time by taking a sick day without evidence of illness or injury, and taking a student in her personal vehicle. (NT 106-107).

Petitioner's second witness was **Coleen Pongratz**, Director of Administrative Services, a position that directly supports the Superintendent of Schools as well as building principals and department heads. (NT 137). As did Ms. Sousa, Ms. Pongratz described the PS3 program as fitted for students with disciplinary and other issues that have not been remediated through less stringent measures. (NT 140-141).

Ms. Pongratz said she learned from another administrator in November 2019 that Respondent had exchanged text messages (BX 19) with students she supervised in the PS3 program. One set was exchanged the night before Ms. Pongratz learned of them and involved a fight between two boys. In those exchanges, a boy, referred to herein as AB, shared details of the fight with Respondent who in turn, voluntarily shared the messages with an administrator herself.[6] (NT 142, 144). Ms. Pongratz characterized the texts as an effort by AB to "reach out" to Respondent for assistance.[7] (NT 145). The messages revealed the fight was off school premises but that other students, including at two in the PS3 program witnessed it. (NT 155-156).

Ms. Pongratz then interviewed Respondent in the presence of High School Vice President Jonathan Bizzell, Ms. Sousa, school counsellor Shirley Aviles, and print shop teacher Ryan Ward. (BX 18; NT 146, 148, 149). Respondent's Association representative Ted Simonitis attended as well. (NT 154). During the interview, Ms. Pongratz and the other administrators discovered that Respondent had given her cell phone number to students who were both current and former members of the PS3 program. (NT 157, 158).

---

[6] As seen below, that administrator was Piscataway High School Vice Principal, Jonathan Bizzell.

[7] AB's texts indicate that he beat another student unconscious and was both remorseful and worried about the consequences of his actions. (BX 19).

In addition to the foregoing, Ms. Pongratz testified that during her investigation of the foregoing she found out from Respondent that Respondent had exchanged text messages with another student in the PS3 program whom Respondent had taken shopping in Respondent's car and treated to breakfast so that the student could buy clothes for school. On that day, Respondent was off on paid sick leave. (BX 21; NT 162-163, 164).[8] Ms. Pongratz stated that Respondent admitted that she had sent/received all the text messages in question (NT 169,170) and acknowledged that in writing **(BX 23).** (NT 171).

Turning to another basis on which Petitioner seeks tenure removal, Ms. Pongratz testified that teachers are generally not permitted to give medicine to students except epinephrine through an "EpiPen" for anaphylactic shock. Instead, the teacher is to refer the student to the school nurse. (NT 172-173). That prohibition extends even when a parent has given permission for teacher-administered medicine. (NT 173). Yet, Ms. Pongratz said Respondent admitted giving Advil to female students suffering menstrual discomfort. (NT 174).

Jonathan Bizzell, the Assistant Principal at Piscataway High School and Respondent's direct supervisor (NT 200), appeared as Petitioner's third witness. He testified that he and another Assistant Principal, Maria Cetta, prepared a memorandum (BX 14) asserting Respondent had left her PS3 classroom uncovered for a time on May 9, 2019 during which a disturbance occurred that required Respondent's request for school security. Mr. Bizzell said he received in turn a written response from Respondent dated June 3, 2019 (BX 15) in which Respondent claimed she had asked a teacher in an adjoining classroom connected by a door to her room to supervise her class and further contending she left her class for a medical emergency necessitating the use of a lavatory. (NT 196-197). Mr. Bizzell explained that during his investigation of the matter, Respondent contended to him that she had asked the other teacher to mind her class but did not claim that teacher did so. (NT 199).

He further testified that late in November 2019, Respondent contacted him and forwarded text messages concerning a fight her student, AB, had been in. (NT 200-201, 202 222,). The text messages detailing the fight and AB's concern about it (BX 19) led to Respondent's disclosure of other text messages to and from her students on a variety of topics. (NT 203). This led Mr.

[8] On cross-examination, Ms. Pongratz stated that Petitioner asked Respondent for medical support for taking sick leave that day and was told by the latter a note would be submitted, but it was not. (NT 183-184).

Bizzell to investigate "the depth of communication that [Respondent] had with her students via text." (N 204). During the investigation, Mr. Bizzell recalled, he and a Dean, Ms. Eyler, interviewed the student correspondents. (NT 207-211).[9]

On cross-examination, Mr. Bizzell said that he and Respondent had several conversations with AB's mother and said the three had agreed that Respondent could text with AB "through his mother," meaning that AB's mother had to be aware of the communication. (NT 223; *also see,* NT 224-225, 227). Further, Mr. Bizzell denied Respondent had authorization to text other students and further denied knowing before the AB fight that Respondent had been texting students. (NT 225-226). However, he conceded that Respondent could contact a parent without permission from Respondent's superiors. (NT 229). He further agreed with Respondent's counsel that he was not in the classroom in May 2019 when Respondent allegedly left her students unattended and only knew what he saw on security cameras in the room at the time. He said they did not show another adult present during Respondent's absence. (NT 230). Neither did he have what he termed "a formal discussion," nor did he "officially" speak with, the teacher whom Respondent claimed to have asked to cover her room because that teacher did not want to discuss the matter with him. (NT 230, 231, 232, 233). Finally, Mr. Bizzell said he was unaware whether other teachers had been the subject of tenure removal efforts because of cell phone use during the workday. (NT 246).

Petitioner's last witness was its Superintendent, **Dr. Frank Ranelli**. Dr. Ranelli agreed that many of the allegations contained in the tenure charges against Respondent were beyond the scope of his personal knowledge but claimed familiarity with others. (NT 251). Of the latter was a 2017-2018 evaluation report (BX 10) for which he personally conducted a classroom observation of Respondent (BX 10; NT 252). Dr. Ranelli noted that he observed and recorded that Respondent was not in her classroom until 4 minutes after the period was to begin despite knowing that Dr. Ranelli would be observing her sometime around the date of the actual observation. (NT 254). There was no one covering her class for that time. (254-255). In a discussion about her tardiness after his observation, Dr. Ranelli recalled, Respondent told him

[9] As hearsay on a dispositive matter and without corroboration, the statements purportedly taken from the interviewed students and marked at hearing as BX 20 were not admitted into evidence.

she thought she thought she had a 504 Plan[10] and that it covered a medical issue which forced her to use a lavatory unexpectedly. (NT 269-270, 271). Dr. Ranelli said that Respondent told him she had tried to get someone to cover her class at that time in accordance with policy that required contacting the school office first but was unsuccessful. (NT 273). He said she did not tell him she had first attempted to call the school office (273-274) and in fact admitted that she had not done so. (NT 275).

Dr. Ranelli further testified about a meeting he conducted with Respondent on June 17, 2019 which was the subject of a memorandum he authored after the meeting[11]. (BX 19; NT 257). Dr. Ranelli said that given his prior experience with Respondent not being in her classroom for a period, he was concerned about her absence from class on May 9, 2019 for a brief period. (NT 258). Additionally, he said, he wanted to discuss other issues about Respondent's classroom management to assist her. (*Id.*). Dr. Ranelli said he was considering yet another increment withholding for Respondent in school year 2019-2020 but decided not to do that as what he called a "point of good faith" and instead resolved to "offer an olive branch" between her and the administration. (NT 258, 259). In his after-meeting memo, Dr. Ranelli noted that the discussion had covered, among other things, the Petitioner's policy on the use of personal cell phones, since he said video of her absence on May 7, 2019 showed her using her cell phone outside the classroom. Dr. Ranelli stated that when accused of that act, Respondent did not dispute it. (NT 261). He also testified that during the discussion he thought there was an understanding that Petitioner's policies were never again to be violated or disregarded by Respondent. (NT 264).

Following an investigation into Respondent's alleged acts and omission during the first half of the 2019-2020 school year, Dr. Ranelli said, a memorandum was prepared by Ms. Pongratz averring several violations of policy by Respondent, including unauthorized administration of medication to students, sharing her personal cell phone number with students, theft of time for abusing sick leave on November 19, 2020, and conduct unbecoming for using her personal vehicle to transport a student during the same day. (BX 23; NT 265-266).

---

[10] Section 504 of a federal act known as the Rehabilitation Act of 1973 that affords protection for staff in designated educational settings against discrimination based on disability. (*See,* NT 270).

[11] Contrary to Dr. Ranelli, Respondent testified that the meeting at which Petitioner decided not to withhold her increment for school year 2019-2020 occurred not on June 17, 2019 but July 16 of that year (NT 330) and that she did not attend a meeting with Petitioners on June 17. (NT 330-331, 334).

Concluding his testimony, Dr. Ranelli said the investigation convinced him that Respondent viewed Petitioner's policies as merely "suggestions" she could follow or ignore as she saw fit. (NT 267).

Factual Contentions of Respondent:

Respondent testified in her own defense. After describing the PS3 program into which she had been placed at the beginning of the 2017-2018 school year, she asserted that her responsibility in the program included assisting students in attendance and their social and emotional welfare. She maintained that that role included attempting to keep students in school and on good behavior. (NT 304, 305). Turning her attention to a June 29, 2017 reprimand for having an unruly classroom at Conackamack Middle School (BX 9), Respondent explained she had allowed students to be in her room for lunch to protect them against bullying in the cafeteria. She recounted that the students were there and that she was on her own lunch break when a group of unruly pupils entered the classroom and began what she called "horseplay." (NT 306). Respondent testified she ordered them out of her room and called the school's office which apparently produced a counselor about 30 minutes later. (NT 306-307). When the incident occurred, Respondent contended, she was watching a video in preparation for an up-coming lesson. (NT 307).

She said that when interviewed by administration about the matter she explained the roles of the students who had been eating in her room and the conduct of those who entered uninvited and that Ms. Sousa had dismissed the episode as "kids will be kids." However, her principal at the time advised her to, among other things, "Curtail the use of our cell phone to your designated lunch/prep periods in the faculty room or in an area reliable free from student use." (BX 9).

Respondent also testified to her Summative Evaluation for the 2017-2018 school year in which she was graded as "Partially Effective." As a result of that grade she was denied a salary increment for the next school year and placed on a remedial Professional Improvement Plan. (BX 10).

The evaluation that triggered those measures included the four-minute absence from the beginning of her classroom, as observed by Dr. Ranelli, above. Respondent explained her absence then as the result of her medical problem for which she had to make emergent use of a

lavatory but only after, as she testified, she had tried calling the office to get another teacher to cover for her. (NT 311). Respondent also averred that in the past she had gotten emergency coverage from administrators and the school secretary, but that she had not known nor asked for inclusion in a 504 plan. (NT 311-312). Respondent said that during that 2017-2018 school year she had frequently used her cell phone to communicate with other teachers on school business. (NT 313). It was after that school year she was transferred to the PS3 program. (NT 312).

According to Respondent, cell phone use for school matters became more important after she transferred to the PS3 program to communicate with administrators, staff, deans, and parents because she had no privacy using her desk phone. (NT 314). Respondent gave the impression pupils in the PS3 program were not tractable at times, explaining that she eventually had to ask for a walkie-talkie to communicate with school security. (NT 316). Nevertheless, she testified, she continued to communicate with school staff using her cell phone and text messages, a practice she was encouraged to use in lieu of the walkie-talkie when necessary. (NT 318-319).

Respondent also spoke to the accusation that she left her class unattended May 9, 2019. (BX 14). Not contesting the fact she left, she said she needed an emergency bathroom break, Respondent vigorously insisted that she had asked the teacher in the adjoining room, Alexandria Artist, to cover for her after unsuccessfully trying to reach her own paraprofessional who was on a school errand, school security on the walkie-talkie, and the school office. (NT 323-324). She said that Ms. Artist stood in the doorway between their two classrooms as Respondent went through the door to the lavatory. (NT 325-326). Respondent said she thought she had a 504 plan in place at the time but was told by Ms. Sousa that the plan had expired previously. (NT 327-328).

Respondent further testified that prior to the 2019-2010 school year she was not aware of a Petitioner policy that prohibited texting to and from students (NT 335) and said that she had only "probably glanced" at the policy, in evidence as BX 3, after she received her tenure charges. (NT 336, 337). She also contended that she did not "receive a physical copy" of the Petitioner's policy covering unbecoming conduct. (BX 5). (NT 337). As for the former, Respondent said she thought cell phone communication with students was to be kept to "school business." (NT 338). She said she gave students her cell phone number primarily to keep in touch with them about transportation issues since the PS3 pupils can only get to and from school on a special bus. (NT

339, 340). She further claimed she only used her cell phone to communicate with students "approximately" three times. (NT 340).

Respondent more specifically testified about her communication with student AB via text messages (BX 19) about homework, a social media post involving a girl, and ultimately about a fight he had with another student identified as AB. (NT 340-344). Respondent said she had received permission from his mother to text him and in fact communicated with the mother "just about every single day of the week." (NT 346).

Also, Respondent acknowledged texting with a female student named TW who had left the PS3 program but was considered a candidate for re-induction. (BX 21; NT 344-345)[12]. She further stated that she shared email with TW with administration (RX 5; NT 360- 361) and was not asked at the time why she was texting with the student. (NT 361, 362).

Respondent acknowledged that on November 15, 2019, a day Respondent had taken off sick, she did take TW shopping[13] and for breakfast. (NT 365, 367). Respondent said she did so with TW's mother's compliance "through the student." (NT 370). As for her own absence from work that day, Respondent explained she had an appointment to see a specialist that had been made two months in advance. She agreed she only submitted the notice of the absence the night before she took off, but that that met compliance with the collective bargaining agreement between her Association and Petitioner. (NT 365-366). She said she was never asked for a note documenting the absence (NT 368) and contended that she was never shown a copy of a Petitioner policy prohibiting the transportation of students in teacher vehicles. (NT 369).

Respondent further testified that she gave KP Advil with the consent of the latter's mother. (NT 370)[14]. She explained that she told KP not to tell anyone because she did not want to create a practice of students seeking medication from her. (NT 371). She further explained that she did not refer KP to the school nurse because students in the PS3 program will take advantage of out-of-classroom permission to avoid doing work in class. (NT 372). Respondent admitted that in hindsight she would not do the same again. (*Id.*). She said she did the same thing for AB, but only to keep him in school and with the consent of his mother. Further, in AB's case, he had brought the medicine to school with him. (NT 373).

---

[12] Communication between Respondent at TW included texts about dental treatment as a cause of absence from school. (NT 359-360).

[13] TW had told Respondent she had nothing to wear to school and was indigent. (BX 21; JRX 4; NT 363).

[14] In brief testimony, KP's mother confirmed she had given such permission. (NT 429-430).

Also testifying for Respondent was the mother of student "AB," designated herein as **"CB."** She testified that her son was in Respondent's PS3 class for over a month in the fall of 2019 (NT 349) and that she communicated with Respondent about AB's academics and attendance. (NT 350). In addition, CB said that Respondent contacted her about giving AB Advil for a headache and that she gave Respondent permission to do so. (*Id.*). However, CB said she did not provide Advil to Respondent nor did her son. (NT 351,352). CB explained she had no knowledge of Petitioner's policy toward the administration of medicine by staff. (NT 353, 354). She added that she authorized Respondent to text AB directly to encourage his attendance. (NT 351).

Arguments of Petitioner:

Petitioner acknowledges that New Jersey's teacher tenure statues, as amended by the 2012 TEACHNJ act, are aimed at protecting public school employees from dismissal for lack of proper cause. *Wright v. Bd. Of Educ. Of East Orange*, 99 NJ 112, 118 (1985). Petitioner says that cause for dismissal may consists of conduct unbecoming a teacher, *In re Riddick*, 93 NJAR 2d (EDU) 345 (1993), as well as violation of specific school district policies. *In the Matter of the Tenure Hearing of Carol Ziznewski, School District of the Township of Edison,* (August 2010) https:www.nj.gov/education/legal/commission/2-1; *In the Matter of the Tenure Hearing of Paula Weckesser, School District of the Township of Woodbridge,* OAL Dkt. No. EDU 09195-12, Agency Dkt.No. EDU 09195-12; adopted by Commissioner September 16, 2013.

Petitioner further says Respondent obviously exhibited unbecoming conduct and disregard of Petitioner's policies throughout the 2019-2020 school year, an attitude that was a continuation of her flaunting of rules in prior years. For example, the administration of drugs to students by her was expressly forbidden by Petitioner's policy as well as New Jersey school regulations. Yet Respondent did exactly that regarding both AB and KP, the latter of whom was put in Respondent's PS3 class for drug abuse. What is even more egregious, Petitioner says, KP had allegedly been to the school nurse and could have been given another medication by the nurse that Respondent would not know about when she gave KP Advil. Moreover, Petitioner argues, Respondent acknowledged that she knew she was violating policy when she texted KP

not to tell anyone. Equally telling of Respondent's consciousness of fault is the fact Respondent never informed the school that she had administered medication on an emergency basis.

In addition to the administration of over-the-counter drugs, Petitioner says, Respondent violated Petitioner's cell phone policy by texting AB, KP, and TW repeatedly. The offended policy was in keeping with NJSA 18A:36-40, which requires local school districts to propound policies regarding communications between teacher and students.

Moreover, Petitioner says, Respondent committed a grave fault in taking TW to breakfast and shopping on a school day when Respondent had claimed a sick day. This would be true, Petitioner argues, even if Respondent had the permission of the student's mother, as she claimed she did. That junket, Petitioner says, violated not only the general unbecoming conduct standard but also the Petitioner' prohibition against the transport of students in personal vehicles, and what the Petitioner asserts was misuse of its sick leave requirements.

As to the final alleged offense, Petitioner derides Respondent's claim that she asked for and procured the presence of another teacher to watch her class on an occasion when she claims to have needed use of the restroom. Petitioner points out that at hearing, Respondent did not call the teacher she claimed had watched her class as a witness. Petitioner asks that an inference to be drawn that such testimony would not have supported Respondent's case.

Petitioner closes by noting Respondent was on her third consecutive Professional Improvement Plan when she was fired, a result Petitioner claims of three straight years of sub-standard performance[15], which included reporting late for class even though she had been told she would have a classroom observation that day. And, Petitioner notes, Respondent showed no signs at hearing of acknowledging her behavioral short-comings and taking responsibility for them. For that reason, Petitioner argues, even had she had an unblemished record, she should not be immune from discharge. *In re Parezo, 2013 WL 4525436 (App. Div. 2013).*[16] Respondent's attitude as well as her past conduct weigh heavily against any reinstatement based on a theory of progressive discipline, according to Petitioner. Such a reinstatement order would ignore

---

[15] Although the evaluations are part of the record, prior to the hearing, the undersigned ruled on a motion in limine that only those portions of the evaluations relating to alleged unbecoming conduct would be admitted at hearing. (NT 4).

[16] "[P]articularly disturbing here is [appellant's] refusal—even at this late date—to recognize the seriousness of her actions or take responsibility for them. Rather she continues to view the whole incident as *de minimis* in nature and scope…Given her steadfast attitude in this regard the Commissioner is not persuaded that such conduct would not be repeated in the future. Under these circumstances, the Commissioner cannot entertain the prospect of [appellant's] return to the District…"

Respondent's actual past record which is tainted by her own acts of unbecoming conduct, Petitioner concludes.

Arguments of Respondent:

Respondent rejects Petitioner's claim that administration of medication to students supports removal of her tenure. She does not dispute the administration to KP and AB, but maintains she did so for altruistic reasons, *i.e.*, to keep them in school and more particularly on task in her room rather than leaving school or going for medicine to the school nurse where they could malinger and miss assigned classwork. All the same, Respondent says she has expressed remorse, something that she says is evident in her responses to Petitioner during its investigation and at hearing before the undersigned. In fact, Respondent has made clear that she would not do the same thing again and called her action a poor choice, however idealistically motivated it may have been.

In the same manner, Respondent asserts her text messaging with students was done for their own good and not from some nefarious motivation she had to become involved with them socially. Respondent argues strenuously that she was not fully aware of Petitioner's anti-testing policy and emphasizes that the employee handbook cited by Petitioner is silent on the question of texting with students. Although the policy has now been called to her attention, Respondent says it is one of what even Petitioner acknowledges are an innumerable quantity of restraints and as such can hardly be known. Importantly, Respondent points out, the record does not contain evidence she ever received training on the implementation of texting rules. Even more critically, Respondent stresses that the policy relied on by Petitioner as a basis for her tenure removal does not expressly exclude all texting with students. That failure is underscored, Respondent reasons, by the fact that Vice Principal Bizzell knew she had texted with students long before Petitioner ever took action against her for doing so because he had received copies of Respondent's text communications with a student regarding dental problems. Respondent theorizes that Mr. Bizzell's lack of action on that knowledge implies either that the policy was not intended to block all texting between pupils and staff or was not important enough to enforce. In either case, Respondent reasons, the policy cannot now be considered grounds for her removal. And, even if taken seriously by the Petitioner, Respondent asks, how could she be censored for alerting Mr.

Bizzell to a student fight in which one of the participants (both being students at Piscataway High School) was so seriously injured that he was rendered unconscious and his assaulter was seriously worried about sanctions for his action?

Respondent further says she never tried to hide her text communications with students—all or nearly all of which—were initiated by the students themselves and that such contact was necessary because of problems PS3 students had with the transportation that exclusively served them in both coming to and returning home from school. The latter issues Respondent says, were perfectly permitted as cell phone subjects between staff and students under Petitioner's practices and policy. Respondent avers this is evident from what she said was were frequent cell phone interchanges between teachers and pupils even during the school day. Moreover, Respondent says the record does not disclose any warning to her from Petitioner about cell phone communication with students in either voice or text format. Rather, what ever criticisms Petitioner communicated to her focused on the time and place of her cell phone usage, were a selective enforcement given the leniency of treatment toward her colleagues.

As for Petitioner's averment that Respondent misused or "stole" sick time, Respondent says there is no support for that argument. Respondent insists that she called to notify Petitioner she was taking a sick day within the time authorized by the labor agreement between her collective bargaining agent and Petitioner, a point that Petitioner does not challenge. She denies that Petitioner's agent, Ms. Pongratz, ever asked her for a doctor's certification for the absence. Furthermore, Respondent points out that nothing in New Jersey school law, which addresses paid sick leave for public school teachers, prohibits use of such leave for medical appointments, and no policy proffered by Petitioner states or implies that use of paid sick time for a medical appointment is prohibited.

As for the charge that Respondent transported TW in her private car to have breakfast and go shopping, Respondent says there is no rule prohibiting such actions and that Petitioner's use of an "unbecoming conduct" claim is a desperate measure to support tenure removal. In Respondent's eyes, Petitioner has dragged her actions with TW under the "unbecoming conduct" standard only because Petitioner has no other ground on which to criticize her behavior.

Last, Respondent rejects the claim that she left her classroom unattended. She says she not only asked but had another teacher oversee the class while Respondent used the restroom on an emergency basis after Respondent had tried to reach her aide, school security, and the school

office. Respondent says that Mr. Bizzell, who testified for Petitioner as to this charge, conceded that he never asked the teacher named by Respondent whether she was asked or in fact did watch Respondent's class during the few minutes Respondent was gone. Instead, Mr. Bizzell said he watched a recording taken from the cameras that cover Respondent's room and did not see another faculty member there at the time. But Respondent replies the cameras could not see the passageway between her classroom and that of the teacher whose assistance she secured. From this space, Respondent insisted, both rooms could be observed simultaneously. Mr. Bizzell's admitted failure to question the other teacher[17] makes Petitioner's accusation dismissible on the ground Petitioner failed to do a thorough and efficient investigation.

At the end of the day, Respondent argues, the only valid charge against her is the one referring to administration of medication to students. Given Respondent's avowed motive for doing so, the parental permission secured in both cases, and the fact the medication was over-the-counter Advil, this should not support removal of her tenure, Respondent argues. Further, Respondent underscores her admission the act was an error and that she would not repeat it. Based on that, Respondent says there is insufficient ground to support her removal after 19 years of service to Petitioner and in the middle of her teaching career which, should removal be permitted, would likely end.

Opinion:

In New Jersey tenure removal cases, the employing district must show that removal of a tenured staff member is justified on some grounds. Often those grounds go to teaching ineffectiveness, but in this case they do not. As explained above, I have previously ruled that Respondent's teaching effectiveness as measured by evaluations in the school years prior to 2019-2020 are not the subject of the charges against her here and, since she did not claim teaching effectiveness, they are inadmissible. Rather, the charges here all revolve around her conduct which Petitioner contends is "unbecoming" within in the meaning of NJSA 18A6-10[18]. Thus, my decision here is based on my judgment of that conduct, both in and out of school.

---

[17] As noted above, Mr. Bizzell testified the teacher in question refused to speak to him about the matter.

[18] Unbecoming conduct is that which has a tendency to destroy public confidence in the operation of public services and need not violate a specific rule. *Karins v. City of Atlantic City, 152 NJ___ 1998; Hartman v. Police Dep't of Ridgewood, 258 NJ Super 22 (1955).*

Petitioner's charges relating to that conduct fall into four categories.

The first I consider is that she wrongfully engaged in text messaging with students. The fact of the messaging cannot be disputed. The relevant issue is whether those communications violated a District policy or rose to unbecoming conduct generally.

The policy, known as 4119.26, was apparently adopted in response to a legislative enactment, codified at NJSA 18A: 36-40, requiring local school districts in New Jersey to set rules on communication between staff members and students, including text messages. However, neither the legislation nor the policy adopted by Petitioner in response absolutely prohibits electronic communications between staff and students. Moreover, the record convinces me that Respondent received no substantive guidance on the communications policy from Petitioner, nor does the record show that Petitioner ever expressly precluded texting between staff and students. Indeed, Petitioner's case in this aspect was undermined by Ms. Sousa's acknowledgement there are of "thousands" of Petitioner policies—meant by Ms. Sousa as an hyperbole to be sure—and the commonsense observation that no employee can be expected to know all of them or their interpretation, especially policies on which no training was provided.

On these facts, I cannot find Respondent violated Petitioner's policy *per se*. Nevertheless, the question remains as to whether Petitioner's texting breached the standard of "conduct unbecoming."

The answer lies in the history and nature of the communications. Several observations are in order. First, in almost every instance the texting was initiated by students—not Respondent. Second, save for some of the texting between Respondent and TW, none of the subjects of the text messages were of an inappropriate nature. Third, none of the texts, including those involving TW, suggested a nefarious pupil-teacher relationship or hinted at untoward intentions of one toward the other.

Quite to the contrary, the TW texts and others seem born out a genuine concern for Respondent's students and their trust in her. In that regard, I am particularly struck that AB, a student with a challenging history, contacted Respondent about a vicious fight he had had earlier in the day with another student which resulted in the latter being beaten unconscious. AB was obviously prompted by a faith in Respondent's understanding and willingness to help him. Even

more astonishing is Respondent's advice that AB take corrective measures and her revealing the texts, without prompting, to Piscataway High School Vice Principal Jonathan Bizzell. Recall that although Mr. Bizzell referred the AB texts to administrators, he had never remonstrated her for exchanging texts, just as he did not criticize her for earlier texts he knew she had exchanged with students, including TW.[19] Indeed, it is not clear that Mr. Bizzell referred the matter up the chain because of Respondent's having received and sent texts from her phone or because he was concerned about the fight.

In the light of this history, it is impossible to conclude that Respondent's tenure should be removed because she texted with students—or rather they with her—or because of the related charge that she allowed students to have her cell phone number.[20]

The next charge considered is that Respondent left her classroom unattended on May 9, 2019. Although the alleged conduct occurred prior to the 2019-2020 school year there is no reason it cannot be considered as part of Petitioner's tenure charges brought in December 2019, particularly as Petitioner has constantly averred Respondent's conduct shows a pattern of unrehabilitated non-compliance with Petitioner's policies.

In this charge, a key fact is disputed. Both parties agree Respondent left her room. However, Respondent claims she asked Ms. Artist, the teacher in an adjoining room which was connected to hers by a short passageway, to oversee the PS3 class during Petitioner's brief absence. Petitioner denies that, and Petitioner's security cameras in Respondent's room do not capture an image of any stand-in. Respondent argues that the cameras do not cover the passageway or the doorway in which she claims Ms. Artist was straddling Respondent's class area and her own. Miss Artist did not appear at hearing on Respondent's behalf.

Petitioner does not dispute that Respondent has a medical condition that forces unexpected lavatory usage on a sporadic basis. Respondent claims it was that condition that forced her from her class on the day in question and that she had unsuccessfully tried to contact the school office, security, and her classroom aide before leaving the room. Without further

---

[19] Mr. Bizzell had also taken no action against Respondent when she sent him pictures texted to her by student TW showing the student's abscessed tooth in October 2019. (NT 361-362).

[20] Petitioner maintained it had warned Respondent about cell phone use in school. None of those warnings addressed the issue of texting with students. As for staff allowing students to have their cell phone numbers without prior notice to administrators, see my comments above regarding Vice Principal Bizzell's earlier inaction

evidence, it is impossible for Petitioner to substantiate the charge Respondent abandoned her room without securing coverage as she claims. However, even assuming Ms. Artist was *not* in a position to watch her class, Petitioner's charge on this incident cannot sustain discipline, let alone revocation of tenure. It is axiomatic in arbitral law that where there is an excuse or justification for not following a rule (in this case attending one's class unless other coverage is secured) there can be no culpability. Respondent has testified credibly that she has a physical disorder that requires unanticipated trips to the bathroom, Respondent has not disproved that testimony, and I have no basis for doubting her claim that that is what prompted her exit from class on May 9, 2019. I cannot therefore hold her culpable for that action.

The next charge considered here is that Respondent gave students medication. Respondent does not deny the fact that she gave students AB and KP the over-the-counter drug Advil for pain in the fall of 2019 while school was in session and she was the "lead" teacher in the PS3 program. Her defense is two-fold: (1) she had parental approval to give the medications, which were common, over-the-counter pain relievers; and, (2) she now recognizes the gravity of her offense, which she acknowledged was prohibited by District policy, and remorsefully vows not to repeat it.

The record establishes that there was parental approval in both cases, and there is no evidence that the medication she administered was other than Advil, although in AB's case the pill he took was one he had brought to school and never was physically examined by Respondent. Nevertheless, Respondent believed that it was, and I have neither evidence of her dissembling on the point nor evidence that the pill was not Advil. As for owning the offense as a grave fault, I have only Respondent's testimony as to her absorption of fault and regret[21]. That may be a thin reed on which to support a defense, but having observed Respondent's testimony on the point, I am willing to credit her.

That willingness, however, is not exculpation. Providing medication to students either actively or, in the case of AB, passively, is strictly limited by Petitioner's policy and for good reason. Drug interactions or allergies are grave dangers as are the possibilities that a given drug

[21] When confronted with the fact she texted KP not to tell anyone she was giving her the medicine, Respondent testified that she merely did not want other students to start using her as a dispensary. I credit Respondent on that point.

will exacerbate a condition rather than alleviate it. Teachers are almost universally unqualified to gauge such perils. Thus, even with parental consent, there is a serious threat when untrained individuals administer medications to pupils. If that were not enough, there must be recognized implicit prohibition against the possibility of teachers administering commonly obtained substances to make students more attentive or tractable. Ignoring such a standard surely shakes public confidence in teachers.

Given those threats, Respondent's blatant violation is so serious that it alone would support tenure removal for conduct unbecoming, and no post-offense remorse would be sufficient to deny Petitioner's action.

Yet there is more. Petitioner's fourth basis for removal is the combination of Respondent's communication with TW, her escorting of TW on a breakfast and shopping trip, and her use of a sick day to do so.

I have already dismissed the email communications as a ground for dismissal, and I find no clear or inherent prohibition against having students in her personal vehicle. Consequently, she cannot suffer discipline on those accounts. Further, although Respondent's actions in taking sick leave was imprudent, thoughtless, and extremely unprofessional in its manner, I cannot affirm removal of tenure because of them. As a long-time teacher, she knew that finding substitutes is challenging generally and on a Friday—which is the weekday this incident occurred—even more difficult. Nevertheless, she was narrowly within her rights not to notify Petitioner until that morning of a medical appointment that she admitted was scheduled well in advance.

Respondent's difficulty in this incident is her condoning and abetting TW's absence from school, especially after defending many of her actions on a claim of concern for student attendance and classroom diligence. Further, Respondent's actions in taking TW to buy clothes strongly suggests favoritism toward TW over other students, many of whom it can be safely assumed were equally disadvantaged. Respondent's behavior in both aspects demonstrates an indifference to standards the public has a right to expect of teachers and affirms Petitioner's argument that she placed herself above the principles of her profession and treated standards of deportment as a catalog of nuisances to be disregarded as she saw fit.

Even more damaging to Respondent's case is that her action lends credence to Petitioner's claim that a lesser penalty based on the theory of progressive discipline would be wholly misplaced because Respondent is incorrigible. Petitioner's judgment is hard to reject given the blatant nature of Respondent's actions with TW. And it is hard to reject considering the leniency Petitioner showed at the close of the 2018-2019 school year when Superintendent Ranelli opted to forego a further increment withholding in an attempt to start anew with Respondent. That choice by the Superintendent was met only a few months later with Respondent's administration of medication to students which has long been forbidden under school law and Petitioner's clear policy, as well as the abetting of truancy, an act that is just as clearly wrong.

It is possible Respondent saw herself as a rogue heroine bucking the system for the sake of her pupils for whom she no doubt cared just as they appear to have cared for her. But actions such as the ones she took when she administered medication and favored TW cannot be tolerated within a public school system which not only have public trust but also some centrality of control advanced by a set of reasonable rules and the standards of the teaching profession. Given Respondent's fault in these two instances and under the circumstances described above, I believe her continued employment by Petitioner would be detrimental to it and the public's confidence in its operation. There is cause for the removal of her tenure, and an Order will be issued accordingly.

Order:

Petitioner's charges are sufficient to remove Respondent's tenure and are affirmed to the extent set forth above. Respondent's appeal of those charges is denied. Respondent's tenure may be removed, and her dismissal is upheld.

10/26/20
Date

Ralph H. Colflesh, Jr., Esq.
Ralph H. Colflesh, Jr., Esq.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
----------X
In the Matter of the TENURE Charges Against

ANGELA FOX,

Agency Dkt. No.
163-7/20

By: PARSIPPANY-TROY HILLS SCHOOL DISTRICT,
MORRIS COUNTY, NEW JERSEY
----------X
Before **MELISSA H. BIREN, Esq.**, Impartial Arbitrator

ORDER APPROVING SETTLEMENT OF TENURE CHARGES

The Parsippany-Troy Hills Board of Education, Morris County (the "Board") certified tenure charges against Angela Fox ("Respondent" or "Fox"), a tenured teacher in the Parsippany-Troy Hills School District, alleging incapacity, unbecoming conduct, insubordination and other just cause (the "Tenure Charges"); the Board's counsel, Katherine A. Gilfillan, Esq. (Schenck Price Smith & King, LLC), filed the Tenure Charges with the Commissioner of Education of the State of New Jersey on or about July 31, 2020. Respondent, by her counsel, Juan Fernandez, Esq. (Fernandez Garcia, LLC) filed Responses with the Commissioner on or about August 6, 2020, denying the allegations in the Tenure Charges. The Commissioner of Education, having reviewed the Tenure Charges and the Response, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and, therefore, referred the matter to arbitration. These charges were referred to the undersigned Arbitrator on August 10, 2020 pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26. A timely request for an extension of time was granted.

The parties reached a mutually acceptable settlement of the Tenure Charges prior to the commencement of the hearings scheduled for October 20 and 26, 2020. The settlement terms were thereafter set forth in a written Settlement Agreement ("Settlement"). On October 22, 2020, the Settlement, signed by the parties, was forwarded to the arbitrator for review and approval. In accordance with *N.J.A.C.* 6A:3-

5.6, the settlement of the Tenure Charges pursuant to the terms of the Settlement is hereby approved, the standards for settlement having been satisfied as set forth below.

1. A copy of the Settlement, as well as the Tenure Charges and the Answer, are annexed to this Order.
2. The settlement of the Tenure Charges is warranted given that Respondent has admitted the charge of incapacity and has resigned her employment with the school district effective October 29, 2020. Fox's resignation renders resolution of the charges moot; no further or other relief would result from a continuation of the arbitration proceeding.
3. Both the charged and charging parties have consented to the settlement terms. Both parties were represented by counsel in the negotiation of the settlement terms and the preparation of the Settlement. Fox signed the Settlement indicating her voluntary agreement to its terms on October 15, 2020. The Board President signed the Settlement indicating the Board's voluntary agreement to its terms on October 20, 2020, following the Board's approval of the Settlement. As reflected in the October 27, 2020 letter from the Board's counsel and the attached certification by the Board Secretary, the Board approved the Settlement at a meeting on October 15, 2020, pending final approval by the Commissioner or his designee.
4. Respondent expressly confirmed in the Settlement that she fully understands the settlement terms and that she voluntarily entered into the settlement with a full understanding of her rights. Competent counsel provided advice and counsel to the Respondent throughout the settlement process.
5. The settlement is in the public interest. Respondent has resigned her employment, admitting her incapacity. Proceeding with the Tenure Charges on the remaining charges will not provide any further or other relief than what would result by the admission of incapacity and resignation. Further, by the settlement, the Board avoids the uncertainty of the outcome of the

arbitration, the time and expense associated with litigation and any disruption to the school district resulting from school personnel's participation in the hearing.

6. Under the Settlement's terms, Respondent has voluntarily resigned from her position with the school district. In accordance with N.J.A.C. 6A:3-5.6(a)6, and as confirmed in Section 6 of the Settlement, Respondent has been advised that the Commissioner may refer this matter to the NJ State Board of Examiners which may suspend or revoke her certificate

By reason of the foregoing, the settlement of the tenure charges against the Respondent, Angela Fox, pursuant to the terms set forth in the Settlement, is approved.

Dated: October 29, 2020

Melissa H. Biren, Arbitrator

State of New Jersey)

County of Morris)

On this 29th day of October 2020, before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Notary Public

Robert D Agree
Notary Public
New Jersey
My Commission Expires February 8, 2023
No. 2429835

SETTLEMENT AGREEMENT

This Agreement and Release ("the Agreement") is entered into and effective this ____ day of October 2020 ("the Effective Date"), by and between Angela Fox ("Respondent") and the Parsippany-Troy Hills Board of Education ("Board").

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and

WHEREAS, Respondent is employed by the Board as a tenured teacher, and

WHEREAS, on or about July 30, 2020, the Board filed tenure charges (the "Tenure Charges") against the Respondent charging her with incapacity, unbecoming conduct, insubordination and other just cause warranting her termination; and

WHEREAS, on or about August 6, 2020, Respondent filed her Answer to the Tenure Charges in which she has denied all allegations of incapacity, unbecoming conduct, insubordination and other just cause warranting her termination; and

WHEREAS, the parties desire to resolve and settle the pending Tenure Charges, pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. **Admission/Denial of Charges.**

   a. Respondent hereby admits to the charge of incapacity.

   b. Respondent denies the charges of unbecoming conduct, insubordination and other just cause warranting termination.

   c. The Board agrees that it will provide full and honest cooperation to Respondent relative to any application for disability retirement that Respondent may make in the future.

2. **Resignation/Re-employment.** Concomitant with execution of this Agreement, Respondent will submit an irrevocable letter of resignation, which shall be effective October 29, 2020. The parties acknowledge and agree that Respondent is not owed any further wages, salary, stipend payment, sick, personal or vacation time, or payment thereof upon resignation or retirement of position, leaves of absence, health, dental or prescription benefits, or any monies/benefits which she would be entitled to pursuant to any union agreement between the Board and any union of which she was a member while employed in the District. Respondent agrees not to seek future employment with the Board.

A.F. Initials AF
BOE Pres. Initials _____

3. **Assent to Terms.** Respondent hereby acknowledges that she signed this Settlement & Release with a full understanding of his rights and that she was fully informed of the implications of this agreement by her counsel, Juan Fernandez, Esq. She acknowledges and agrees that she has signed this Settlement Agreement without duress and of her own free will and volition and acknowledges that she was given the opportunity to fully consider this Agreement prior to its execution.

4. **Authority.** This Agreement is subject to Board approval and that of the Commissioner of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

5 **Confidentiality** Respondent and the Board understand and acknowledge that this Agreement is confidential to the fullest extent permitted by law. Each party agrees that they will not directly or indirectly divulge, discuss, publicize, disclose or communicate the contents of this Agreement unless specifically required under the provisions of law or at the directive of any agency having authority over the Board without the express written consent of the other party. The parties acknowledge that Respondent's resignation from the District is not confidential and further acknowledge that the District has the obligation and will truthfully respond to any inquiry regarding Respondent from the State or federal government or their agencies, departments, divisions or instrumentalities. Respondent acknowledges and understands that this Agreement will be provided to the Commissioner of Education for final approval. These limitations on disclosure shall not apply to Respondent's disclosure to her immediate family, union, or legal representatives provided that Respondent instructs them and secures their agreement, to maintain all such information in the strictest of confidence.

6. **State Board of Examiners Reporting Requirement**

Respondent understands that the Commissioner of Education may refer this matter to the N.J. State Board of Examiners which may suspend or revoke her certificate.

7. **Satisfaction of *In re Cardonick*, 1990 S.L.D. 842 (1990)**

The parties agree that this matter satisfies the six (6) criteria for settlement set forth in *In re Cardonick*, 1990 S.L.D. 842, 846 (1990) and delineated in N.J.A.C. 6A:3-5.6:

i. Documentation as to the nature of the charges - See, Exhibit A for a copy of the tenure charges.

ii. Circumstances justifying settlement – Respondent has resigned from the District effective October 29, 2020 making the tenure charges moot.

iii. Consent of both the charged and charging parties - The agreement has been executed by both parties.

A.F. Initials AF
BOE Pres. Initials

iv. Charged party entered into this agreement with a full understanding of her rights - See Paragraph 3, supra

v. Agreement in the public interest – This agreement is in the public interest because Respondent has resigned from the District, making the matter moot. Moreover, Respondent has admitted to the charge of incapacity which warrants termination. Proceeding with a full tenure hearing on the remaining charges will not provide any further or other relief than what would result from the admission of incapacity. Additionally, the settlement will save the District a significant amount in both attorneys' fees and administrative time/expense as the hearing is presently scheduled for two full days.

vi. Referral to State Board of Examiners – See Paragraph 5, supra

8. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

9. Amendment; Severability; No Waiver. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

10. Personal Belongings. Upon her execution of this Agreement, the District will schedule an appointment with her to retrieve her personal belongings, if any remain within the District, at a mutually convenient date and time before or after school hours.

11. District Property. At the time Respondent retrieves her personal belongings she shall immediately be responsible for returning any District-owned property in her possession to the District including, but not limited to computers, computer files, keys, books, flash drives, curriculum and student records.

12. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

13. Construction. The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

A.F. Initials AF
BOE Pres. Initials _____

14. **Law Governing.** This Agreement is governed by the laws of New Jersey.

IN WITNESS WHEREOF, the parties have executed this agreement consisting of four (4) pages as of the effective date.

Witness

Angela L. Fox

ANGELA FOX

Dated: 10/15/2020

Witness

JIA 2017

Dated: 10/15/2020

PARSIPPANY-TROY HILLS BOARD OF EDUCATION

Witness

By: _____

FRANK NEGLIA, BD. PRESIDENT

Dated:

Dated:

A.F. Initials _____

BOE Pres. Initials _____

SETTLEMENT AGREEMENT

This Agreement and Release ("the Agreement") is entered into and effective this 15th day of October 2020 ("the Effective Date"), by and between Angela Fox ("Respondent") and the Parsippany-Troy Hills Board of Education ("Board").

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

WHEREAS, Respondent is employed by the Board as a tenured teacher; and

WHEREAS, on or about July 30, 2020, the Board filed tenure charges (the "Tenure Charges") against the Respondent charging her with incapacity, unbecoming conduct, insubordination and other just cause warranting her termination; and

WHEREAS, on or about August 6, 2020, Respondent filed her Answer to the Tenure Charges in which she has denied all allegations of incapacity, unbecoming conduct, insubordination and other just cause warranting her termination; and

WHEREAS, the parties desire to resolve and settle the pending Tenure Charges, pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. **Admission/Denial of Charges.**

   a. Respondent hereby admits to the charge of incapacity.

   b. Respondent denies the charges of unbecoming conduct, insubordination and other just cause warranting termination.

   c. The Board agrees that it will provide full and honest cooperation to Respondent relative to any application for disability retirement that Respondent may make in the future.

2. **Resignation/Re-employment.** Concomitant with execution of this Agreement, Respondent will submit an irrevocable letter of resignation, which shall be effective October 29, 2020. The parties acknowledge and agree that Respondent is not owed any further wages, salary, stipend payment, sick, personal or vacation time, or payment thereof upon resignation or retirement of position, leaves of absence, health, dental or prescription benefits, or any monies/benefits which she would be entitled to pursuant to any union agreement between the Board and any union of which she was a member while employed in the District. Respondent agrees not to seek future employment with the Board.

A.F. Initials
BOE Pres. Initials

3. **Assent to Terms.** Respondent hereby acknowledges that she signed this Settlement & Release with a full understanding of his rights and that she was fully informed of the implications of this agreement by her counsel, Juan Fernandez, Esq. She acknowledges and agrees that she has signed this Settlement Agreement without duress and of her own free will and volition and acknowledges that she was given the opportunity to fully consider this Agreement prior to its execution.

4. **Authority.** This Agreement is subject to Board approval and that of the Commissioner of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

5. **Confidentiality**. Respondent and the Board understand and acknowledge that this Agreement is confidential to the fullest extent permitted by law. Each party agrees that they will not directly or indirectly divulge, discuss, publicize, disclose or communicate the contents of this Agreement unless specifically required under the provisions of law or at the directive of any agency having authority over the Board without the express written consent of the other party. The parties acknowledge that Respondent's resignation from the District is not confidential and further acknowledge that the District has the obligation and will truthfully respond to any inquiry regarding Respondent from the State or federal government or their agencies, departments, divisions or instrumentalities. Respondent acknowledges and understands that this Agreement will be provided to the Commissioner of Education for final approval. These limitations on disclosure shall not apply to Respondent's disclosure to her immediate family, union, or legal representatives provided that Respondent instructs them and secures their agreement, to maintain all such information in the strictest of confidence.

6. **State Board of Examiners Reporting Requirement**

Respondent understands that the Commissioner of Education may refer this matter to the N.J. State Board of Examiners which may suspend or revoke her certificate.

7. **Satisfaction of *In re Cardonick*, 1990 S.L.D. 842 (1990)**

The parties agree that this matter satisfies the six (6) criteria for settlement set forth in *In re Cardonick*, 1990 S.L.D. 842, 846 (1990) and delineated in N.J.A.C. 6A:3-5.6.

i. Documentation as to the nature of the charges - See, Exhibit A for a copy of the tenure charges.

ii. Circumstances justifying settlement – Respondent has resigned from the District effective October 29, 2020 making the tenure charges moot.

iii. Consent of both the charged and charging parties - The agreement has been executed by both parties.

A.F. Initials _____
BOE Pres. Initials _____

iv. Charged party entered into this agreement with a full understanding of her rights - See Paragraph 3, supra.

v. Agreement in the public interest – This agreement is in the public interest because Respondent has resigned from the District, making the matter moot. Moreover, Respondent has admitted to the charge of incapacity which warrants termination. Proceeding with a full tenure hearing on the remaining charges will not provide any further or other relief than what would result from the admission of incapacity. Additionally, the settlement will save the District a significant amount in both attorneys' fees and administrative time expense as the hearing is presently scheduled for two full days.

vi. Referral to State Board of Examiners – See Paragraph 5, supra.

8. **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

9. **Amendment; Severability; No Waiver.** This Agreement shall not be amended, changed or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

10. **Personal Belongings.** Upon her execution of this Agreement, the District will schedule an appointment with her to retrieve her personal belongings, if any remain within the District, at a mutually convenient date and time before or after school hours.

11. **District Property.** At the time Respondent retrieves her personal belongings she shall immediately be responsible for returning any District-owned property in her possession to the District including, but not limited to computers, computer files, keys, books, flash drives, curriculum and student records.

12. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

13. **Construction.** The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

A.F. Initials _____
BOE Pres. Initials _____

14. **Law Governing.** This Agreement is governed by the laws of New Jersey.

IN WITNESS WHEREOF, the parties have executed this agreement consisting of four (4) pages as of the effective date.

Witness:

ANGELA FOX

Dated:

Dated:

PARSIPPANY-TROY HILLS BOARD OF EDUCATION

Witness:

By: FRANK NEGLIA, BD. PRESIDENT

Vicki Conklin

Dated:

Dated: 10-20-2020

A.F. Initials
BOE Pres. Initials

SETTLEMENT AGREEMENT

This Agreement and Release ("the Agreement") is entered into and effective this 15th day of October 2020 ("the Effective Date"), by and between Angela Fox ("Respondent") and the Parsippany-Troy Hills Board of Education ("Board").

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

WHEREAS, Respondent is employed by the Board as a tenured teacher; and

WHEREAS, on or about July 30, 2020, the Board filed tenure charges (the "Tenure Charges") against the Respondent charging her with incapacity, unbecoming conduct, insubordination and other just cause warranting her termination; and

WHEREAS, on or about August 6, 2020, Respondent filed her Answer to the Tenure Charges in which she has denied all allegations of incapacity, unbecoming conduct, insubordination and other just cause warranting her termination; and

WHEREAS, the parties desire to resolve and settle the pending Tenure Charges, pursuant to the terms and conditions set forth in this Agreement,

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. Admission/Denial of Charges.

   a. Respondent hereby admits to the charge of incapacity.

   b. Respondent denies the charges of unbecoming conduct, insubordination and other just cause warranting termination.

   c. The Board agrees that it will provide full and honest cooperation to Respondent relative to any application for disability retirement that Respondent may make in the future.

2. Resignation/Re-employment. Concomitant with execution of this Agreement, Respondent will submit an irrevocable letter of resignation, which shall be effective October 29, 2020. The parties acknowledge and agree that Respondent is not owed any further wages, salary, stipend payment, sick, personal or vacation time, or payment thereof upon resignation or retirement of position, leaves of absence, health, dental or prescription benefits, or any monies/benefits which she would be entitled to pursuant to any union agreement between the Board and any union of which she was a member while employed in the District. Respondent agrees not to seek future employment with the Board.

A.F. Initials AF
BOE Pres. Initials

3. **Assent to Terms.** Respondent hereby acknowledges that she signed this Settlement & Release with a full understanding of his rights and that she was fully informed of the implications of this agreement by her counsel, Juan Fernandez, Esq. She acknowledges and agrees that she has signed this Settlement Agreement without duress and of her own free will and volition and acknowledges that she was given the opportunity to fully consider this Agreement prior to its execution.

4. **Authority.** This Agreement is subject to Board approval and that of the Commissioner of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

5 **Confidentiality.** Respondent and the Board understand and acknowledge that this Agreement is confidential to the fullest extent permitted by law. Each party agrees that they will not directly or indirectly divulge, discuss, publicize, disclose or communicate the contents of this Agreement unless specifically required under the provisions of law or at the directive of any agency having authority over the Board without the express written consent of the other party. The parties acknowledge that Respondent's resignation from the District is not confidential and further acknowledge that the District has the obligation and will truthfully respond to any inquiry regarding Respondent from the State or federal government or their agencies, departments, divisions or instrumentalities. Respondent acknowledges and understands that this Agreement will be provided to the Commissioner of Education for final approval. These limitations on disclosure shall not apply to Respondent's disclosure to her immediate family, union, or legal representatives provided that Respondent instructs them and secures their agreement, to maintain all such information in the strictest of confidence.

6. **State Board of Examiners Reporting Requirement**

Respondent understands that the Commissioner of Education may refer this matter to the N.J. State Board of Examiners which may suspend or revoke her certificate.

7. **Satisfaction of *In re Cardonick*, 1990 S.L.D. 842 (1990)**

The parties agree that this matter satisfies the six (6) criteria for settlement set forth in *In re Cardonick*, 1990 S.L.D. 842, 846 (1990) and delineated in N.J.A.C. 6A:3-5.6.

i. Documentation as to the nature of the charges - See, Exhibit A for a copy of the tenure charges.

ii Circumstances justifying settlement – Respondent has resigned from the District effective October 29, 2020 making the tenure charges moot.

iii. Consent of both the charged and charging parties - The agreement has been executed by both parties.

A.F. Initials AF
BOE Pres. Initials

v. Subject party entered into this agreement with the [illegible] Paragraph 5 supra.

vi. Agreement on the public [illegible] Respondent has resigned from the District making [illegible] has admitted to the charges of misconduct which [illegible] tenure hearing on the remaining charges [illegible] what would result from the admission of the agreed [illegible] the District a significant amount in both [illegible] the hearing is presently scheduled for two full days.

vii. Referral to State Board of Examiners. See Paragraph 7 supra.

8. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

9. **Amendment; Severability; No Waiver.** This Agreement shall not be altered, changed or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

10. **Personal Belongings.** Upon her execution of this Agreement, the District will schedule an appointment with her to retrieve her personal belongings if any remain within the District at a mutually convenient date and time before or after school hours.

11. **District Property.** At the time Respondent retrieves her personal belongings she shall immediately be responsible for returning any District-owned property in her possession to the District including, but not limited to computers, computer files, keys, books, [illegible] curriculum and student records.

12. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

13. **Construction.** The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

AF Initials AF
BOE Pres. Initials [illegible]

14. **Law Governing.** This Agreement is governed by the laws of New Jersey.

IN WITNESS WHEREOF, the parties have executed this agreement consisting of four (4) pages as of the effective date.

Angela L. Fox
ANGELA FOX

Witness: VIA ZOOM JUAN FERNANDEZ

Dated: 10/15/2020

Dated: 10/15/2020

PARSIPPANY-TROY HILLS BOARD OF EDUCATION

By: Frank Negl
FRANK NEGLIA, BD. PRESIDENT

Witness: Vicki Condlin
Vicki Condlin

Dated:

Dated: 10-20-2020

A.F. Initials _____
BOE Pres. Initials _____

October 22, 2020

Parsippany-Troy Hills Board of Education
292 Parsippany Road
Parsippany, New Jersey 07054

Re: Resignation

Dear Dr. Satter:

Please accept my irrevocable letter of resignation from my employment with the Parsippany-Troy Hills Board of Education effective October 29, 2020 due to incapacitation as a result of work related Post Traumatic Stress Disorder.

Regards,

Angela L. Fox

Angela L. Fox

Schenck Price

SCHENCK PRICE SMITH & KING, LLP

Serving Our Clients and Community For Over 100 Years

KATHERINE A. GILFILLAN
Admitted in NJ, NY & MA
Direct Line: 973-631-7857
Email: kag@spsk.com
220 Park Avenue
PO Box 991
Florham Park, NJ 07932
Telephone: 973-539-1000
Fax: 973-540-7300
www.spsk.com

October 27, 2020

Via Electronic Mail Only (mbiren@gmail.com)
Melissa Biren, Esq.
52 Whitewood Drive
Morris Plains, NJ 07950

Re: In the Matter of Angela Fox; Dkt. #163-7/20

Dear Arbitrator Biren:

Enclosed please find a copy of the certified resolution of the Parsippany-Troy Hills Board of Education approving the settlement in the above-referenced matter subject to the Commissioner's final approval. The Board intends to accept Ms. Fox's resignation at its meeting this Thursday, October 29, 2020.

Should you have any further questions or concerns, please do not hesitate to contact me. The parties appreciate your assistance in bringing this matter to closure.

Very truly yours,

SCHENCK, PRICE, SMITH & KING, LLP

Katherine A. Gilfillan

Enc.
cc: Juan Fernandez, Esq. (via electronic mail only)
Dr. Robert Sutter (via electronic mail only)

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Parsippany-Troy Hills in the County of Morris, New Jersey, convened at its Regular Meeting on **Thursday, October 15, 2020** at the Dr. Frank A. Calabria Education Center, 292 Parsippany Road, Parsippany, NJ 07054

ROLL CALL **ROLL CALL**

The following members of the Board of Education were present

Mr. Timothy Berrios
Mr. Andrew Choffo
Mr. Matthew DeVitto
Mrs. Judy Mayer
Mrs. Deborah Orme
Mrs. Kendra Von Achen
Mrs. Alison Cogan
Mr. Frank Neglia

The following resolution was offered by Mr. DeVitto, seconded by Mr. Berrios and was unanimously adopted by the Board of Education:

Settlement Agreement **SETTLEMENT AGREE**

BE IT RESOLVED that the Board hereby approves the tentative settlement agreement with employee #30709 subject to the final approval of the Commissioner of Education and or his designee and further authorizes the Board President to execute the Agreement on behalf of the Board.

STATE OF NEW JERSEY)

COUNTY OF MORRIS)

I, Alfred Savio, School Board Secretary of the Board of Education, of the Township of Parsippany-Troy Hills 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 October 15, 2020, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Parsippany-Troy Hills 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 27th day of October, 2020.

(AFFIX SEAL)

Alfred Savio
Board Secretary

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the
Parsippany-Troy Hills Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST ANGELA FOX, BY THE BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, NEW JERSEY.	STATE OF NEW JERSEY BEFORE THE COMMISSIONER OF EDUCATION Agency Ref. No.: **SWORN TENURE CHARGES**

STATE OF NEW JERSEY)

COUNTY OF MORRIS)

I, Dr. Barbara Sargent, Superintendent of the School District of the Township of Parsippany-Troy Hills (hereinafter "Board" or "District"), of full age and capacity, and having been duly sworn by the undersigned authority, depose and say, I hereby charge Angela Fox ("Respondent"), a tenured teaching staff member employed by the Board, with incapacity, inefficiency, insubordination, conduct unbecoming a teaching staff member and/or other just cause warranting dismissal, pursuant to N.J.S.A. 18A:28-5 and N.J.A.C. 6A:3-5.1 *et seq.*

FACTS COMMON TO ALL CHARGES

1. The Board is a body corporate under the laws of the State of New Jersey charged with the supervision of public schools within the Township of Parsippany-Troy Hills, New Jersey, pursuant to N.J.S.A. 18A:1-1, *et seq.*

2. Respondent was hired as a certified teacher in or around September of 2011 and has served her entire District-teaching career as a 5th grade teacher assigned to the Lake Hiawatha Elementary School. Respondent holds an Elementary K-5 teacher certificate from the State of New Jersey.

3. Respondent gained tenure on or about September 2, 2014.

4. In or around November 25, 2014, the Board granted Respondent's request for a maternity leave of absence through the end of the 2014-2015 academic year.

5. The Board's approval of this request was immediately followed by Respondent's request for a child-rearing leave for the entirety of the 2015-2016 academic year which request was also granted by the Board.

6. On or about August 25, 2016, immediately prior to her anticipated return for the 2016-2017 school year, and days before school was to begin, Respondent requested another maternity/childrearing leave to commence immediately and continue through the December 2016 holiday break. The Board granted the requested leave.

7. Respondent returned to her teaching staff duties on or about January 9, 2017 and worked through the end of the 2016-2017 school year.

8. Although the Respondent returned to her position for the 2017-2018 school year, she was absent for 26.5 days out of the total 184 days required for teachers.

9. On August 29, 2018, again mere days before the start of the school year, the Respondent requested a "discretionary" leave of absence for the entirety of 2018-2019 school year.

10. Although initially it appeared that the Respondent was requesting a leave for maternity purposes, Respondent later claimed that the requested leave was for medical reasons.

11. The Board conditionally granted the requested leave utilizing Family and Medical Leave Act ("FMLA") entitlement from August 30, 2018 through November 26, 2018 pending receipt of supporting medical documentation.

12. On September 11, 2018, the Board advised the Respondent that upon exhaustion of her FMLA leave, she was expected to return to work.

13. Between July 2018 and August 2018, Respondent refused to provide the required medical certification and/or supporting documentation to support her leave request.

14. The FMLA medical certification that was eventually provided by the Respondent was ambiguous relative to the basis(es) for Respondent's requested leave. Thus, on November 15, 2018, the Board voted to send Respondent for a *Fit for Duty* evaluation to support her request for a discretionary leave of absence.

15. Respondent's FMLA entitlement was exhausted as of November 27, 2018.

16. Respondent underwent a *Fit for Duty* evaluation on December 4, 2018 with Dr. Mario Finkelstein, a licensed psychiatrist, who determined that Respondent was unable to perform her teaching duties and that she required mental health counseling before she could return to her position. Dr. Finkelstein indicated that it was "unlikely" that Respondent could return to her position before the end of the 2018-2019 school year.

17. Based on Dr. Finkelstein's report, the Board extended Respondent's leave through the end of the 2018-2019 school year but required that the Respondent provide status updates relative to her receipt of treatment that would permit her to return to her duties.

18. Respondent failed to provide the District with any doctors' notes/status reports as required from December 2018 through June of 2019.

19. Upon information and belief, Respondent did not undertake the needed treatment that would have allowed her to return to work between December 2018 and June 2019.

20. On or about July 11, 2019, the Board specifically directed the Respondent to provide the requested reports/notes from her treating providers. Although she insisted that she was undergoing treatment, Respondent refused to provide the requisite paperwork.

21. On or about July 19, 2019, Respondent continued to assure the Board that she was receiving treatment however refused/failed to provide any reports from that treatment and advised Dr. Robert Sutter that she had not been "cleared" to return to work.

22. Having received no information from Respondent's treating providers, the Board again required Respondent to undergo a *Fit for Duty* evaluation with Dr. Finkelstein to support her immediate return to the classroom for the 2019-2020 school year.

23. On August 20, 2019, Respondent underwent a second *Fit for Duty* evaluation and was found unfit to return to her duties as a classroom teacher.

24. During the course of the August 20, 2019 evaluation, Respondent advised Dr. Finkelstein that she continued to receive the required treatment when, in fact, she had not sought such treatment.

25. Dr. Finkelstein attempted to verify Respondent's claims of treatment but was unable to do so.

26. Dr. Finkelstein again recommended that Respondent undergo psychological/psychiatric treatment and be re-assessed in three months to determine if she could return to her teaching staff duties.

27. On September 23, 2019, Dr. Sutter met with Respondent to discuss her refusal to follow Dr. Finkelstein's prior recommendations, the requirement that she undergo therapy and directed her to provide status updates related to that treatment to his office.

28. The Board permitted Respondent to continue her leave of absence through December of 2019 provided that she receive the necessary treatment that would allow her to return to the classroom in January of 2020.

29. Respondent failed to provide the Board with any doctors' notes/status updates relative to any course of treatment from August 2019 through December 2019.

30. Respondent was scheduled for a third *Fit for Duty* evaluation on December 11, 2019 to ensure that she could return to her teaching staff position.

31. Despite being explicitly advised in August 2019 to undergo treatment as a condition of her leave, Respondent stated during her December 2019 *Fit for Duty* evaluation that she "had only just started" treatment in October 2019.

32. During the December 11, 2019 *Fit for Duty* evaluation, Respondent advised Dr. Finkelstein that she had "re-started" her mental health treatment by seeing a psychiatrist for medication management and had begun seeing a therapist on a weekly basis beginning in October of 2019.

33. Dr. Finkelstein sought to verify the information relayed by the Respondent relative to her alleged treatment by contacting the treating providers. The psychotherapist with whom Respondent was allegedly treating relayed that she had not seen the Respondent since early 2019.

34. Dr. Finkelstein's follow-up discussion with Respondent's psychiatrist revealed that Respondent continued to be "very anxious" about returning to work.

35. Dr. Finkelstein again opined that Respondent was unfit for duty as her inability to undertake/maintain the recommended therapy and to truthfully relay information called into question her reliability as well as the severity of her condition.

36. Based upon the foregoing, the Respondent was placed on administrative leave pending the certification of these charges.

CHARGE ONE

(Incapacity/Unbecoming Conduct)

The allegations set forth in numbered paragraphs one (1) through thirty-six (36) are incorporated by reference as if fully set forth herein.

COUNT ONE

(Unfit for Duty - 2018/2019 School Year)

Respondent was absent from her duties from December of 2014 through June of 2015.

Respondent was absent from her duties for the entirety of the 2015-2016 academic year.

Respondent was absent from her teaching duties from September 6, 2016 through January 6, 2017.

Respondent returned to the District for the 2017-2018 school year utilizing sixteen (16) sick days, three (3) personal days, and six (6) family illness days including the two ½ days of school immediately preceding the last day of school on June 21, 2018.

Respondent was scheduled to return to her classroom for the 2018-2019 school year.

On or about August 29, 2018, mere days before school was to open for the year, Respondent advised the District that she could not return to her teaching duties and required a "leave of absence."

Respondent refused to cooperate with the District in obtaining documentation to support

her requested leave of absence for the entirety of the 2018-2019 school year.

Respondent's FMLA entitlement expired on November 26, 2018.

On December 4, 2018, Respondent underwent a *Fit For Duty* evaluation to determine if Respondent could immediately return to the classroom.

On or about December 10, 2018, Dr. Finkelstein issued a report concluding that Respondent was unfit for her duties as a classroom teacher.

Respondent failed to undertake the necessary treatment to be able to return to her teaching staff duties.

Respondent was incapacitated from performing her job responsibilities of classroom teacher for the entirety of the 2018-2019 school year.

Respondent's absence from her teaching staff duties negatively impacted the educational program of students over a significant period of time.

The foregoing demonstrates Respondent's incapacity to perform her teaching staff duties, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A: 28-5.

COUNT TWO

(Unfit for Duty – 2019-2020 School Year
August 2019 Evaluation)

On or about August 20, 2019, Respondent underwent a second psychiatric evaluation by Dr. Mario Finkelstein to determine whether she was able to return to employment for the 2019-2020 school year.

On or about August 26, 2019, Dr. Finkelstein issued a report concluding that Respondent was unfit for duty and needed to be reassessed in three months.

Dr. Finkelstein recommended that Respondent undergo mental health

counseling/treatment in order to permit her to return to her duties.

Respondent failed to undertake the necessary treatment to return to her classroom.

Respondent was incapacitated from performing the job responsibilities of classroom teacher from August 2019 through December 2019.

Respondent's absence from her teaching staff duties negatively impacted the educational program of students over a significant period of time.

The foregoing, singularly or cumulatively, demonstrates Respondent's incapacity to perform her teaching staff duties, inefficiency and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A: 28-5 and N.J.S.A. 18A:6-10, *et seq.*

COUNT THREE

(Unfit for Duty – 2019/2020 School Year
December 2019 Evaluation)

On or about December 11, 2019, Respondent underwent a third psychiatric evaluation by Dr. Mario Finkelstein to determine whether she was capable of returning to work.

On or about December 23, 2019, Dr. Finkelstein issued a third report concluding that Respondent was unfit for duty.

Respondent failed to undertake the necessary treatment to return to her classroom.

Respondent was incapacitated from performing the job responsibilities of classroom teacher from August 2019 through December 2019.

Respondent's absence from her teaching staff duties negatively impacted the educational program of students over a significant period of time.

The foregoing, singularly or cumulatively, demonstrates Respondent's incapacity to perform her teaching staff duties, inefficiency and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A: 28-5 and N.J.S.A. 18A:6-10, *et seq.*

CHARGE TWO

(Insubordination/Unbecoming Conduct)

The allegations set forth in numbered paragraphs one (1) through thirty-six (36) and the above Tenure Charge are incorporated by reference as if fully set forth herein.

COUNT ONE

(Refusal to Provide Medical Documentation
2018/2019 School Year)

In or around July/August 2018, Respondent requested a "leave" of absence and was advised to provide documentation to the Human Resources Department in order for the leave to be substantiated.

From August 2018 through the end of October 2018, Respondent refused to provide the necessary documentation to substantiate her leave of absence as directed.

Respondent further refused to cooperate with the District by failing to timely provide an appropriate authorization permitting the District to share records with the District's medical examiner for purposes of scheduling Respondent's *Fit for Duty* evaluation as directed.

Respondent's actions required the Board incur the unnecessary expense of funding a *Fit for Duty* evaluation in support of Respondent's requested leave and requiring the District to employ a long-term substitute teacher to cover Respondent's classroom at the last minute.

The foregoing, singularly or cumulatively, establishes Respondent's insubordination, unbecoming conduct and/or demonstrates other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*

COUNT TWO

(Refusal to Provide Status Updates December 2018)

Respondent underwent a second *Fit for Duty* evaluation on December 4, 2018 and was found incapacitated from her position as a classroom teacher and in need of mental health counseling.

Respondent was directed by Dr. Sutter to undertake the necessary treatment to return to her duties and to provide status updates to his office.

From December 2018 through August 2019, Respondent failed and/or refused to undertake the necessary treatment that would have permitted her to return to her duties.

From December 2018 through August 2019. Respondent refused/failed to provide any reports/updates indicating that she was receiving the requisite treatment.

From December 2018 through August 2019, Respondent disobeyed a directive from her superior to provide status reports/updates relative to her treatment.

From December 2018 through August 2019, Respondent disobeyed a directive from her superior to undertake treatment that would allow her to return to her position.

The foregoing establishes Respondent's insubordination, unbecoming conduct and/or demonstrates other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq*.

COUNT THREE

(Refusal to Provide Status Updates 2019-2020 School Year)

In or around July-August of 2019, Respondent was directed to provide status updates as to her treatment and clearance to return to work for the 2019-2020 school year.

From August 2019 through December 2019, Respondent failed and/or refused to undertake the necessary treatment that would have permitted her to return to her duties for the 2019-2020 school year.

From August 2019 through December 2019, Respondent failed and/or refused to provide the requisite status updates relative to her treatment to permit her to return to work for the 2019-2020 school year.

From August 2019 through December 2019, Respondent disobeyed a directive from her superior to provide the requisite medical documentation to demonstrate her ability to return to work and/or her treatment.

From August 2019 through December 2019, Respondent disobeyed a directive from her superior to undertake treatment that would allow her to return to her classroom duties.

The foregoing establishes Respondent's insubordination, unbecoming conduct and/or demonstrates other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*

COUNT FOUR

(Refusal to Undertake Actions to Return to Duty December 2019)

Upon completion of the December 2019 *Fit for Duty* evaluation, Respondent was again directed to undertake a course of recommend psychological/psychiatric treatment which would permit her to return to her classroom.

Since December 2019, Respondent has refused or failed to undertake the requisite treatment that would allow her to return to duty.

Since December 2019, Respondent has failed/refused to provide the requisite status updates to the District as directed.

Since December 2019, Respondent disobeyed a directive from her superior to provide the requisite medical documentation to demonstrate her ability to return to work and/or her treatment.

Since December 2019, Respondent disobeyed a directive from her superior to undertake treatment that would allow her to return to her classroom duties.

Respondent's inability to follow through on recommended treatment in order to return to her duties, demonstrates Respondent's incapacity or inability to undertake her professional responsibilities.

The foregoing, singularly or cumulatively, demonstrates Respondent's incapacity to perform her teaching staff duties, insubordination, unbecoming conduct and/or other just cause warranting her dismissal pursuant to N.J.S.A. 18A: 28-5 and N.J.S.A. 18A:6-10, *et seq.*

et seq.

CHARGE THREE

The allegations set forth in numbered paragraphs one (1) through thirty-six (36) and the above Tenure Charges One and Two are incorporated by reference as if fully set forth herein.

COUNT ONE

(Unbecoming Conduct – Dishonesty Towards Employer)

On July 18, 2019, Respondent affirmatively represented to Dr. Sutter that she was undertaking the necessary activities, i.e., counseling, to permit her to return to her duties as a classroom teacher.

The foregoing representation was knowingly and willfully false.

The foregoing establishes Respondent's insubordination, unbecoming conduct and/or demonstrates other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and

N.J.S.A. 18A:6-10, *et seq.*

COUNT TWO

(Unbecoming Conduct – Dishonesty Towards Employer's Agent)

On August 20, 2019, Respondent represented to Dr. Finkelstein during her *Fit For Duty* evaluation that she was undergoing treatment as previously recommended/required.

The foregoing representation was knowingly and willfully false.

On December 11, 2019 during her *Fit for Duty* Evaluation with Dr. Finkelstein, Respondent represented that she was undergoing treatment to permit her to return to her duties as classroom teacher.

The foregoing representation was knowingly and willfully false.

The foregoing establishes Respondent's insubordination, unbecoming conduct and/or demonstrates other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*

CHARGE FOUR

(Failure to Follow District Directives and Procedures)

The allegations set forth in numbered paragraphs one (1) through thirty-six (36) and Tenure Charges One, Two, and Three are incorporated by reference as if fully set forth herein.

Respondent repeatedly failed to follow administrative directives and District procedures, including, but not limited to, failing to provide the District with doctors'/providers' notes relative to her medical status so that the District could make appropriate alternative arrangements to cover and manage Respondent's classroom.

Respondent's actions, as set forth above and in further detail in these Tenure Charges, had a negative effect on the education of students; resulted in the need to employ long-term

substitutes on an ad-hoc basis as Respondent failed to keep the District apprised of her status; and resulted in the significant, yet unnecessary expenditure of administrative time and effort to address her incapacity, insubordination and unbecoming conduct.

Respondent's actions fall far below the behavior expected of a teaching staff member, are unprofessional, disrespectful and insubordinate, and constitute inefficiency, incapacity, conduct unbecoming a teaching staff member and/or other just cause warranting dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

CHARGE FIVE

(Failure to Adhere to Teacher Job Description)

The allegations set forth in numbered paragraphs one (1) through thirty-six (36) and Tenure Charges One, Two, Three and Four are incorporated by reference as if fully set forth herein.

The Board-approved job description for the position of Teacher sets forth the expectations of the Board of Education with respect to those individuals employed in that position. Pursuant to the job description, the District expects its teachers to, among many other things, satisfy the following minimum requirements:

(1) Meets and instructs assigned classes in the location and at times designated.

(2) Develops and maintains a classroom environment conducive to effective learning.

(3) Prepares for classes assigned, [sic] and shows written evidence of preparation upon request of supervisors.

(4) Sets and maintains standards of classroom behavior.

(5) Employs a variety of effective instructional techniques.

(6) Implements district initiatives and instructional goals and objectives.

(7) Takes all necessary and reasonable precautions to protect students, equipment,

materials, and facilities.

(8) Provides a systematic, well-documented summary of students' progress in the classroom.

(9) Upholds and enforces school rules, administrative regulations, Board policy, state and federal law.

As set forth in detail herein and in the documents contained within the Sworn Statement of Evidence, Respondent's performance falls far below the level expected of a District teacher, is not in compliance with the requirements set forth in the District's job description for classroom teachers and constitutes incapacity, insubordination, inefficiency, conduct unbecoming a teaching staff member and/or other just cause warranting dismissal pursuant to N.J.S.A. 18A:6-10, et seq. and N.J.S.A. 18A:28-5.

CHARGE SIX

(Failure to Adhere to Board Policies)

The allegations set forth in numbered paragraphs one (1) through thirty-six (36) and Tenure Charges One, Two, Three, Four and Five are incorporated by reference as if fully set forth herein.

The foregoing actions are in violation of Board policies and regulations governing the conduct of teaching staff members in the District including, but not limited to, Board Policy #3161 (Examination for Cause), #3211 (Code of Ethics), and #3435 (Anticipated Disability) with associated regulations.

As set forth in detail herein and in the documents contained within the Sworn Statement of Evidence, Respondent's performance falls far below the level expected of a District teacher, and is in violation of the Board's policies and regulations governing teacher conduct, constitutes incapacity, insubordination, inefficiency, conduct unbecoming a teaching staff member and/or

other just cause warranting dismissal pursuant to N.J.S.A. 18A:6-10, et seq. and N.J.S.A. 18A:28-5.

WHEREFORE, I, Dr. Barbara Sargent, Superintendent of the Parsippany-Troy Hills School District, respectfully request that the Board certify the within charges to the Commissioner of Education for further action consistent with N.J.S.A. 18A:6-10, *et seq.* and 28-5, *et seq.*

Barbara Sargent

Dr. Barbara Sargent, Superintendent
Parsippany-Troy Hills School District

Sworn to and subscribed before me
On this 2nd day of July 2020

Katherine A. Gilfillan
Attorney at Law
State of New Jersey

Juan C. Fernandez, Esq. Attorney ID 02011988
FERNANDEZ GARCIA, LLC
14 Elm Street
Morristown, NJ 07960
Phone: (973) 500-2256 FAX: (973) 298-5737
Attorneys for Angela Fox

	STATE OF NEW JERSEY
IN THE MATTER OF THE TENURE CHARGES AGAINST ANGELA FOX	BEFORE THE COMMISSIONER OF EDUCATION
BY THE PARSIPPANY-TROY HILLS BOARD OF EDUCATION, MORRIS COUNTY, NEW JERSEY.	Agency Ref. No.: 163-7/20
	RESPONDENT'S RESPONSES TO SWORN TENURE CHARGES

Angela Fox, by and through her counsel, Juan C. Fernandez, Esq., a duty admitted Attorney at Law for the State of New Jersey, hereby responds to Parsippany Troy Hills School District Board of Education's Sworn Tenure Charges as follows:

FACTS COMMON TO ALL CHARGES

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.
6. Admit.
7. Admit.
8. Admit.
9. Deny.

10. Deny.

11. Deny.

12. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

13. Deny.

14. Respondent admits that the Parsippany Troy Hills School District Board of Education voted to send her for a Fit For Duty Evaluation. However, Respondent denies that she was "ambiguous relative to the basis(es) for [her] leave."

15. Admit.

16. Admit.

17. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

18. Deny.

19. Deny.

20. Deny.

21. Deny.

22. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

23. Admit.

24. Deny.

25. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

26. Admit.

27. Deny.

28. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

29. Deny.

30. Admit.

31. Deny.

32. Admit.

33. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

34. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

35. Respondent neither admits nor denies this factual aversion but leaves to the Parsippany Troy Hills School District Board of Education to its proofs.

CHARGE ONE
(Incapacity/Unbecoming Conduct)

Respondent repeats and reiterates her responses to the allegations in paragraphs one (1) through 36 as if set forth fully herein.

COUNT ONE
(Unfit for Duty – 2018/2019 School Year)

Respondent denies that she was unfit for duty during the 2018-2019 school year. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein.

Otherwise, Respondent denies that:

(a) Respondent's absence from her teaching staff duties negatively impacted the educational program of he students over a significant period of time; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that Respondent's action rise to the level of "unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5".

COUNT TWO
(Unfit for Duty – 2019-2020 School Year
August 2019 Evaluation)

Respondent denies that she was unfit for duty during the 2019-2020 school year or failed to properly submit for an August 2019 Evaluation. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent's absence from her teaching staff duties negatively impacted the educational program of the students over a significant period of time; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that "[the allegations], singularly or cumulatively, demonstrates Respondent's incapacity to perform her teaching staff duties, inefficiency and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

COUNT THREE
(Unfit for Duty – 2019-2020 School Year
December 2019 Evaluation)

Respondent denies that she was unfit for duty during the 2019-2020 school year or failed to properly submit for a December 2019 Evaluation. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent's absence from her teaching staff duties negatively impacted the educational program of the students over a significant period of time; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that "[the allegations], singularly or cumulatively, demonstrates Respondent's incapacity t perform her teaching staff duties, inefficiency and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

CHARGE TWO
(Insubordination/Unbecoming Conduct)

Respondent repeats and reiterates her responses to the allegations in paragraphs one (1) through 36 and the above Tenure Charge One as if set forth fully herein.

COUNT ONE
(Refusal to Provide Medical Documentation 2018/2019 School Year)

Respondent denies that she refused to provide medical documentation for the 2018/2019 school year. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent's denies that her "actions required the Board [to] incur unnecessary expense[s]"; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that "[the allegations], singularly or cumulatively, demonstrates Respondent's incapacity t perform her teaching staff duties, inefficiency and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

COUNT TWO
(Refusal to Provide Status Updates
December 2018)

Respondent denies that she refused to provide medical status updates in or about December 2018 school year. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent "disobeyed a directive from her superior"; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that Respondent's action rise to the level of "insubordination, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

COUNT THREE
(Refusal to Provide Status Updates
2019-2020 School Year)

Respondent denies that she refused to provide medical status updates during the 2019-2020 school year. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent "disobeyed a directive from her superior"; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that Respondent's action rise to the level of "insubordination, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

COUNT FOUR
(Refusal to Undertake Actions to Return to Duty December 2019)

Respondent denies that she refused to undertake actions to return to duty in or about December 2019. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent "disobeyed a directive from her superior [and/or] failed to follow through on recommended treatment"; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that "[the allegations], singularly or cumulatively, demonstrates Respondent's incapacity to perform her teaching staff duties, insubordination, unbecoming conduct and/or other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

CHARGE THREE
(Unbecoming Conduct – Dishonesty Towards Employer)

Respondent repeats and reiterates her responses to the allegations in paragraphs one (1) through 36 and the above Tenure Charge Ones and Two as if set forth fully herein.

COUNT ONE
(Unbecoming Conduct – Dishonesty Towards Employer)

Respondent denies that she was knowingly and willfully dishonest toward her employer. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent's "representation was knowingly and willfully false"; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that Respondent's action rise to the level of "insubordination, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

COUNT TWO
(Unbecoming Conduct – Dishonesty Towards Employer's Agent)

Respondent denies that she was knowingly and willfully dishonest toward her employer's agent. As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent "representation was knowingly and willfully false"; and/or

(b) That the Parsippany Troy Hills School District Board of Education has failed to demonstrate that Respondent's action rise to the level of "insubordination, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

CHARGE FOUR
(Failure to Follow District Directives and Procedures)

Respondent repeats and reiterates her responses to the allegations in paragraphs one (1) through 36 and the above Tenure Charge Ones through Three, inclusive, as if set forth fully herein. Respondent denies that she "repeatedly failed to follow administrative directives and District procedures".

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent's actions negatively impacted the education program of the students and/or caused the unnecessary expenditures of administrative time and effort; and/or

(b) Respondent's "actions fall far below the behavior expected of a teaching staff member, are unprofessional, disrespectful and insubordinate"; and/or

(c) The Parsippany Troy Hills School District Board of Education has failed to demonstrate that Respondent's action rise to the level of "insubordination, inefficiency, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, *et seq.*"

CHARGE FIVE
(Failure to Adhere To Teacher Job Description)

Respondent repeats and reiterates her responses to the allegations in paragraphs one (1) through 36 and the above Tenure Charge Ones through Four, inclusive, as if set forth fully herein. Respondent denies that she failed to meet "Board-approved job description".

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent knowingly and willfully failing to meet the Board policies; and/or

(b) The Parsippany Troy Hills School District Board of Education has failed to demonstrate that Respondent's action rise to the level of "insubordination, inefficiency, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5".

CHARGE SIX
(Failure to Adhere to Board Policies)

Respondent repeats and reiterates her responses to the allegations in paragraphs one (1) through 36 and the above Tenure Charge Ones through Five, inclusive, as if set forth fully herein. Respondent denies that she failed to meet "Board policies and regulations governing the conduct of teaching staff members in the District ". As for the factual aversions set forth herein:

To the extent that the factual aversions alleged herein are aversions which have been previously set forth in paragraphs one through 36 above, Respondent repeats, reiterates and incorporates her responses to those allegations as if set forth fully herein. Otherwise, Respondent denies that:

(a) Respondent knowingly and willfully failed to meet the requirements set forth by the "Board-approved job description"; and/or

(b) The Parsippany Troy Hills School District Board of Education has demonstrated that Respondent's action rise to the level of "insubordination, inefficiency, unbecoming conduct and/or constitutes other just cause warranting her dismissal pursuant to N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5".

FERNANDEZ GARCIA, LLC.
Attorneys for Respondent, Angela Fox

By: /s/ *Juan C. Fernandez*
JUAN C. FERNANDEZ, ESQ.

Date: August 6, 2020

252-20

New Jersey Commissioner of Education

Final Decision

H.D. and D.D., on behalf of minor child, L.D.,

Petitioners,

v.

Board of Education of the Borough of Woodcliff Lake, Bergen County,

Respondent.

Synopsis

Petitioners appealed the respondent Board's determination that their minor child, L.D., committed an act of harassment, intimidation and bullying (HIB) in violation of New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The Board's HIB determination stemmed from an incident in January 2020 wherein L.D. was accused of making a racial comment toward a fellow fifth grader. An administrative hearing was requested by an attorney for the petitioners, and held on March 5, 2020. Thereafter, on March 6, 2020, the Board's written decision upholding the finding of HIB was delivered to petitioners. The within petition of appeal was not filed until July 2020. The Board filed a motion for summary decision, arguing that the petition is time-barred time-barred pursuant to *N.J.A.C.* 6A:3-1.2(i), which requires petitions to be filed no later than 90 days from the date of receipt of the action that is the subject of the case. The petitioners opposed the motion.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the case is ripe for summary decision; under *N.J.A.C.* 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency that is the subject of the case; and petitioners' argument that the timeframe in this matter must be relaxed given the exceptional circumstances of the COVID-19 epidemic is without merit. Accordingly, the ALJ concluded that petitioners did not file a timely appeal of the Board's HIB decision, and consequently declined to address the substantive issues in this case.

Upon an independent review – and finding petitioners' exceptions to be unconvincing – the Commissioner concurred with the ALJ's determinations and adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

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

252-20
OAL Dkt. No. EDU 06602-20
Agency Dkt. No. 153-7/20

New Jersey Commissioner of Education

Final Decision

H.D. and D.D., on behalf of minor child, L.D.,

Petitioners,

v.

Board of Education of the Borough of Woodcliff Lake, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Board have been reviewed and considered.

This matter involves a harassment, intimidation, and bullying (HIB) complaint made by another student against petitioners' minor child, L.D. The Administrative Law Judge (ALJ) granted the Board's motion to dismiss on the basis that that the petition was untimely because it was filed more than 90 days after the Board's decision finding that L.D. had committed an act of HIB.

In their exceptions, petitioners argue that their attorney was not served with a copy of the Board's decision. Petitioners include a certification stating that due to the COVID-19 pandemic, they were delayed in sending a copy of the Board's decision to their attorney until April 3, 2020. Petitioners also contend that the 90-day timeline should be relaxed in the interest of justice, because the case raises constitutional issues that should be evaluated on the merits.

In reply, the Board argues that it had no knowledge that petitioners were represented by counsel, as they appeared at the Board hearing the day before the decision was issued without counsel and indicated that they had elected to proceed without counsel. The Board also asserts that there is no evidence to support relaxing the 90-day timeline.[1]

Upon review, the Commissioner concurs with the ALJ that the petition is time-barred pursuant to *N.J.A.C.* 6A:3-1.2(i), which requires petitions to be filed no later than 90 days from the date of receipt of the action that is the subject of the case. The Board's decision was issued on March 6, 2020, and the petition of appeal was not filed until July 2, 2020. The Anti-Bullying Bill of Rights Act does not require that the Board's decision be served on counsel for the parents of the students at issue. Furthermore, while the Commissioner recognizes the difficulties many individuals have faced due to the COVID-19 pandemic and understands that petitioners may have been delayed in sending a copy of the decision to their attorney as a result, petitioners admit that they forwarded the decision to their attorney on April 3, 2020, two months before the 90-day timeline expired on June 4, 2020.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2020
Date of Mailing: November 6, 2020

[1] The Board's reply also includes substantive arguments regarding the HIB decision. As the Commissioner has determined to dismiss this matter for failure to timely file, he does not reach the substantive HIB issues alluded to in petitioner's exceptions and more explicitly argued in the Board's reply.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 06602-20
AGENCY DKT. NO. 153-7/20

H.D. & D.D. ON BEHALF OF L.D.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIF LAKE, BERGEN COUNTY,

Respondents.

Phoung Dao, Esq. for petitioners

Jeffrey R. Merlino, Esq., for respondent Borough of Woodcliff Lake (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC)

Record Closed: September 10, 2020 Decided: September 17, 2020

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner challenges the Borough of Woodcliff Lakes Board of Education's (Board or respondent) determination that minor child L.D. committed an act of Harassment, Intimidation and Bullying (HIB).

A petition challenging the Board's HIB determination was filed with the Office of Administrative Law (OAL) on July 8, 2020. Respondent filed a motion for summary

decision on September 4, 2020. Petitioner filed opposition to the motion on September 10, 2020.

FACTUAL DISCUSSION

Having reviewed the supporting documents submitted by both sides I **FIND** the following to be the **FACTS** of this matter:

On January 15, 2020, L.D was a fifth-grade student in Woodcliff Lakes Public Schools. On that date a parent of one of the students complained that L.D. committed an act of HIB against the parent's daughter. L.D. was accused of making a racial comment that her daughter was a poor African. An investigation was conducted which confirmed HIB based on race/skin color. On or about January 16, 2020, petitioners were informed of the HIB investigation. On January 24, 2020, petitioners were informed the investigation determined that the incident with L.D. was an HIB incident.

On or about February 12, 2020, the law firm of Dao Law LLC sent a letter to Lauren Barbelet, Superintendent of Woodcliff Lake Public Schools that petitioners requested an administrative hearing, which was held on March 5, 2020. On or about March 6, 2020, respondent delivered the Board's written decision denying the appeal to petitioners. Petitioners were advised in the letter that they could appeal the Board's decision to the Commissioner of Education no later than ninety days after the Board's decision. Petitioner forwarded the March 6, 2020, letter from the Board denying their appeal to their attorney on April 3, 2020. Petitioners filed an appeal with the Commissioner of Education on June 29, 2020.

LEGAL DISCUSSION AND CONCLUSIONS

The Commissioner has specifically addressed the time in which a petitioner must initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws.

N.J.A.C. 6A:3-1.3(i) requires that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district

> board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Such a rule represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws and falls within the scope of authority granted to the Commissioner. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Ibid. Its purposes are to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend and to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs. Id. at 587.

The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. A petitioner must file a petition within ninety days from a notice of adverse action and not within ninety days of her exhaustion of other avenues and mechanisms she might have employed in seeking renewal of employment. Id. Informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow supra at 588. Also, the ninety-day period for filing a petition of appeal commences when a petitioner learns of facts that would enable her to file a timely claim. Id. at 587. "Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Ibid. (citation omitted).

N.J.A.C. 6A:3-1.13 states:

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

Respondent knew that petitioners had counsel, and respondent did not copy petitioners' counsel of its decision. However, petitioners were informed of the Board's

decision to deny their appeal on or about March 6, 2020. Petitioners informed their attorney of the Bord's denial of their appeal on April 3, 2020.

Petitioner argues that N.J.A.C. 6A:3-1.3(i) (the 90-day rule) should be relaxed in accordance with N.J.A.C. 6A:3-1.16. N.J.A.C. 6A: 3-1.3(I) is to be strictly construed. It clearly states the petitioner **shall** file a petition no later than the 90th day. The fact that petitioner's attorney was not noticed by the Board is not an exceptional circumstance because petitioners were noticed by the Board on or around March 6, 2020.

Petitioner argues that the Covid 19 pandemic is an exceptional circumstance requiring the 90-day rule to be relaxed. Petitioner did not provide a certification or any information specifically as to how the pandemic affected them to cause a relaxation of the 90-day rule.

I **CONCLUDE** petitioner did not file a timely appeal of the Board's HIB decision. Since the appeal was not timely filed, I will not address the substantive portion of the motion.

ORDER

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

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

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

September 17, 2020

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: September 17, 2020

Date Mailed to Parties: September 17, 2020

ljb

253-20

New Jersey Commissioner of Education

Final Decision

M.M., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Lafayette, Sussex County,

Respondent.

Synopsis

Petitioner appealed the finding of the respondent Board's Anti-Bullying Coordinator (ABC) that her son was not the victim of harassment, intimidation and bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner was given the opportunity to contest the ABC's HIB findings in a hearing before the Board and was offered two options on how to proceed in light of the COVID-19 epidemic. Petitioner chose instead to file the within petition, challenging the ABC's findings and arguing that the district has violated the Act and the Family Educational Rights and Privacy Act (FERPA) by refusing to provide access to and copies of video recordings showing the events at issue. The Board filed a motion to dismiss, contending that petitioner failed to exhaust her administrative remedies by not pursuing the required appeal at the Board level.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact here, and the Board is entitled to prevail as a matter of law because petitioner failed to avail herself of a Board-level hearing before appealing to the Commissioner; the district has substantially complied with petitioner's FERPA request for access to the video recordings; and, further, FERPA does not require the Board to provide copies of the videos. The ALJ concluded that the petitioner's appeal before the Commissioner is not ripe; accordingly, summary decision was granted to the Board as a matter of law, and the petition was dismissed.

Upon a comprehensive review, the Commissioner, *inter alia,* concurred with the ALJ that petitioner's claim regarding the district's HIB decision is not ripe for review because the statutory procedures outlined in the Act have not been completed. Having found petitioner's exceptions to be without merit, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed with instruction that the matter shall proceed at the local level before the Board, and that, if and when the petitioner disagrees with the Board's decision following that hearing, a new petition of appeal may be filed with the Commissioner. The instant 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.

253-20

OAL Dkt. No. EDU 05225-20
Agency Dkt. No. 94-5/20

New Jersey Commissioner of Education

Final Decision

M.M., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Lafayette, Sussex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Board have been reviewed and considered.[1]

This matter involves allegations of harassment, intimidation, and bullying (HIB) made by petitioner's minor child. Following an investigation, the district's anti-bullying coordinator (ABC) issued a report indicating the complaint was unsubstantiated. Petitioner appealed to the Commissioner, disputing the ABC's conclusion and arguing that the district has violated the Anti-Bullying Bill of Rights Act (Act) and the Family Educational Rights and Privacy Act (FERPA) by refusing to provide access to and copies of video recordings showing the events at issue. The Board filed a motion to dismiss, and the matter was transmitted to the OAL. The case was initially assigned

[1] An audio recording of a telephone conference conducted by ALJ Danielle Pasquale has also been reviewed.

to ALJ Danielle Pasquale and was later transferred to ALJ Jude Tiscornia.[2] In his Initial Decision, ALJ Tiscornia granted summary judgment to the Board, concluding that petitioner had failed to exhaust her administrative remedies because she had not availed herself of a hearing before the Board prior to appealing to the Commissioner. The ALJ also ruled that the district had substantially complied with petitioner's FERPA request for access to the video recordings, and that FERPA does not require the Board to provide copies of the videos.

Following the Initial Decision, petitioner filed a motion to reopen pursuant to *N.J.A.C.* 1:1-18.5, in which she argued that she was not afforded a hearing or oral argument to present evidence in responsive to the Board's motion to dismiss. The Commissioner denied the motion, finding that no statute or regulation requires a hearing or oral argument.[3]

In her exceptions, petitioner argues that the ALJ incorrectly found that she was appealing the ABC's HIB finding, and instead asserts that the issue is her request for discovery access to the video recordings prior to the Board hearing. Petitioner also disputes the ALJ's statements that indicate she is seeking copies of the video recordings and that she is seeking access to the videos under FERPA. Petitioner reiterates arguments made in her motion to compel discovery, contending that she needs access to the video recordings to present her case to the Board. Petitioner takes issue with the proceedings at the OAL, in particular the ALJ's granting of a motion for summary decision that the Board did not file. She alleges that if the ALJ converted the Board's

[2] Petitioner filed a motion to disqualify ALJ Pasquale following a telephone conference she conducted with the parties. The record does not include an Order ruling on the motion to disqualify, but as the case was subsequently transferred to another ALJ, there is no need for a decision on the motion, as petitioner received the relief which she sought.

[3] Following the issuance of Commissioner Decision No. 191-20L regarding the motion to reopen, petitioner filed a "Motion for Hearing and Oral Argument," in which she expressed disagreement with the Commissioner's decision. There is no statutory or regulatory provision for such a motion. Nonetheless, as the Commissioner concluded in Decision No. 191-20L, there is no requirement that every case before the OAL include a hearing and/or oral argument, and it was entirely appropriate for the ALJ to issue an Initial Decision without conducting either type of proceeding. For that reason, petitioner's "Motion for Hearing and Oral Argument" is denied.

motion to dismiss to a motion for summary decision, she did not have notice or an opportunity to respond.[4]

In reply, the Board argues that the Initial Decision was correctly decided and should be affirmed.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ that petitioner's claim regarding the district's HIB decision is not ripe for review because the statutory procedures outlined in the Act have not been completed.[5] As a preliminary matter, the Commissioner finds that it was appropriate for the ALJ to decide the matter on a summary basis, notwithstanding the fact that the Board did not file a document entitled "Motion for Summary Decision." The Board did file a motion to dismiss, and it included documents outside the pleadings in support of the motion. Converting such a motion to one for summary decision is common practice and consistent with *N.J. Ct. R.* 4:6-2, which is applicable to proceedings at the OAL pursuant to *N.J.A.C.* 1:1-1.3.

Petitioner argues that *N.J. Ct. R.* 4 :6-2 requires the court to provide notice that it intends to consider a motion to dismiss as a motion for summary judgment, and that she received no such notice. Her argument is belied by the fact that following a telephone conference with ALJ Tiscornia on August 4, 2020, petitioner filed a letter dated August 5, 2020 in which she objected to having the matter heard on a summary basis. It is clear that petitioner did, therefore, have notice

[4] Following the filing of her exceptions, petitioner filed a motion to stay the Commissioner's decision in this matter. It appears that petitioner misunderstands *N.J.A.C.* 6A:3-1.15, which provides for a motion for a stay of a Commissioner's decision. This regulation is not a mechanism by which a party can delay the issuance of the Commissioner's decision. Rather, this regulation allows a party delay any relief ordered in the Commissioner's decision, pending a determination on appeal to the Appellate Division of the Superior Court. A motion for a stay of a Commissioner's decision cannot be appropriately filed until after the Commissioner's decision has been issued, and must be filed concurrent with, or subsequent to, a notice of appeal of that decision. Accordingly, petitioner's motion for a stay has not been considered.

[5] While petitioner indicated in her exceptions that she is not seeking to appeal the ABC's HIB finding, the Commissioner is nonetheless compelled to address this issue, as it was included in the petition of appeal and many of petitioner's filings throughout the pendency of the case, including the exceptions themselves, have included arguments related to the correctness of the ABC's finding that her child was not the victim of an act of HIB.

of the ALJ's intention to treat the Board's motion to dismiss as a motion for summary decision. Moreover, petitioner had the opportunity to present evidence in opposition to the Board's arguments directly in both her original opposition to the motion to dismiss and the August 5, 2020 letter raising additional objections, and indirectly in her numerous other filings making arguments on both the HIB claim and the discovery claim. The Commissioner further rejects petitioner's argument that the Board's failure to provide the video recordings in discovery precludes the entry of summary decision, as the content of the videos is irrelevant to the legal questions pertaining to the Commissioner's jurisdiction over this matter and petitioner's right to her child's student records. The Commissioner therefore agrees with the ALJ's decision to convert the Board's motion to dismiss to a motion for summary decision.[6]

A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29 (1995).

There is no dispute that the Board has not issued a decision regarding petitioner's HIB claim; in fact, petitioner admits as much in the petition of appeal.[7] The district's ABC has made

[6] Following the Initial Decision, petitioner filed a "Motion to Strike" the Board's motion for summary decision and a "Motion to Vacate" the Initial Decision, based on arguments substantially similar to those made in petitioner's exceptions. There is no statutory or regulatory provision for such motions. Nonetheless, as the Commissioner has concluded that converting the Board's motion to dismiss to a motion for summary decision was appropriate, the motions are denied.

[7] While petitioner filed a motion for leave to amend her petition of appeal, nothing contained in that motion alters the fact that the Board has not yet issued a decision. Instead, the motion seeks to raise additional issues regarding the procedures followed by district staff during the course of the HIB investigation and the accuracy of the ABC's

findings, and the superintendent has reported those findings to the Board, but the Act requires those findings to be affirmed, rejected, or modified by the Board, and it is the Board's decision that is appealable to the Commissioner. *N.J.S.A.* 18A:37-15(b)(6)(e). The Legislature explicitly created a multi-step process for the investigation and determination of HIB allegations. Only after the final decision by the board of education did the Legislature create a right of appeal to the Commissioner, and for good reason – it is not in the interest of judicial economy to adjudicate HIB matters in a piecemeal fashion. To allow an appeal following the ABC's written report, as petitioner sought to do here, would result in the expenditure of time and money to dispute findings that could have been rejected by the Board if the matter had proceeded to a vote. Moreover, the standard of review applicable to the Commissioner's decision in HIB matters necessitates that the process be concluded prior to coming before the Commissioner. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *See Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The Commissioner is unable to determine whether the Board's decision was arbitrary, capricious, or unreasonable when the Board has not issued a decision.

Although the Commissioner has jurisdiction to hear all controversies arising under the school laws, the criteria for determining the ripeness of a controversy for judicial determination are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 *U.S.* 136, 149 (1967). In assessing fitness, the court must determine if a legal question suitable for judicial resolution has crystallized and whether the ruling or action that is the subject of the complaint is final. *Ibid.* Here, the action complained of – the HIB finding – is not final, and therefore the matter is not

findings. Petitioner's HIB claim, including any and all issues regarding the district's procedures or findings, is not ripe for review, for the reasons explained herein. Therefore, the motion for leave to amend is moot and is denied.

ripe for review. The Commissioner notes that, in arguing for dismissal, the Board frames the issue as a failure to exhaust administrative remedies, an argument that the ALJ accepted. However, the jurisdictional issue is more properly characterized as one of ripeness, as the Board's decision regarding the HIB allegations is not a remedy to an action by the ABC or the superintendent, but rather a necessary predicate to a decision by the Commissioner.[8] For these reasons, summary judgment is granted in favor of the Board.

The Commissioner also concurs with the ALJ's decision denying petitioner's motion to compel discovery related to the video recordings.[9] Petitioner has, in various filings, argued that discovery is needed as part of the district-level HIB process and as part of the contested case opened through her petition of appeal. To the extent that the motion sought discovery in the docketed contested case, the motion is moot and is denied.[10] To the extent that the motion sought "discovery" for the Board hearing on the HIB claim that has not yet occurred, the Commissioner has previously addressed the question of the nature of a board of education's hearing regarding an HIB allegation and concluded that the Act does not require trial-type adversary proceedings. *L.K. and T.K., obo*

---

[8] Participants in the Board hearing process may colloquially refer to the hearing as an "appeal." However, while a hearing presents an opportunity for parents to dispute the findings of the ABC and/or the superintendent, it is not, in fact, an appeal of those decisions, and it is not characterized in the Act as such. A parent who does not request a hearing is still permitted to appeal a board's decision to the Commissioner – provided that a decision has been made. Here, the obstacle to the Commissioner's jurisdiction is not the lack of a hearing, but the lack of a decision by the Board.

[9] Petitioner also filed a motion for emergent relief, asking the ALJ to grant her motion to compel discovery before any other pending motions are decided. Petitioner argued that she is unable to proceed with a hearing before the Board without the video recordings. The motion for emergent relief seeks the same relief as the motion to compel discovery, and it must be rejected for the same reasons.

[10] This decision does not preclude petitioner from seeking the video recordings as discovery in any future proceedings before the OAL, nor does it determine whether any such request should be granted or denied. Petitioner's motion to sanction the Board for failing to respond to her discovery request is also denied. Petitioner emailed counsel for the Board on June 9, 2020, seeking access to or copies of the videos. Petitioner argues that by failing to provide access or copies within 15 days of the request, the Board should be subject to sanctions. However, petitioner had filed a motion to compel discovery, seeking the same items from the Board, on June 12, 2020. With its motion to dismiss pending, as well as petitioner's motion to compel the Board to produce the same video recordings requested in discovery, it was not unreasonable for the Board to withhold discovery until decisions on those motions could be issued. Therefore, sanctions are not warranted. Moreover, as the motion to compel discovery has been denied, the motion for sanctions is moot, and imposing sanctions for failure to produce that discovery would be unfounded.

A.K. v. Mansfield Bd. of Educ., Commissioner Decision 107-19 (April 22, 2019). The Act provides that "[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents." *N.J.S.A.* 18A:37-15(b)(6)(d). Provisions for procedures more judicial in nature – including discovery – could have been included by the Legislature in the Act, but were not, and the Commissioner declines to require such procedures when they are not supported by the plain language of the statute. *See DeFalco v. Bd. of Educ. of the Twp. of Hamilton*, Commissioner Decision No. 198-19, decided July 26, 2019.

However, the Commissioner notes that the petition of appeal claims that the board has violated the law by failing to provide her with access to her child's educational records, which is a claim that should be evaluated on its own merits and not only with respect to the motion to compel discovery. Petitioner bases her claim on the Family Educational Rights and Privacy Act (FERPA), 20 *U.S.C.* § 1232g.[11] The Commissioner has jurisdiction to hear and determine all controversies and disputes arising under the school laws, as well as the rules of the State Board of Education or the Commissioner. *N.J.S.A.* 18A:6-9. The Commissioner has no jurisdiction to adjudicate FERPA, which is a federal law. Accordingly, any claim that the Board has violated FERPA is dismissed. Even viewing the pleadings in the light most favorable to petitioner – affording her leeway as a *pro se petitioner* and addressing her claims under New Jersey's Pupil Records Act, *N.J.S.A.* 18A:36-19, and its implementing regulations, most specifically *N.J.A.C.* 6A:32-7.5 – the Board is not required to provide petitioner with copies of her child's records, but rather only access to them, which it has done.[12]

[11] While petitioner's exceptions indicate that she is not actually seeking access to the recordings under FERPA, she also includes arguments that the district violated FERPA, such that the Commissioner is compelled to address them.

[12] While petitioner indicated in her exceptions that she is not seeking copies of the video recordings, but rather "discovery access" to them, the Commissioner is nonetheless compelled to address this issue, as it was included in the petition of appeal and many of petitioner's filings throughout the pendency of the case have referred to her

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed. The matter shall proceed before the Board for the hearing requested by petitioner, and, if petitioner disagrees with the Board's decision following that hearing, she may file a new petition of appeal.[13]

IT IS SO ORDERED.[14]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 5, 2020
Date of Mailing: November 6, 2020

request for copies of the video recordings. In fact, even the exceptions themselves are contradictory, as petitioner both indicates she is not seeking copies and expresses a "preference" for copies of the recordings.

[13] The Commissioner notes that the petition of appeal indicates that petitioner was concerned about deadlines, which may have resulted in her filing the petition of appeal prior to the Board's decision. To the extent that clarity may assist the parties on this point, the Commissioner finds that petitioner's time to appeal the ultimate decision of the Board in this matter will begin anew following that decision.

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

254-20 E
OAL Dkt. No. EDU 09096-20
Agency Dkt. No. 205-9/20

New Jersey Commissioner of Education

Order on Emergent Relief

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to each of the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 5, 2020
Date of Mailing: November 6, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 09096-20
AGENCY REF. NO. 205-9/20

D.S. ON BEHALF OF MINOR CHILD M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON,
Respondent.

D.S., petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox Law, LLC, attorneys)

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by petitioner on behalf of her daughter, M.S., as a result of seven allegations of harassment, intimidation or bullying (HIB) against another student at Hamilton High School West (HHSW), charged by respondent, the Township of Hamilton Board of Education (Board). On July 22, 2020, the Board conducted a hearing

regarding one of the seven allegations, HIB #6813. Following that hearing, petitioner withdrew her request for the Board to hear the other six charges against M.S.

On July 27, 2020, petitioner filed a due process petition which was transmitted to the Office of Administrative Law (OAL), OAL Dkt. No. EDU 07830-20, challenging the seven HIB allegations against M.S.

Petitioner initiated the within matter through a motion for emergent relief filed on September 24, 2020, with the New Jersey Department of Education (DOE), Office of Controversies and Disputes (OCD). Petitioner indicated in her Pro Se Petition of Appeal (Petition) that she was appealing a finding by respondent dated September 23, 2020, (resulting from the hearing on July 22, 2020), upholding the school superintendent's decision in HIB #6813 that M.S.'s conduct met the criteria for HIB against another student. Although petitioner failed to state in her Petition what relief she sought, it will be presumed that petitioner sought to have respondent's finding of September 23, 2020, overturned.

Petitioner also used the within emergent appeal to levy charges against her daughter's school principal, Brian Smith, accusing him of continuing harassment of both mother, D.S., and student, M.S. As a result, respondent opened an investigation into petitioner's charges against Principal Smith on or about September 30, 2020. Because the within Petition was transmitted by OCD to OAL only as an appeal of the Board's HIB decision of September 23, 2020, regarding HIB #6813, and because the statutorily-required investigation by the Board is still ongoing, these charges against Principal Smith were not heard as part of the within emergent action.

The motion for emergent relief was transmitted to the OAL on September 25, 2020. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A telephone prehearing call was scheduled for September 29, 2020, but petitioner failed to appear for the call. A telephone prehearing call took place on the record on October 1, 2020, and this matter was scheduled for emergent hearing.

Due to the COVID-19 pandemic, an emergent hearing in this matter took place via Zoom on October 5, 2020. Petitioner, stating that this court did not allow her to argue her

case during the telephone prehearing call of October 1, 2020, requested that the Hon. Jeffrey N. Rabin, Administrative Law Judge, recuse himself from this case. Petitioner's motion for recusal was denied by Judge Rabin, and the Zoom hearing took place on October 5, 2020.

FINDINGS OF FACT

Based on petitioners' Petition for emergent relief and testimony at the hearing, and the documentation and testimony proffered by respondent, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. Petitioner, D.S., is the parent of minor child, M.S., a student at HHSW. A fellow student at HHSW claimed that, on multiple occasions on multiple dates, M.S. bullied her, called her a "ho" to her face and on social media, and threatened her with physical harm. "Ho" is a derogatory term suggesting that a female is sexually promiscuous. (Board letter of September 23, 2020.)

LEGAL ANALYSIS

The issue is whether petitioner has proven by a preponderance of the evidence that she has met the standard for emergent relief, and that she is entitled to have the findings of a school board overturned.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies between a parent and a school board. OAL is the appropriate venue for hearing an appeal of a school board findings and OCD properly forwarded this matter to OAL for this emergent appeal to be heard.

Pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the evidence that four prongs/prerequisites have been met in petitioner's favor in order to be eligible for emergent relief. The form of Petition executed and filed by petitioner on September 24,

2020, contained a Section VI clearly setting forth petitioner's obligation to demonstrate that the four prongs have been met, and providing petitioner with the four-prong test and legal citations to the regulatory code section and Crowe.

Emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

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

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

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

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

Section VI of the Pro Se Petition of Appeal required that a petitioner's appeal be accompanied by a memorandum addressing the four-pronged standard for relief. Petitioner attached such a memorandum to her petition entitled "Section VI: RE: Seeking Relief on an Emergent Basis" (Memorandum). However, petitioner failed to address the Crowe standard for emergent relief in her memorandum. During the hearing, this court attempted to guide petitioner through the prerequisites for emergent relief, but petitioner was argumentative and non-responsive regarding those prerequisites, continuing to argue that the HIB #6813 decision should be overturned because school officials were harassing her and her daughter, without providing any proof of such harassment.

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

Petitioner failed in her memorandum to offer any evidence of harm to M.S. resulting from the Board's action in upholding HIB #6813. Petitioner did not claim that any harm had taken place since the Board's decision was issued on September 23, 2020. She did not indicate that M.S. had been suspended or in any way had her education affected. In

fact, there had been no encounters between M.S. and the complaining student since early 2020 due to a school shutdown resulting from the COVID-19 pandemic. The Board's September 23, 2020, decision referred to "remedial measures" created after its investigation, designed to prevent any more HIB incidents by M.S., but the Board stated that such measures had not yet been implemented due to the shutdown resulting from the current health emergency. Petitioner did not mention remedial measures, but the Board indicated that the suggested remedial measure was for M.S. to meet with a guidance counselor in order to prevent further incidents. Petitioner did not claim any harm or stigma to M.S. resulting from the implementation of any remedial measures or resulting from an appointment with a guidance counselor.

Petitioner's memorandum and testimony at the hearing offered claims that D.S. and M.S. had been harassed by the school principal and other school personnel, including Board counsel, Patrick Carrigg. But petitioner proffered no corresponding evidence, such as the harassers' names (except for Principal Smith), and did not specify what type of harassment, did not list dates on which such harassments might have taken place, and did not specify what harm M.S. suffered from each such alleged harassment. Any allegations of harassment by the principal are currently under investigation and are not part of the within appeal as transmitted to OAL.

Petitioner stated in her memorandum that a security guard had, at one time, placed his hands on M.S. However, petitioner proffered no evidence during the within appeal of such action such as the name of the security guard, witness statements, date of said alleged touching, etc. Petitioner did not proffer any evidence that such alleged touching constituted "harassment," or any claim or evidence that harm resulted from such alleged touching.

Even if harm had already resulted from these alleged Board actions, petitioner still failed to show that additional harm would occur if emergent relief were denied. The within appeal is of the Board's September 23, 2020, decision regarding HIB #6813; petitioner provided no evidence of any harm that occurred after the Board issued its decision on September 23, 2020, and in fact petitioner filed for emergent relief immediately after receiving the Board's decision. Petitioner failed to offer examples of harm that might

befall M.S. resulting from the Board's September 23, 2020, decision. Petitioner offered lay testimony referring to psychological damages to M.S. resulting from being accused of HIB, but did not specify what psychological damages had been incurred or whether any psychological issues borne by M.S. were related to the Board's decision of September 23, 2020. Petitioner introduced no expert medical testimony and proffered no evidence that M.S. had been evaluated or treated by a psychologist for alleged damages stemming from the Board's allegations of HIB or its decision upholding HIB #6813.

Without any real claim or evidence of harm to M.S. resulting from the Board's decision of September 23, 2020, or claims of anticipated harm resulting from that decision, it is clear that petitioner's appeal of the Board decision upholding HIB #6813 was not to be resolved on an emergent appeal but rather was ripe for a full due process appeal. Petitioner has already filed a due process appeal on the seven charges of HIB against M.S.; any issues petitioner had regarding actions or statements by the school or Board or evidence to be turned over would best be addressed during the discovery phase in OAL Dkt. No. EDU 07830-20.

Accordingly, I **CONCLUDE** that petitioner failed to show that this first prong of the Crowe test for emergent relief had been met in favor of the petitioner.

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

Petitioner did not address the legal right underlying her claim in either her Petition and accompanying memorandum or during the hearing. Petitioner did not state a legal claim, except to state that the Board's decision was faulty. Petitioner did not state any legal grounds for her position that the Board's decision should be overturned. In fact, petitioner's Petition failed to state a claim for relief; at the hearing petitioner stated that the relief she sought was the rescinding of all seven allegations of HIB against her daughter, despite the fact that the Board only issued a decision on one of the seven charges, and the within appeal was filed only regarding the one charge that was decided (HIB #6813).

If petitioner's claim is that the Board, for example, withheld information or evidence, she did not state what statutes, regulations or caselaw were violated, or what statutes, regulations or caselaw work in her favor. Further, petitioner did not state with specificity or offer any proofs as to what evidence may have been withheld from her, proofs as to when she formally requested such evidence, and whether she had a legal right to whatever evidence she may have wanted (such as, for example, whether there is any legal authority for petitioner to view video allegedly taken by the complaining student on her own cellphone). The Board has stated throughout its documentation that petitioner offered no evidence or witnesses at the hearing of July 22, 2020, whereas the Board's exhibits indicate that they conducted a full investigation and entered the results into evidence at the July 22, 2020, hearing. It is difficult to believe that there is caselaw that is settled in favor of a litigant who offered no evidence or witnesses at a hearing or trial. However, if petitioner had provided any evidence at all for purposes of the within hearing proving that, for example, witnesses had lied at the July 2020 hearing, one could then have argued that caselaw is settled, that witnesses under oath are obligated to tell the truth; petitioner's lack of evidence or legal argument instead led to the conclusion that any legal rights claimed by petitioner were not settled.

Accordingly, I **CONCLUDE** that petitioner failed to show that the second prong of the Crowe test for emergent relief had been met in favor of the petitioner.

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

Petitioner did not address her likelihood of prevailing on the merits of the underlying claim, except to state at the hearing that she was sure she would win. The Board provided exhibits for the within hearing which indicated that its decision of September 23, 2020, was based on investigative evidence. Petitioner offered no witnesses or evidence at the hearing of July 22, 2020, and no evidence at the within hearing. In the face of evidence, witnesses and a full investigation by the Board, it seems more likely that respondent would prevail on the merits of the underlying claim. As further pointed out by respondent at the hearing, at a full due process hearing petitioner would have to show that the Board's decision on the underlying claim was arbitrary and capricious. Petitioner did not make such showing at the within hearing.

Accordingly, I **CONCLUDE** that petitioner failed to show that the third prong of the Crowe test for emergent relief had been met in favor of the petitioner.

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

Petitioner failed to address this fourth prong of the Crowe test. Most difficult in addressing this prong without input from the petitioner is that petitioner in her formal Petition failed to state a claim upon which relief could be granted.

If petitioner's claim was that the Board's evidence at the July 22, 2020, hearing was fraudulent, and that their decision upholding the charge of HIB committed by M.S. was based on this faulty information, the harm to petitioner would be that her daughter had been wrongly accused. Then one could look at the harm suffered by M.S. due to this hypothetically wrong accusation. For purposes of this argument, however, petitioner failed to show any harm suffered by M.S. due to the Board's decision of September 23, 2020. Further, there would be no legal harm to petitioner because she would still be entitled to a full due process factual hearing at which she could proffer evidence, offer witnesses, and cross-exam Board witnesses in order to prove that the Board's decision was improperly reached.

If petitioner had argued that there was harm to her daughter due to harassment from school officials or the complaining student, she should have made that argument in her Petition and provided evidence to that effect during the hearing. It must be noted, however, that HHSW has not yet opened for in-person learning at the school building, so there would have been no encounters between school personnel, or the complaining student and M.S. At the time of this hearing, it appeared that HHSW would not be opening for in-person learning until October 12, 2020, at the earliest.

Conversely, there would be harm to the Board if their decision was reversed at this time. If the allegations in HIB# 6813 were reversed without a full evidentiary due process hearing, the student allegedly bullied and threatened by M.S. could again be at risk of

suffering the same HIB, and the Board would be deemed to have failed to protect a student against whom threats of violence were made. The equities at this time tip the balance in favor of the Board in protecting a student, not in favor of a petitioner who has failed to show that any harm would be suffered.

Accordingly, I **CONCLUDE** that petitioner failed to show that the fourth prong of the Crowe test for emergent relief had been met in favor of the petitioner.

Therefore, I **CONCLUDE** that petitioner failed to show by a preponderance of the evidence that she met any of the four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioner failed to prove that she was entitled to emergent relief in this matter.

In addition to the above-referenced analysis of the Crowe test, petitioner's appeal appeared technically deficient. As stated herein, petitioner failed to address in her memorandum the four prerequisites of the Crowe test. Further, it must be noted that petitioner chose to file this appeal for emergent relief using a form of petition supplied by the DOE. As with any legal filings to a court, this form required the petitioner's signature to be notarized. Section IV of the form is entitled "Notarized Statement of Verification or Certification in lieu of Affidavit for each petitioner." There is a space below the petitioner's signature line for a notary signature and date. Two copies of petitioner's Petition were transmitted to OAL; neither had a notary signature or stamp. Petitioner wrote the date of her filing in the notary date line, and left the notary signature line blank. Yet the copy of the Petition enclosed with respondent's hearing exhibits (Respondent Exhibit A) had a notary signature and stamp. The notary signature is visibly similar to petitioner's signature (with an "S" similar to a musical "G clef"). Therefore, either the notary signed and stamped the Petition separately and subsequently to when petitioner executed it and not in her presence, or the notary signature is fraudulent. Either way, I **CONCLUDE** that petitioner's Pro Se Petition of Appeal was legally deficient.

ORDER

The petitioner's motion for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 6, 2020
DATE

JEFFREY N. RABIN, ALJ

JNR/dw

APPENDIX

BRIEFS/EXHIBITS

For petitioner:

Petitioner's Pro Se Petition of Appeal and accompanying Section VI: RE: Seeking Relief on an Emergent Basis memorandum, dated September 24, 2020

For respondent:

Exhibits A through O, received October 2, 2020

256-20

OAL Dkt. No. EDU 04644-20
Agency Dkt. No. 62-3/20

New Jersey Commissioner of Education

Final Decision

S.P., on behalf of minor children, S.P. and E.P.,

Petitioner,

v.

Board of Education of the Township of Branchburg, Somerset County,

Respondent.

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 9, 2020
Date of Mailing: November 10, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04644-20
AGENCY DKT. NO. 62-3/20

S.P. ON BEHALF OF MINOR CHILDREN,
S.P. AND E.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF BRANCHBURG,
SOMERSET COUNTY,
Respondent.

S.P., petitioner, pro se

David B Rubin, Esq. for respondent

Record Closed: September 23, 2020 Decided: September 28, 2020

BEFORE **KIM C. BELIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 25, 2020, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. (J-1) Also attached is the Board of Education's resolution approving the agreement. (J-2)

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

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

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

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

Kim C. Belin

September 28, 2020
DATE

KIM C. BELIN, ALJ

Date Received at Agency: 9/30/2020

Mailed to Parties: 9/30/2020

/vj

APPENDIX

EXHIBIT

Jointly Submitted:

J-1 Stipulation of Settlement

J-2 Board of Education's resolution approving the agreement.

J-1

Settlement Agreement

Whereas, Sandra Papavero ("Parent") commenced a proceeding before the Commissioner of Education to challenge a decision by the Branchburg Township Board of Education ("the Board") finding her children Sydney Papavero and Ellie Papavero ineligible for enrollment in the Branchburg Township Public School District ("the District"), *S.P. o/b/o S.P. and E.P. v. Township of Branchburg Board of Education*, OAL Dkt. No. EDU 04644-2020 S, Agency Dkt. No. 62-3/20 ("the Action"); and

Whereas, the Board asserted a counterclaim in the Action seeking payment of back tuition for the period of ineligible attendance; and

Whereas, the parties have amicably resolved their differences and desire to memorialize an agreement to settle the Action;

It is Therefore Agreed as follows:

1. The petition of appeal and counterclaim shall be withdrawn, with prejudice, on the terms set forth herein.

2. Within 30 days of full execution and exchange of this Settlement Agreement, Parent shall deliver to the Board's Business Office a lump sum of $3,000.00 in full satisfaction of any claim by the Board for back tuition that was or could have been asserted in its counterclaim. Payment of this sum shall be guaranteed by Parent's former husband, Jason Papavero.

3. In the event that the agreed-upon sum is not paid by the deadline set forth hereinabove, Parent and Jason Papavero agree to pay any attorney fees or other litigation expenses incurred by the Board in the collection of this debt.

4. Parent represents that she and her daughter Ellie Papavero have resumed domicile in Branchburg Township at 103 Briar Way, Neshanic Station, NJ 08853 as of the commencement of the 2020-2021 school year, and will remain domiciled in Branchburg Township for so long as Ellie remains enrolled in the District.

5. Parent and Jason Papavero certify under penalty of perjury that the financial information provided by their legal counsel to the Board's counsel by email during the negotiation of this Settlement Agreement is true and accurate.

6. The parties agree to keep the terms of this Settlement Agreement confidential to the maximum extent permitted by law.

7. Parent and Jason Papavero represent that they were advised by their attorney, Michael Poreda, Esq., during the negotiation of this Settlement Agreement, that they fully understand its terms, and that they enter into it voluntarily and without coercion or duress.

8. This Settlement Agreement is subject to approval by the Board.

BRANCHBURG TOWNSHIP BOARD OF EDUCATION

Dated: 9/21/20 By: _____

Dated: 9/2/20 _____
SANDRA PAPAVERO

Dated: 9/2/20 _____
JASON PAPAVERO

J-2

BRANCHBURG TOWNSHIP SCHOOL DISTRICT

"Excellence in Education"

240 Baird Road • Branchburg, New Jersey 08876-4200 • Fax (908) 526-6144

Theresa Linskey • *Business Administrator/Board Secretary*
(908) 722-3335

I hereby certify that the following is a true and accurate excerpt of the Minutes of the Regular meeting of the Branchburg Township Board of Education held on September 17, 2020.

Motion by Mr. Sarles seconded by Mr. Horowitz, that Item XII.B.. be moved upon the recommendation of the Superintendent.

On call of the vote, the following was unanimously approved by Roll Call vote:

B. <u>Approval of Settlement Agreement</u>

BE IT RESOLVED, that the Board of Education approves a settlement in the matter of S.P. o/b/o S.P. and E.P. v. Branchburg Township Board of Education, in the amount of $3,000 for back tuition reimbursement.

Theresa Linskey

Theresa Linskey
Business Administrator/ Board Secretary

9/18/20
Date

257-20
OAL Dkt. No. EDU 16117-19
Agency Dkt. No. 260-9/19

New Jersey Commissioner of Education

Final Decision

Frank Quatrone,

Petitioner,

v.

Board of Education of the Borough of Lodi, Bergen County,

Respondent.

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 9, 2020
Date of Mailing: November 10, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16117-19
AGENCY DOCKET NO. 260-9/19

FRANK QUATRONE.,
Petitioners,
v.
BORO OF LODI BOARD OF EDUCATION,
BERGEN COUNTY,
Respondent.

Andrew Babiak Athos, Esq. appearing on behalf of petitioner

Mark A. Wenczel, Esq., appearing on behalf of respondent (Cleary Giacobbe Alfieri Jacobs, LLC)

Record Closed: September 3, 2020 Decided: September 29, 2020

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 13, 2019, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on December 10, 2019. Several telephone conferences were scheduled thereafter, wherein the parties engaged in extensive settlement discussions. The last telephone conference was

scheduled for September 24, 2020. Prior to the conference, the parties submitted the fully executed Settlement Agreement, Release Agreement and a certified copy of the Board minutes, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

September 29, 2020

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: September 29, 2020

Date Mailed to Parties: September 29, 2020

ljb

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

MARK A. WENCZEL, Counsel
mwenczel@cgajlaw.com

Reply to: Oakland Office

September 3, 2020

Via Email (Latoya.bryant@oal.nj.gov)
Honorable Kimberly A. Moss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, N.J. 07102

Re: Frank Quatrone v. Borough of Lodi Board of Education, Bergen County
OAL DKT NO.: EDU 16117-2019N

Dear Judge Moss:

As your Honor is aware, this firm represents the Lodi Board of Education in the above-referenced matter.

Attached please find a true copy of the Full and Final Settlement and Release Agreement signed by the parties, together with a certified copy of the Board minutes, evidencing the Board's approval of the Settlement Agreement.

The parties respectfully request your Honor's approval of the attached Settlement Agreement.

Respectfully submitted,

MARK A. WENCZEL

cc: Andrew Babiak, Esq. (via email ababiak@njasa.net)

FULL AND FINAL
SETTLEMENT AND RELEASE AGREEMENT

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into as of the 26th day of August 2020, by and between the **LODI PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION**, with an office located at 8 Hunter Street, Lodi, New Jersey 07644 (hereinafter the "Board"), and **FRANK QUATRONE**, residing at 159 Washington Place, Hasbrouck Heights, New Jersey 07604 (hereinafter "Quatrone" or the "Employee"); (the Board and Quatrone are collectively referred to herein as the parties, or individually as the party).

WHEREAS, Quatrone filed a Petition before the Commissioner of Education of the State of New Jersey on or about September 25, 2019 to institute litigation on his claim against the Board to be compensated for 212 days of accumulated sick leave upon his retirement from his employment with the Board on June 30, 2019, which litigation is entitled Frank Quatrone v. Lodi Board of Education, OAL DKT. NO.: EDU 16117-2019N; Agency Ref. No. 260-9/19; and

WHEREAS, the Board filed an Answer denying the merits of Quatrone's claim; and

WHEREAS, the parties have reached a full and final resolution of all matters related to the employment relationship between them, including but not limited to the claims asserted by Quatrone in the litigation entitled Frank Quatrone v. Lodi Board of Education, OAL DKT. NO.: EDU 16117-2019N; Agency Ref. No. 260-9/19.

NOW THEREFORE, in consideration of the mutual promises of the parties to this Agreement, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **PAYMENT.**

Within ninety (90) days of the execution and Board approval of this Agreement, or ten (10) business days of the Board's receipt of 2019-2020 Extraordinary Aid ("EXAID"), whichever occurs first, the Board shall pay Quatrone the sum of $166,767.68, less applicable withholdings, based upon a per diem amount of $786.64 for 212 accumulated sick days, as payment in full of any and all claims asserted or which could have been asserted by Quatrone regarding his employment and retirement from the Board.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE.**

In consideration of the Agreement hereinabove, Quatrone, on behalf of himself, his heirs, assigns and agents (hereinafter referred to collectively as "Quatrone") voluntarily enters into this Agreement, and certifies that he has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Quatrone hereby releases, waives and discharges the Board, its affiliated departments, officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, action or writ of any kind, nature, character or description that Quatrone had, now has, or may in the future have against the Releasees on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement including, but not limited to, Quatrone's employment with and retirement from his employment with the Board. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, and/or claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory

law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

b. Quatrone represents that there are no pending lawsuits, charges or other claims of any nature whatsoever by him against the Board and/or the Releasees in any State or Federal

court, agency or other administrative body on account of or arising out of Quatrone's employment with the Board. Quatrone understands that nothing in this Agreement shall be construed to prohibit him from filing a charge with, or participating in any investigation or proceeding conducted by, the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC), or with any other Federal, State or local court or agency. Notwithstanding the foregoing, Quatrone hereby waives any and all rights to recover monetary damages in any charge, complaint, or lawsuit filed by him or by anyone else on his behalf based on events occurring which arose or existed on or before the date on which this Agreement is fully executed.

c. If Quatrone should ever file any claim, charge or complaint as prohibited above, Quatrone agrees to pay all costs and expenses of defending against the suit incurred by the Board and/or the Releasees, including reasonable attorney's fees and all costs associated with a judicial determination that Quatrone violated the Agreement and Release.

3. CONFIDENTIALITY.

All parties shall not disclose, either directly or indirectly, in any manner whatsoever, any information regarding the existence of the terms or contents of this Settlement Agreement and Release, to any third party, person or organization, including but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public. This paragraph shall not preclude the parties from discussing the existence or terms of this Settlement Agreement to governmental authorities who require such information by subpoena duly issued by a court or agency with competent jurisdiction. In addition, Quatrone may make disclosures regarding this Agreement to members of his immediate family, his attorneys, and as may be required to his accountant and/or financial advisor. Additionally, this paragraph shall not preclude the parties

from providing copies of this Agreement pursuant to an order of the New Jersey Government Records Council and/or a court of competent jurisdiction. The parties acknowledge that the Board must record its approval of the terms of this Agreement with the passage of a public Board resolution approving the Agreement. **Although the Parties agree to keep the settlement and underlying facts confidential, this provision is unenforceable against the Board if Quatrone decides to reveal settlement and claim details in such a way that the Board is reasonably identifiable.**

4. **MUTUAL NON-DISPARAGEMENT.**

Quatrone agrees that, in any communications with the press, other media or any other individual, he shall not criticize, ridicule or make any statement which disparages or is derogatory of the Board or its employees, elected officials, directors or senior officials. Likewise, the Board and its senior officials will not criticize, ridicule or make any statement which disparages or is derogatory of Quatrone.

5. **INDEMNIFICATION.**

If there is a judicial determination that Quatrone or the Board violated this Agreement in any way, then the violating party agrees to pay, in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the non-violating party as a result of such violation, including reasonable attorney's fees.

6. **CONSULTATION WITH ATTORNEY.**

Quatrone has had an opportunity to consult with his attorney with respect to this Agreement and has had an opportunity to review with his Attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

7. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between Quatrone and the Board with respect to the subject matter and supercedes all prior agreements, understandings and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the Board to do anything other than what is expressly stated in this Agreement. It is understood, between and among all parties hereto, that the terms of this settlement shall not have any precedential effect or constitute binding practice.

8. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by an authorized agent or officer of the Lodi School District Board of Education and Frank Quatrone.

9. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby. Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid and/or unenforceable, the parties will make reasonable efforts to reform that provision(s) to be legal, valid and enforceable.

10. **ATTESTATION.**

Quatrone represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Quatrone represents and warrants that he enters into this Agreement

voluntarily, of his own free will, without any pressure or coercion from any person or entity including, but not limited to the Board.

11. GOVERNING LAW.

This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

12. VENUE.

Any controversies or disagreements arising out of, or relating to this Agreement or the breach thereof, shall be resolved in the Bergen County Superior Court of New Jersey.

13. REVOCATION.

Quatrone may revoke this Agreement within seven (7) days after the date this Agreement is signed by Quatrone. This revocation must take the form of written notice by Quatrone, which specifically indicates that that he intends to revoke this Agreement. This revocation must be provided directly to the Board, c/o Matthew J. Giacobbe, Esq., Cleary Giacobbe Alfieri Jacobs, LLC, 169 Ramapo Valley Road, Upper Level - Suite 105, Oakland, New Jersey 07436. This seven (7) day revocation period may not be waived. In the event Quatrone revokes his acceptance of this Agreement, any and all payments to Quatrone from the Board made pursuant to this Agreement must be returned with the written letter of revocation.

14. REASONABLE PERIOD OF TIME.

Quatrone agrees that he has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but that he may waive this twenty-one (21) day period by signing in the space provided at the end of this Agreement (see Exhibit "A" attached hereto).

15. PRECATORY PHRASES.

The precatory phrases ("whereas clauses") are not mere recitals, but are specifically agreed to by the Parties and are incorporated herein by reference.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THE TERMS OF THIS AGREEMENT, UNDERSTANDS THE TERMS OF THIS AGREEMENT AND INTENDS TO BE LEGALLY BOUND BY THIS AGREEMENT AND ITS PROVISIONS. ADDITIONALLY, THE PARTIES ARE SIGNING BELOW VOLUNTARILY AND WITHOUT THREAT OR COERCION OF ANY KIND.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Frank Quatrone, executed the foregoing Agreement this 26 day of AUGUST, 2020.

Sworn and Subscribed to before me
this 26 day of AUGUST, 2020.

Notary Public of the
State of New Jersey

FRANK D. ROTELLI
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 09/28/2022
License # 2292270

FRANK QUATRONE

LODI PUBLIC SCHOOL DISTRICT
BOARD OF EDUCATION

8/27/2020

EXHIBIT A

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 14 of this Agreement.

DATE: 8/26/20

FRANK QUATRONE

Sworn and Subscribed to before me
this 26 day of AUGUST, 2020.

Notary Public of the
State of New Jersey

FRANK D. ROTELLI
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 09/26/2022
License # 2292270

Special Meeting 26 August 2020

THIS IS A TRUE EXCERPT OF THE OFFICIAL MINUTES FROM THE MEETING OF August 26, 2020
JAMES R. SEKELSKY - BOARD SECRETARY

LODI BOARD OF EDUCATION

LODI, NEW JERSEY

RESOLUTION# 60-2020

RESOLUTION RE: **APPROVE THE FULL AND FINAL SETTLEMENT AND RELEASE AGREEMENT OAK DKT. NO.: EDU 16117-2019N**

RESOLVED that the Lodi Board of Education approve the Full and Final Settlement and Release Agreement with the former Superintendent, Frank Quatrone, to resolve the litigation entitled Frank Quatrone v. Lodi Board of Education, OAL DKT. NO.: EDU 16117-2019N; Agency Ref. No. 260-9/19.

ACTION ITEM: Resolution 60-2020

Motion to adopt: **Cardone** Seconded By:**Delgado**

Roll Call	Yes	No	Abstain
Cardone	X		
Delgado	X		
A.Mastrofilipo		X	
K.Mastrofilipo		X	
Ramos		X	
Salvacion	X		
Scorzetti	X		
Telep			X
Schrieks	X		

259-20

OAL Dkt. No. EDU 09617-19
Agency Dkt. No. 143-6/19

New Jersey Commissioner of Education

Order

C.E., on behalf of minor child, K.E.,

Petitioner,

v.

Board of Education of the Township of West Orange, Essex County,

Respondent.

On January 9, 2020, a final agency decision was rendered in this matter, wherein the Commissioner found C.E. liable for tuition in the amount of Twenty-One Thousand Two Hundred Five Dollars ($21,205.00), representing tuition for a period of ineligible attendance by his child, K.E., in the Board's school district from the beginning of the 2018-2019 school year through October 21, 2019, plus One Hundred One Dollars and Fifty-One Cents ($101.51) for each school day following October 21, 2019 on which K.E. attended the district's schools. The Board subsequently requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. C.E. offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Corey Ellington is now subject to entry of a judgment by the court in the amount of $21,306.51, which represents the payment ordered by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 9, 2020
Date of Mailing:

260-20
OAL Dkt. No. EDU 02760-19
Agency Dkt. No. 21-1/19

New Jersey Commissioner of Education

Order

M.B., on behalf of minor children,
D.B. and M.B.,

Petitioner,

v.

Board of Education of the Township
of Union, Union County,

Respondent.

On March 17, 2020, a final agency decision was rendered in this matter, wherein the Commissioner found M.B. liable for tuition in the amount of Twenty-Eight Thousand Forty-Six Dollars ($28,046.00), representing tuition for a period of ineligible attendance by his children, D.B. and M.B., in the Board's school district for the 2018-2019 school year. The Board subsequently requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. M.B. offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Marcus Broughton is now subject to entry of a judgment by the court in the amount of $28,046.00, which represents the payment ordered by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 9, 2020
Date of Mailing:

261-20

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF TENURE HEARING OF	)	
	)	
LOWER TOWNSHIP ELEMENTARY SCHOOL	)	
CAPE MAY COUNTY,	)	CONSENT
Petitioner	)	AWARD
	)	
- against -	)	
	)	
GLENN DONAHUE,	)	
Respondent	)	
	)	
Docket No. 177-8/20	)	

Before: Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE BOARD

Brett E.J. Gorman, Esq., Parker McCay, P.A.

FOR THE RESPONDENT

Dean R. Wittman, Esq., Zeller & Wieliczko, LLP

BACKGROUND

In accordance with N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11, by letter dated August 14, 2020, the Lower Township Elementary Board of Education ("Board") or ("Petitioner") filed Sworn Tenure Charges and a Statement of Evidence against the Respondent, Mr. Glenn Donahue, a duly certified and tenured teacher employed by the Board.

Pursuant to N.J.A.C. 6A:3-5-1(b)(6), Brett E.J. Gorman, Esq., Parker McCay, P.C., Counsel for the Board/Petitioner, by letter dated August 14, 2020, submitted the following documents to the Commissioner of Education:

(1) a Statement of Tenure Charges, Statement of Evidence with exhibits;

(2) a signed sworn Statement of Tenure Charges, Certificate of Determination and Board Resolution certifying the charges to be served via overnight mail upon Edward Cridge, Esq., Mellk O'Neil, along with Proof of Service upon the Respondent.

By letter dated August 14, 2020, Dean R. Wittman, Esq., Zeller & Wieliczko, LLP, Counsel for the Respondent, submitted a Sworn Statement of Position and Statement of Evidence as Mr. Donahue's written response to the Tenure Charges in accordance with N.J.S.A. 18A:6-11.

Following receipt of the Respondent's answer on August 14, 2020, on August 24, 2020, Ms. Jennifer Killough-Herrera, Director, Office of Controversies and Disputes, on behalf of the Commissioner of Education, reviewed the tenure charges and deemed them "sufficient, if true to warrant dismissal or reduction in salary, subject to determination by the arbitrator of the respondent's defenses

and any motions which may be filed with the arbitrator." The undersigned was appointed as Arbitrator on August 24, 2020.

The Respondent was charged with "Conduct Unbecoming a Staff Member" and "Incapacity."

Aside from acknowledging his employment as a teacher with the Board responsible for "performing all of the duties and responsibilities of a public school employee..." and receiving District Policy 3218, the Respondent denied all of the charges and specifications.

A hearing was scheduled for October 2, 22 and 23, 2020. Prior to the commencement of the hearing, the Respondent, by letter dated October 1, 2020, submitted a notarized letter to Mr. Jeff Samanieg, Superintendent, "resigning from his employment with the Lower Township Elementary School District, effective December 1, 2020." The letter continues as follows:

> This resignation is due to my disabilities and my incapacity to continue as a teacher in the District. I understand that this is a voluntary relinquishment of my tenure rights and that this resignation is irrevocable, regardless of any subsequent change in my circumstances. With that said, my resignation is being tendered with the understanding that I will receive salary and benefits from October 1, 2020 through November 30, 2020. [Attachment 2]

By letter dated October 9, 2020, Counsel for the Respondent submitted the Respondent's letter of resignation to Counsel for the Board and the Arbitrator.

Mr. Wittman requested "a fully signed copy of the Separation and Release of Claims Agreement once it is approved by the Board."

Given the respondent's unilateral resignation, in the Arbitrator's opinion, the approval of the Commissioner of Education would not be necessary pursuant to N.J.A.C. 6A:3-5.6 a "Withdrawal, settlement or mooting of tenure charges." The relevant case law supports this determination as follows:

> The case of State-Operated School District of the City of Jersey City, Hudson County v. Deborah Robinson, Dkt. No. 403-11/03 (2004) would seem applicable to the instant case. In Robinson, the respondent submitted a letter of resignation, indicating that she was "retiring on an ordinary disability pension." ALJ Sandra Ann Robinson of the Office of Administrative Law ("OAL") held: "An issue is 'moot' when a determination is sought on a matter, which, when rendered, cannot have any practical effect on the existing controversy since there remains no conflict between the parties."
>
> Similarly, In The Matter of the Tenure Hearing of Bernard Saez, State Operated School District of the City of Newark, Essex County, OAL DKT. NO. EDU 11306-05 (2006), ALJ Robert J. Giordano held:
>
> > "Against this backdrop, the disposition of the case is made. I CONCLUDE that given his unilateral resignation as a tenured teacher the tenure charges against the respondent are rendered moot. He is no longer employed by the school district. He has no claim for back pay which could be resolved by the disposition of the charges here. The petitioner has no other legitimate interest arising out of the instant matter. I thus CONCLUDE the tenure charges certified by petitioner State Operated School District of the City of Newark against respondent Bernard Saez should be dismissed."

Following the Board's meeting on October 27, 2020, the Respondent's resignation and separation was approved. (See Attachment 1, Minutes of the October 27, 2020 meeting of the Lower Township Board of Education).

AWARD

Based on the foregoing case law and N.J.A.C. 6A:3-5.6, I hereby accept the "Letter of Resignation" submitted by the Respondent Glenn Donahue, dated October 1, 2020, (Attachment 2) and Separation and Release of Claims entered into by the parties on October 27, 2020 (Attachment 3) and order that the tenure charges against Glenn Donahue be dismissed as moot.

November 6, 2020

Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN]

On the 6th day of November 2020 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument which is his Award.

November 6, 2020

Notary Public

262-20

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing
of Joseph Giambona

Secaucus Public School District (Hudson County),

"Petitioner,"

-and-

Joseph Giambona,

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 26-1/20

Appearances:

For the Petitioner:
Stephen R. Fogarty, Esq.
Fogarty & Hara

For the Respondent
Colin M. Lynch, Esq.
Zazzali Fagella Nowak
Kleinbaum & Friedman

On June 30, 2020, I was assigned as the arbitrator for the above referenced matter. Subsequent to correspondence, conference calls and a videoconference with counsel, an in-person hearing was scheduled for September 22, 29, 30 and October 6, 2020.

On September 17, 2020, Counsel for the Petitioner notified me that the parties reached general terms for a settlement and, therefore, did not intend to proceed on the evidentiary record. On October 23, 2020, a Settlement Agreement, Release and Petitioner's submission supporting the basis of the settlement was forwarded to me for review. [See Attachments]. On November 6, 2020, I conducted a final conference with the parties' Counsel and the Respondent to discuss the terms of settlement.

N.J.A.C. 6A:3-5.6 requires the arbitrator to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement.

The parties' settlement agreement expressly details the basis for resolution. In addition, the Petitioner's submission supporting the basis of the settlement addresses the six (6) standards outlined and adopted by *In re Cardonick*, State Board Decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846) that must be met before a settlement is approved. I have thoroughly reviewed and

considered the parties' reasons for settlement. Having considered the stated reasons in conjunction with the issues raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Response to Tenure Charges filed by the Respondent, I am persuaded that the parties entered the settlement agreement knowingly and willingly and that the terms of the settlement agreement represent a reasonable basis for settlement that will serve the public's interest and are consistent with the public good.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Dated: November 9, 2020
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 9th day of November, 2020, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-21

263-20

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of

SCHOOL DISTRICT OF THE TOWNSHIP OF LAWRENCE,

MERCER COUNTY

and

JILL MARIA, RESPONDENT

Agency Docket Number 123-5/20

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been duly designated by the Commissioner of Education from the Panel of Arbitrators in accordance with the TeachNJ statute, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the Lawrence Township Board of Education properly revoked the tenure and terminated the employment of Respondent Jill Maria. Respondent's grievance is hereby denied.

November 16, 2020

Daniel F. Brent, Arbitrator

NATURE OF THE CASE

The Respondent was employed as a Special Education Teacher at the Lawrence Intermediate School on September 1, 2005. The School District of the Township of Lawrence granted her tenure as a teacher in September 2008. Tenure charges were first brought against the Respondent in or about December 2018, when the Respondent was charged with failing to report to the District her arrest on criminal charges in Pennsylvania in January 2017 and positive drug tests arising thereafter. These tenure charges (hereafter, the First Set of Tenure Charges) were upheld in part and denied in part by Arbitrator Ralph Colflesh, who reduced Respondent's termination of employment and loss of tenure in the District to a 120-day suspension without pay and withholding of an annual salary increment based on the Respondent's failure to report her arrest and a subsequent positive drug test to the District. He predicated his decision and remedy on the limited scope of the initial set of tenure charges, which were based solely on Respondent's failure to report her arrest rather than the underlying conduct leading to the arrest. Arbitrator Colflesh held that the District could impose additional charges based on the conduct underlying the arrest and the possession or use of a controlled substance.

The District filed a second set of Tenure Charges against Respondent in February 2020, alleging that the conduct that she failed to report constituted additional grounds to revoke her tenure. Respondent disputed the propriety of the Second Tenure Charges. Arbitrator Andrée McKissick was appointed to decide the Second Tenure Charges. Applying the Entire Controversy Doctrine, Arbitrator McKissick dismissed the Second Set of Tenure Charges on April 18, 2020, holding that the District should have incorporated all actions of the Respondent of which it was aware, or reasonably should have been aware, into its original tenure charges. Arbitrator McKissick held that Respondent's underlying conduct, as well as her failure to report her arrest for a domestic dispute and for possession of controlled substances were known, or should have been known, by the District when the First Set of Tenure Charges were filed and thus should have been included in the initial tenure charges.

The District brought the Third Tenure Charges, the instant matter, on April 30, 2020 alleging that Respondent Maria engaged in additional misconduct after the Colflesh Award was issued, and that her actions constituted new instances of dishonesty and conduct unbecoming a teacher employed by the Lawrence Township Board of Education. The District cited Respondent's intentional failure to reveal to the District during an interview with the District Director of Personnel before

returning to work in September 2019, pursuant to Arbitrator Colflesh's award, that she had recently failed multiple additional drug tests and lied to District administrators about her recent drug use and failed drug tests. The District also alleged that Respondent intentionally failed to disclose other information relevant to her employment as a teacher that she was obligated to disclose regarding her bankruptcy proceedings, court cost repayment probation, and child custody status.

Respondent filed a Motion to Dismiss the Third Tenure Charges, contending that the McKissick Award precluded revisiting conduct that occurred before Arbitrator Colflesh issued his award on July 22, 2019 and should not have been referred to in the Third Tenure Charges. The undersigned issued an Interim Award on July 27, 2020 that denied Respondent's Motion to Dismiss as to those events addressed in the Third Tenure Charges that occurred after the date that Arbitrator Colflesh issued his Award. The Interim Award held that reciting the procedural history of the prior two tenure charges did not revive charges addressing conduct before July 22, 2019, but ordered that conduct occurring after the First Tenure Charge proceedings before Arbitrator Colflesh, culminating in his award on July 22, 2019, created a valid basis for imposing discipline, up to and including revocation of tenure. The matter proceeded to hearings on the merits of these aspects of the Third Tenure Charges.

award issued on July 22, 2019. Nor, pursuant to the arbitration decision issued by Arbitrator Andrée McKissick dismissing the Second Tenure Charges, is this proceeding about any other misconduct alleged to have occurred before the date of Arbitrator Colflesh's award. The Third Set of Tenure Charges comprising the instant case is limited to allegations regarding misconduct that occurred after the Colflesh award was issued and the District and Respondent became aware of Arbitrator Colflesh's decision. The two previous tenure proceedings are relevant only to demonstrate that the Respondent knew, or reasonably should have known, of her obligation to advise the District of pertinent circumstances regarding her employment, including arrests, failed drug tests, and changes in her probation status or in her health that affected her fitness for duty or her ability to resume her teaching duties.

The instant matter also does not involve the Respondent's status as a recovering abuser of alcohol and drugs. Credible testimony during the tenure arbitration hearings established that, if Respondent had been immediately forthcoming and candid about her substance abuse problems, the District would have granted her a leave of absence to seek treatment and would have assisted her in obtaining medical and psychological treatment. There is no evidence in the evidentiary record that the District retaliated or discriminated against Respondent because

she had abused drugs and alcohol in the past, because of her status as a recovering substance abuser, or because she relapsed after she completed an in-patient treatment program. The instant tenure charges were predicated on her failure to disclose at least two positive drug tests and on her dishonesty in providing false answers to direct inquiries by one or more District administrators regarding her recent drug use.

This case is also not about the Respondent's personal financial situation, her bankruptcy court proceedings, or the topics discussed in meetings with her Probation Officer or her Probation Officer's supervisor, provided that the meetings did not result in a change in her probation status. The allegations regarding her failure to report the content of meetings with her Probation Officer, her delinquency in tendering periodic payments of court costs and fees, her personal bankruptcy court proceedings, or her child custody issues cited by the District were deemed to be irrelevant or immaterial and thus did not materially affect the outcome of the instant case.

The decision regarding the current set of tenure charges against Respondent Jill Maria is predicated solely on her failure to advise the District that she failed drug tests on September 12, 2019 and on October 4, 2019 and on her false answer when she was asked if she was

no longer using illegal drugs by the District Director of Personnel Sean Fry during Return to Work interviews on September 9, 2019, and on October 1, 2019. She lied about her use of drugs as recently as September 24, 2019, concealed her recent positive test, and only admitted her falsehoods for the first time in her testimony under oath during the arbitration hearings.

Respondent testified candidly that she lied to the District Director Fry in a meeting on October 1, 2019. She explained her dishonest answer as a by-product of her shame and mortification because she had relapsed after completing her thirty-day in-patient treatment program. Although the Arbitrator understands the Respondent's embarrassment and anger at herself arising from her relapse, and is sympathetic to her painful plight as she struggled with the challenges in remaining sober, her heartfelt explanation does not insulate her from the consequences of her repeated proven dishonesty toward her employer.

Respondent argued persuasively that she should not be punished for failing to disclose to the District the twists and turns of her ongoing personal bankruptcy case, as her personal financial situation was beyond the purview of the District's legitimate concern. The District asserted that it was entitled to know if Respondent was delinquent in her

obligation to make periodic payments of court costs that had been assessed in connection with her criminal proceedings. The nexus between Respondent's fitness to teach and her ongoing fulfillment of her obligation to remain current in her court-ordered repayment plan has not been persuasively established by the District.

Accepting Respondent's argument that she did not fail to fulfill a valid obligation to disclose all aspects of her bankruptcy, as she had made appropriate arrangements with her Probation Officer to continue her periodic payment of court costs, mandates a conclusion that Respondent was not culpable for failing to alert the District regarding the results of a December 2019 meeting with her Probation Officer and her Probation Officer's supervisor because there was no change in her probation status. Nevertheless, Respondent Maria remains culpable for lying to District management about her two failed drug tests and recent drug use.

After July 22, 2019, Respondent was unequivocally on notice of her obligation to disclose all failed drug tests. Not only had she been disciplined following the first set of Tenure Charges for failing to disclose her arrest for assault and possession of drugs and drug paraphernalia, but the testimony revealed that Respondent had also been explicitly

admonished by the District before, during, and after those proceedings regarding the District's unambiguous and reasonable requirement that she must disclose any future failed drug test.

The evidentiary record in the instant matter established by clear and convincing evidence that Respondent failed to learn the lesson of her earlier legal travails and personal challenges. Had she been forthright initially, she might have averted the first set of Tenure Charges, which resulted in the imposition of a 120-day suspension without pay and forfeiture of her annual increment. This penalty is relevant to the extent that the instant case may properly be viewed as one in which the District imposed progressively severe discipline based on the penalty previously imposed by Arbitrator Colflesh. Applying the concept of progressively severe discipline, the increase from the penultimate penalty of a 120-day unpaid suspension and loss of increment to revocation of tenure and termination for repeated dishonest conduct and use of a controlled substance was neither arbitrary nor capricious.

Even if the penalty imposed in the instant matter were construed to be a summary discharge not predicated on previous discipline for similar misconduct, the Respondent's admitted intentional prevarication in response to a direct unequivocal inquiry by a District administrator

when she did not disclose the drug test she recently failed and her recent drug use constituted just and proper cause under applicable statutory criteria to revoke her tenure and to uphold her dismissal for conduct unbecoming a teacher.

All employees have a duty of honesty to, and fair dealing with, their employers. Employees in safety sensitive and "caring" professions, including teachers, have a particular obligation to apprise their employers of circumstances in their personal lives that may raise questions about their fitness for duty. This degree of trust is heightened when the safety of young children is entrusted to a public school teacher such as in Respondent's sixth grade teaching position at Lawrence Middle School.

As a professional educator, Respondent is entrusted by parents, the elected Board of Education, and District administrators with the responsible care of children, in her case children with special needs. District administrators, parents, and professional colleagues must be able to rely on her integrity, pedagogical competence, and adherence to professional standards of conduct. After Respondent's participation in two prior tenure charge proceedings involving similar misconduct, Respondent Maria was unequivocally aware of her duty to disclose the

264-20

New Jersey Commissioner of Education

Final Decision

Garfield Park Academy,

Petitioner,

v.

New Jersey Department of Education,
Office of Fiscal Accountability and Compliance,

Respondent.

Synopsis

Petitioner Garfield Park Academy (GPA) – an approved private school for students with disabilities (APSSD) – challenged the action of the respondent, New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC), disallowing the cost of student meals in the tuition rate calculated by GPA for the 2009-2010 school year. OFAC found that GPA had not received board resolutions from a majority of sending school districts prior to the start of the school year, as required for the cost of meals to be included in the tuition rate. GPA argued that it should be permitted to include the cost of the meals as the Department allegedly failed to release the mandated tuition contract forms necessary for the contracts at issue in a timely manner.

The ALJ found, *inter alia,* that: *N.J.A.C.* 6A:23A-18.5(a)(20) generally prohibits an APSSD from including the cost of student meals in its tuition rate; there is, however, an exception allowing the cost of meals to be included if the school receives – prior to the start of the school year – board resolutions from a majority of school districts that have contracted to send students to the APSSD in that fiscal year stating that the districts do not require the APSSD to apply for funding from the Child Nutrition Program or to charge students for meals; immediately prior to the start of the 2009-2010 school year, GPA had informal commitments from 28 school districts, but no executed contracts for students from these districts to attend GPA; petitioner's argument that GPA meets the exception criteria because a majority of zero school districts is zero, is without merit; however, GPA was delayed in complying with the requirements of *N.J.A.C.* 6A:23A-18.5(a)(20) because OFAC delayed posting the mandated tuition contract (MTC) form that GPA needed in order to enter into contracts with sending districts. The ALJ concluded that if the MTC had been posted earlier, GPA could have complied with the regulation's time requirements. Accordingly, the ALJ ordered that OFAC's disallowance of $82,753 in student meal cost be reversed.

Upon comprehensive review, the Commissioner found, *inter alia*, that: because GPA did not have any contracts with sending school districts as of June 30, 2009, it was not required to submit any resolutions in order to qualify for the regulatory exception allowing it to include meal costs in its tuition; GPS's interpretation that a majority of zero is zero is correct; and there is no suggestion in this case that GPA had any improper motive or intentionally delayed its contracting process. Accordingly, the Commissioner adopted the Initial Decision of the OAL as modified herein. OFAC's disallowance of $82,753 was reversed.

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.

264-20

OAL Dkt. No. EDU 11338-14
Agency Dkt. No. 213-8/14

New Jersey Commissioner of Education

Final Decision

Garfield Park Academy,

Petitioner,

v.

New Jersey State Department of Education, Office of Fiscal Accountability and Compliance,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by petitioner have been reviewed.

This matter involves a decision by the Office of Fiscal Accountability and Compliance (OFAC) of the New Jersey Department of Education (DOE), disallowing the cost of student meals in the tuition rate calculated by petitioner Garfield Park Academy (GPA), an approved private school for students with disabilities (APSSD). OFAC found that GPA had not received board resolutions from a majority of sending school districts prior to the start of the school year, as required for the cost of meals to be properly included in the tuition rate. GPA filed a petition of appeal.

The ALJ found that *N.J.A.C.* 6A:23A-18.5(a)(20)[1] generally prohibits an APSSD from including the cost of student meals in its tuition rate. However, the regulation contains an exception allowing the cost of meals to be included if the school receives – prior to the start of the school year – board resolutions from a majority of school districts that have contracted to send students to the APSSD in that fiscal year, resolving that the districts do not require the APSSD to apply for funding from the Child Nutrition Program or to charge students for meals. On June 30, 2009, the last day prior to the start of the 2009-2010 school year, GPA had informal commitments from 28 school districts, but no executed contracts to send any students to GPA. The ALJ rejected GPA's argument that a majority of zero school districts is zero, such that GPA met the criteria for the exception, concluding that GPA's interpretation would undercut the intent of the regulation and would incentivize APSSDs to delay receipt of signed contracts. However, the ALJ also found that GPA was delayed in complying with the conditions of the regulation because the DOE delayed posting the mandated tuition contract (MTC) form that GPA needed to use to enter into the contracts as required. The MTC was not posted on the DOE's website until June 12, 2009, shortly before the June 30 deadline, and the ALJ concluded that if the MTC had been posted earlier, GPA could have complied with the regulation's time requirements. Accordingly, the ALJ ordered that OFAC's disallowance of $82,753 in student meal cost be reversed.

In its exceptions, which largely reiterate arguments made below, OFAC argues that the MTC was not delayed, as the evidence presented at hearing showed that the MTC for the 2008-2009 school year had been released even later than the 2009-2010 MTC. OFAC notes that GPA's business manager admitted that GPA had not sought an extension of the June 30 deadline,

[1] This section of the regulations pertaining to APSSD tuition was subsequently renumbered and revised. Citations herein refer to the provisions in effect at the time of the events at issue in this matter.

and asserts that there was no evidence that the June 12 release of the MTC had an identifiable impact on GPA.

In response, GPA asserts similar arguments to those it made below, including that it should not have been required to provide any resolutions because it had not entered into any contracts as of June 30, and that it was prejudiced by the late posting of the MTC, which even OFAC's witness admitted made it unlikely that GPA could have timely obtained signed contracts and resolutions.

Upon comprehensive review, the Commissioner finds that, because GPA did not have any contracts with sending school districts as of June 30, 2009, it was not required to submit any resolutions in order to qualify for the regulatory exception allowing it to include meal costs in its tuition.[2] In *Delaware Valley Sch. for Exceptional Children v. N.J. Dep't of Educ.*, Commissioner Decision No. 56-12 (February 17, 2012), the Commissioner held that "the date identified in [the regulation] as the time at which school districts must weigh in about whether they will allow food service costs to be included in tuition fees is clear. In *Delaware Valley*, *supra*, that date was June 30, 2007. Thus, for petitioner to have been allowed to include food service costs in its tuition fees, it would have had to receive the required board resolutions from [a majority of districts] *that had entered into contracts with it by June 30, 2007*." (emphasis added). The undisputed facts in this matter demonstrate that GPA had not entered into any contracts with school districts by June 30, 2009. The Commissioner agrees with GPA's

[2] Because the Commissioner concludes that GPA was not required to submit any resolutions, she does not reach the issues of the alleged "delay" in the DOE's posting of the MTC or its impact on GPA.

interpretation that a majority of zero is zero, such that GPA was permitted to include meal costs in its tuition for the 2009-2010 school year even though it did not obtain any board resolutions.[3]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, as modified herein. OFAC's disallowance of $82,753 is reversed.

IT IS SO ORDERED.[4]

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

Date of Decision: November 19, 2020
Date of Mailing: November 24, 2020

[3] The Commissioner acknowledges and appreciates the ALJ's concern that this interpretation could incentivize APSSDs to delay the execution of their contracts so that they could include meal costs in their tuition without the school districts having the opportunity to agree or disagree. However, there is no suggestion in this case that GPA had any improper motive or intentionally delayed its contracting process. By this decision, the Commissioner does not foreclose the possibility that other cases may present facts demonstrating that an APSSD purposefully subverted the intent of this regulation.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11338-14
AGENCY DKT. NO. 213-8/14

GARFIELD PARK ACADEMY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,
Respondent.

David Rubin, Esq., for petitioner

Laurie Fichera, Deputy Attorney General, for respondent New Jersey State Department of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 25, 2019 Decided: August 19, 2020

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Garfield Park Academy (GPA), a private school for the disabled, appeals from the decision of the Office of Fiscal Accountability and Compliance (OFAC) of the

Department of Education (Department) disallowing the cost of meals for students in its tuition rate where it had not contracted timely with any school district prior to the start of the fiscal year. GPA argues that it should be permitted to include the cost of the meals as the Department allegedly failed to release the mandated tuition contract forms necessary for the contracts at issue in a timely manner.

On July 3, 2014, OFAC issued a decision affirming the disallowance of meal costs and GPA appealed. The matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case. It was filed with the OAL on September 9, 2014. The parties then moved for partial summary decision on the issue of whether GPA met the requirements of N.J.A.C. 6A:23a-18.5(A(20)(ii) and (iii) (the regulation) for the school year at issue 2009-2010. The cross motions were denied, and a hearing was ordered on the limited issue of what, if any, impact the alleged delay in releasing the mandated tuition contract form had on GPA's ability to comply with the exemption requirements for that school year. A hearing on that issue was held on March 2, 2017 and the record remained open for the submission of post hearing documents and exhibits. The record closed on May 9, 2019, and extensions of time were granted for the filing of the Initial Decision.

FACTUAL DISCUSSION

GPA is an approved private school for the disabled (PSD), authorized to receive students from public school districts. On June 12, 2009, the Department posted to its website the 2009-2010 mandated tuition contract (MTC) form prescribed by the Commissioner for use by PSDs. As of June 30, 2009, GPA had informal commitments from twenty-eight (28) sending districts but had not yet obtained executed MTCs from any of those districts.

On February 22, 2012, OFAC issued a report detailing the results of its review of GPA's audited financial records for the 2009-2010 school year. Therein, OFAC determined that GPA had erroneously included in its tuition rate certain non-allowable costs including, *inter alia*, the cost of student meals in the amount of $82,753. According to the report, GPA could not include the cost of student meals in its tuition rate unless it submitted board resolutions showing approval by June 30, in accordance with N.J.A.C.

6A:23A-18.5(a)(20)(ii) and (iii), from a majority of its sending districts resolving that GPA was neither required to apply for funding from the CNP, nor required to charge students for meals. The audit determined that forty-two sending districts had contracted with GPA for the 2009-2010 school year and, thus, GPA was required under the regulation to submit appropriate resolutions from twenty-two sending districts. The audit further determined that GPA had submitted appropriate resolutions from only seven sending districts.

On appeal, OFAC Director Robert Cicchino determined that the report had overstated the number of resolutions required. Accordingly, Director Cicchino amended the findings to reflect that GPA was required to submit appropriate resolutions from only fifteen sending districts. Director Cicchino ultimately upheld the disallowance, finding that GPA had not obtained appropriate resolutions from the required number of sending districts. As eight resolutions would have satisfied the regulation's requirements, GPA was short by one resolution.

As set forth in the Order of April 26, 2016 Denying Cross Motions for Summary Decision[1], testimony was taken on the limited issue of what, if any, impact the alleged delay in releasing the MTC from by the Department had on GPA's ability to comply with the exemption requirements for that school year. To that end, testimony was taken from Michele Heinz (Heinz), Business Manager for GPA, and from Elise Sadler Williams (Sadler-Williams), a supervising auditor at the Department.

Heinz described in detail the process for submission of GPA's sending district tuition contracts to the Department to satisfy the regulation's requirements. Once the Department issues the MTC in the spring, GPA staff incorporates any changes on the form MTC to the contract form in its computer system. The contract for each student then is prepared with their individual information. After copying, the contracts are mailed to each district. When they arrive at the district's business office, staff there must contact their special education staff to verify the contract information for each student. Once that process is completed, the contracts must be placed on a board's agenda for approval at a scheduled meeting. That scheduling must allow for the fact that some boards may only

[1] The Order is incorporated herein and attached as C-1.

meet once a month and the placement of agenda items must occur in advance of the meeting. Heinz further testified that in her experience it was not unusual for June meeting dates to be cancelled or rescheduled due to school activities such as graduations.

According to Heinz, the MTC for school year 2009-2010 was emailed to schools by the Department at 2:20 p.m., on Friday afternoon, June 12, 2009. As there was an early dismissal that day, Heinz and her staff had left by that time in the afternoon. She also described the heavy workload she and her staff were under dealing with end of school year activities such as report cards, employee contract and performance reviews, inventory and other matters. Heinz was of the opinion that even if the contracts had been sent out by June 12, it was unlikely that they would have received them back by June 30 with each Board's approval. In this case, she testified that the contracts were sent out on June 22, six business days later. On cross-examination Heinz agreed that GPA had not sought an extension of time for submission of the contracts.

Sadler-Willliams then testified for the Department. A longstanding employee of respondent she was responsible for overseeing changes to the MTC and sending it out to the schools. Additionally, she is the supervising auditor for desk reviews for PSDs. In the event changes are made to the MTC, a lengthy review process within the Department takes place. She described that process as "involved" with a multi-level review process in the Department, and with the release date for the MTC varying each year. Under cross-examination she agreed that school districts and schools must wait for each year's version of the MTC before finalizing contracts with sending districts. She did not dispute Heinz' description of the steps necessary for the approval of the contracts and agreed it would be unlikely for a district to have completed and approved contracts by June 30 that year.

Both witnesses presented credible testimony in this matter.

LEGAL DISCUSSION

Approved private schools for the disabled are authorized to receive students from public school districts. PSDs are required to use the MTC prescribed by the Commissioner for each student received from a district board of education. N.J.A.C. 6A:23A-18.4 (a)13. A PSD's final tuition rate must be determined in accordance with N.J.A.C. 6A:23A-18.2 and must be less than or equal to the certified actual cost per student (CACPS). N.J.A.C. 6A:23A-18.2.

Pursuant to N.J.A.C. 6A:23A-18.5, approved PSDs are prohibited from including certain specified costs in the calculation of the CACPS. Such "non-allowable costs" include the cost of meals for students when i) the meals do not meet the nutritional requirements of the CNP as administered by the New Jersey Department of Agriculture, ii) the PSD has not applied for and received funding from the CNP, or iii) the PSD has not charged students for paid and reduced meals in accordance with the income eligibility criteria established by the CNP. N.J.A.C. 6A:23A-18.5(a)(20).

Should a PSD wish to include the cost of meals in the CACPS, the regulations provide a mechanism for obtaining an exemption from this prohibition. In that regard, pursuant to N.J.A.C. 6A:23A-18.5(a)(20), a PSD may include the cost of meals in the CACPS if the meals meet CNP nutritional guidelines and the PSD receives on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the PSD in that fiscal year, which resolve that the board of education does not require the PSD to a) apply for and receive funding from the CNP, and b) charge students for a reduced and/or paid meal.

In the instant matter, as of June 30, 2009, GPA had informal commitments from 28 school districts to send students to GPA in the 2009-2010 school year. Yet, at that time, no board of education had actually executed a tuition contract. Petitioner's primary argument in its motion for summary decision was that "a majority of zero is zero" and, since it had not contracted with any school districts prior to the start of the fiscal year, it was permitted to include the cost of meals for students in its tuition rate without submitting any board resolutions at all. Respondent argued that, under the regulation, the cost of

student meals is generally not allowable and, since GPA had not contracted with any school districts prior to the start of the fiscal year, it was not eligible for the exemption outlined in N.J.A.C. 6A:23A-18.5(a)(20).

In relevant part, N.J.A.C. 6A:23A-18.5(a)(20) provides as follows:

> (a) Costs that are not allowable in the calculation of the certified actual cost per student include the following:
>
> . . . (20) The cost of meals:
>
> i. For students when the meals do not meet the nutritional requirements of the Child Nutrition Program as administered by the New Jersey Department of Agriculture;
>
> ii. Effective July 1, 2007, for students when a non-profit approved private school for students with disabilities has not applied for and received funding from the Child Nutrition Program as administered by the New Jersey Department of Agriculture **except** when the private school has received, on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the private school in that fiscal year, which resolves the district board of education does not require the private school to apply for and receive funding from the Child Nutrition Program (CNP);
>
> iii. Effective July 1, 2007, for students when the approved private school for students with disabilities has not charged students for paid and reduced meals in accordance with the income eligibility criteria established by the Child Nutrition Program as administered by the New Jersey Department of Agriculture **except** when the private school has received, on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the private school in that fiscal year, which resolves the district board of education does not require the private school to charge students for a reduced and/or paid meal; and
>
> [N.J.A.C. 6A:23A-18.5(a)20] (emphasis added)

As set forth in the Order on Cross Motion the plain language of the regulation supports the DOE's interpretation. The regulation expressly prohibits PSDs from including the cost of student meals in the tuition rate. The regulation provides a mechanism by which a PSD may obtain an exemption from the general prohibition. But a PSD seeking to take advantage of this exemption must take affirmative steps to satisfy all of its regulatory conditions. More specifically, such a PSD must obtain the requisite number of appropriate board resolutions. Here, GPA had not contracted with any sending districts and, thus, was not capable of satisfying the conditions for the exemption.

The DOE's interpretation is further supported by the regulatory history of the rule, which evidences the DOE's intent to generally mandate participation in the CNP. During the comment period, a commenter requested that the proposed regulation be altered to allow a PSD to include the cost of student meals in the tuition rate in the event it is unable to collect student income eligibility forms and/or collect payment for meals. In its response, the DOE stated, in pertinent part:

> Meals are critical to the educational health of all students, both public and private, which is one of the primary reasons the Child Nutrition Program (CNP) was established. The CNP, administered by the New Jersey Department of Agriculture, offers reimbursement for the cost of meals to non-profit organizations that comply with the agency's nutritional and financial requirements. Due to the Federal requirements, profit schools are precluded from receiving Federal reimbursement for meals. **The Department, however, does not believe that the full cost of these meals should be charged to tuition when Federal reimbursement is available and Federal guidelines exist on the maximum amount allowable to charge for paying students...Public school districts comply with the income eligibility requirements in order to receive Federal funding to decrease the cost to the taxpayers of their communities. Private schools should be required to maximize reimbursement and minimize the burden on the taxpayers of the sending districts**.
> [38 N.J.R. 4178(b)] (emphasis added).

The DOE reiterated the purpose of the rule in its January 7, 2013 denial of a Petition for Rulemaking, which had sought an amendment to N.J.A.C. 6A:23A-18.5(a)20

that would have allowed an alternate mechanism for obtaining an exemption. Therein, the State Board of Education stated:

> The CNP offers reimbursement for the cost of meals to nonprofit organizations that comply with the agency's nutritional and financial requirements. **Therefore, the full cost of these meals should not be charged to tuition when deferral reimbursement is available and State guidelines exist on the maximum amount allowable to charge for paying students. The purpose of the regulations at N.J.A.C. 6A:23A-18.5(a)20ii and iii is to require all approved and eligible PSSDs to take advantage of the additional revenues that are available if they comply with certain requirements.** Nonprofit PSSDs have the opportunity to receive Federal reimbursement from the CNP as administered by the New Jersey Department of Agriculture. All PSSDs have the opportunity for additional revenue by charging for paid and reduced meals in accordance with the income eligibility requirements of CNP. These additional revenues will decrease the cost of providing meals to students enrolled in PSSDs. Public school districts comply with the income eligibility requirements in order to receive Federal funding to decrease the cost to the taxpayers of their communities. Private schools should be similarly required to maximize reimbursement and minimize the burden on the taxpayers of the sending districts.
> [45 N.J.R. 57(a)] (emphasis added).

The "majority of zero is zero" interpretation advocated by GPA directly undercuts the intent of the regulation, and incentivizes PSDs to delay receipt of signed contracts, allowing them to unilaterally determine to forego CNP funding and lay the full cost of student meals upon sending districts. Thus, GPA's argument in this regard was rejected. However, the issue of the alleged delay in releasing the MTC remains.

GPA argues that it was delayed in complying with the conditions of the regulatory exemption because DOE delayed posting the 2009-2010 MTC. Here GPA has shown it could have satisfied the conditions of the regulatory exception had the contract been timely posted to DOE's website[2]. Although the MTC was issued midafternoon on June

[2] In its April 3, 2012 appeal to Director Cicchino, GPA indicated that, in lieu of board resolutions, it submitted to OFAC letters signed by board members/administrators from a number of its sending districts. GPA argued that those

12 that year, it was a Friday afternoon. When GPA staff returned on the following Monday, it had to balance end of year duties with the detailed preparation of individual student contracts for a number of districts. Once those individuals' contracts were transmitted to the districts, each district had to go through their own review process and schedule the contracts on a Board meeting in conformance with Open Public Meeting Act requirements. Had the MTC been issued earlier in June, both GPA and the individual sending districts would have been in a better position to comply with the regulation's time requirements.

Here GPA presented credible testimony as to its efforts in complying with the regulation once the MTC was issued by the DOE. Even respondent's witness admitted that given all of the steps necessary for the preparation, transmittal and Board approval of the contracts it would be difficult to comply with regulation's time mandate. It should also be noted that GPA fell short by only one contract to be in compliance. To penalize GPA under the above facts is unfair given the timing of the MTC release and GPA should not be penalized for its substantial compliance with the regulation. GPA therefore is entitled to a reversal of the $82,753.00 disallowance of student meal costs.

ORDER

It is hereby **ORDERED** that respondent's disallowance of $82,753 in student meal costs is **REVERSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

---

letters substantially complied with the board resolution requirement. However, the Commissioner has specifically upheld OFAC's refusal to accept such letters signed by board members/administrators in lieu of board resolutions. Delaware Valley Sch. for Exceptional Children v. N.J. Dept. of Educ., Div. of Finance, OAL Dkt. No. EDU 9326-10, Init. Dec. (November 18, 2011), adopted as modified, Dkt. No. 144-7/10, Comm'r Dec. (February 17, 2012).

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Patricia M Kerins

August 19, 2020
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: August 19, 2020 (emailed)

Date Mailed to Parties:

/mel

APPENDIX

WITNESSES

For Petitioner:

Michele Heinz

For Respondent:

Elisa Sadler-Williams

EXHIBITS

For Petitioner:

P-1 E-Mail from E. Sadler-Williams dated June 12. 2009

P-2 New Jersey Department of Education Website Posting (2009-10 School Year – Annual Information)

P-3 Memorandum from K. Attwood to Chief School Administration, et als, dated June 12, 2009

P-4 Mandated Tuition Contract for School Year 2009-10

P-5 Chart of GFA Contract Return Dates

P-6 Chart of GFA Sending District Meeting Date/Agenda Information

P-7 E-Mail from L. McCormick to GFA Sending Districts, dated September 14, 2012, and responses received

P-8 Order on Cross-Motions for Partial Summary Decision dated April 26, 2016

P-9 Certification of Michele Heinz dated October 14, 2015

For Respondent:

R-1 Letter dated February 22, 2012 from NJ Department of Education – Office of Fiscal Accountability and Compliance – Director

R-2 Letter from David Rubin, Esq., to Director, NJ Department of Education – Office of Fiscal Accountability and Compliance dated April 3, 2012

R-3 Letter from NJ Department of Education – Office of Fiscal Accountability and Compliance – Director dated July 3, 2014 to Steven Morse, Director of Garfield Park Academy

264-20

OAL Dkt. No. EDU 11338-14
Agency Dkt. No. 213-8/14

New Jersey Commissioner of Education

Final Decision

Garfield Park Academy,

Petitioner,

v.

New Jersey State Department of Education, Office of Fiscal Accountability and Compliance,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by petitioner have been reviewed.

This matter involves a decision by the Office of Fiscal Accountability and Compliance (OFAC) of the New Jersey Department of Education (DOE), disallowing the cost of student meals in the tuition rate calculated by petitioner Garfield Park Academy (GPA), an approved private school for students with disabilities (APSSD). OFAC found that GPA had not received board resolutions from a majority of sending school districts prior to the start of the school year, as required for the cost of meals to be properly included in the tuition rate. GPA filed a petition of appeal.

The ALJ found that *N.J.A.C.* 6A:23A-18.5(a)(20)[1] generally prohibits an APSSD from including the cost of student meals in its tuition rate. However, the regulation contains an exception allowing the cost of meals to be included if the school receives – prior to the start of the school year – board resolutions from a majority of school districts that have contracted to send students to the APSSD in that fiscal year, resolving that the districts do not require the APSSD to apply for funding from the Child Nutrition Program or to charge students for meals. On June 30, 2009, the last day prior to the start of the 2009-2010 school year, GPA had informal commitments from 28 school districts, but no executed contracts to send any students to GPA. The ALJ rejected GPA's argument that a majority of zero school districts is zero, such that GPA met the criteria for the exception, concluding that GPA's interpretation would undercut the intent of the regulation and would incentivize APSSDs to delay receipt of signed contracts. However, the ALJ also found that GPA was delayed in complying with the conditions of the regulation because the DOE delayed posting the mandated tuition contract (MTC) form that GPA needed to use to enter into the contracts as required. The MTC was not posted on the DOE's website until June 12, 2009, shortly before the June 30 deadline, and the ALJ concluded that if the MTC had been posted earlier, GPA could have complied with the regulation's time requirements. Accordingly, the ALJ ordered that OFAC's disallowance of $82,753 in student meal cost be reversed.

In its exceptions, which largely reiterate arguments made below, OFAC argues that the MTC was not delayed, as the evidence presented at hearing showed that the MTC for the 2008-2009 school year had been released even later than the 2009-2010 MTC. OFAC notes that GPA's business manager admitted that GPA had not sought an extension of the June 30 deadline,

[1] This section of the regulations pertaining to APSSD tuition was subsequently renumbered and revised. Citations herein refer to the provisions in effect at the time of the events at issue in this matter.

and asserts that there was no evidence that the June 12 release of the MTC had an identifiable impact on GPA.

In response, GPA asserts similar arguments to those it made below, including that it should not have been required to provide any resolutions because it had not entered into any contracts as of June 30, and that it was prejudiced by the late posting of the MTC, which even OFAC's witness admitted made it unlikely that GPA could have timely obtained signed contracts and resolutions.

Upon comprehensive review, the Commissioner finds that, because GPA did not have any contracts with sending school districts as of June 30, 2009, it was not required to submit any resolutions in order to qualify for the regulatory exception allowing it to include meal costs in its tuition.[2] In *Delaware Valley Sch. for Exceptional Children v. N.J. Dep't of Educ.*, Commissioner Decision No. 56-12 (February 17, 2012), the Commissioner held that "the date identified in [the regulation] as the time at which school districts must weigh in about whether they will allow food service costs to be included in tuition fees is clear. In *Delaware Valley*, *supra*, that date was June 30, 2007. Thus, for petitioner to have been allowed to include food service costs in its tuition fees, it would have had to receive the required board resolutions from [a majority of districts] *that had entered into contracts with it by June 30, 2007*." (emphasis added). The undisputed facts in this matter demonstrate that GPA had not entered into any contracts with school districts by June 30, 2009. The Commissioner agrees with GPA's

[2] Because the Commissioner concludes that GPA was not required to submit any resolutions, she does not reach the issues of the alleged "delay" in the DOE's posting of the MTC or its impact on GPA.

interpretation that a majority of zero is zero, such that GPA was permitted to include meal costs in its tuition for the 2009-2010 school year even though it did not obtain any board resolutions.[3]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, as modified herein. OFAC's disallowance of $82,753 is reversed.

IT IS SO ORDERED.[4]

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

Date of Decision: November 19, 2020
Date of Mailing: November 24, 2020

[3] The Commissioner acknowledges and appreciates the ALJ's concern that this interpretation could incentivize APSSDs to delay the execution of their contracts so that they could include meal costs in their tuition without the school districts having the opportunity to agree or disagree. However, there is no suggestion in this case that GPA had any improper motive or intentionally delayed its contracting process. By this decision, the Commissioner does not foreclose the possibility that other cases may present facts demonstrating that an APSSD purposefully subverted the intent of this regulation.

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

265-20+

OAL Dkt. No. EDU 11498-19
Agency Dkt. No. 168-7/19

New Jersey Commissioner of Education

Corrected Final Decision

Danielle Hare,

Petitioner,

v.

Board of Education of the Township of Tabernacle, Burlington County,

Respondent.

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

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

IT IS SO ORDERED.

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

Date of Decision: November 23, 2020
Date of Mailing: November 24, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 11498-19
AGENCY DKT. NO. 168-7/19

DANIEL HARE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TABERNACLE, BURLINGTON COUNTY,
Respondent.

Steven R. Cohen, Esq., for petitioner (Selikoff & Cohen, P.A., attorneys)

Susan S. Hodges, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: October 8, 2020 Decided: October 9, 2020

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This appeal was filed on July 16, 2019. On August 16, 2019, the Department of Education Office of Controversies and Disputes transmitted the matter along with the petition of appeal to the Office of Administrative Law.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General Release indicating the terms thereof, and submitted the Resolution of the Tabernacle Township Board of Education accepting the Settlement Agreement and General Release, which are attached and fully incorporated herein. (J-1.)

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the Settlement Agreement and General Release.

2. The settlement fully disposes of all issues in controversy.

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

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

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

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

October 9, 2020
DATE

Tricia M Caliguire
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 10/13/2020 (Trans Failed)

Date Mailed to Parties: 10/14/2020
nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement and General Release, and Board Resolution

J-1

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (the "Agreement") is by and between Danielle Hare ("Hare") on the one hand, and the Tabernacle Township Board of Education/Tabernacle Township School District ("Board") on the other hand. The aforementioned will be referred to as the "Released Parties" throughout this agreement.

As used in this Agreement, any reference to the Released Parties shall include their predecessors and successors, all of their affiliates, their parent or controlling corporations, partners, divisions, and subsidiaries, and all of their present, past, and future owners, directors, officers, employees, representatives, attorneys, insurers, reinsurers, third-party administrators, agents, and assigns. The Released Parties, each intending to be legally bound, agree as follows:

1. General Release. In consideration of the provisions set forth in this Agreement, the Released Parties, and upon the fulfillment of the terms and obligations specified herein, hereby knowingly and voluntarily release and forever discharge the other, as defined above, from any and all suits, causes of action, complaints, charges, obligations, demands, or claims of any kind, whether in law or in equity, direct or indirect, known or unknown (hereinafter "Claims"), ever had or now have against the Released Parties, as defined above, arising out of or relating to any matter, thing or event occurring up to and including the date of this Agreement exclusive of a claim for breach of this Agreement in addition to other exclusions listed below. This release specifically includes, but is not limited to:

a. any and all Claims arising from, involving, or relating to the subject matter of the Petition filed by Hare, docket numbers Office of Administrative Law ("OAL") Docket. No.: EDU 11498-2019S; Agency Ref. No.: 168-7/19, captioned Hare v. Tabernacle Township Board of Education (the "Lawsuit");

b. any and all Claims for wages and benefits including, without limitation, salary, commissions, health and welfare benefits, settlement pay, overtime pay, vacation pay, bonuses, any and all claims for any difference in salary that she was paid while she was employed by the Medford Board of Education and the alleged claim for any salary differential owed during her first year of employment with Tabernacle, any payment relative to difference in the amount Hare paid for medical benefits during her year at Medford Board of Education, and any and all claims for back pay or pension credit for the 2014-2015 school year, including any obligation of the Board to apply to the Division of Pensions for any salary credit; as such, the Parties agree that the Board is not obligated to pay Hare any back pay and neither Party will seek pension credit for the 2014-2015 school year; notwithstanding the foregoing, this Agreement does not prevent Ms. Hare from seeking to buy back pension credit for the 2014-2015 school year at her own expense should she choose to do so, subject to the approval of the New Jersey Division of Pensions;

c. any and all Claims relating to any employment, separation, non-renewal, or employment contract issue.

d. any and all Claims for wrongful discharge in violation of express or implied public policy of the United States, the State of New Jersey, or any state, constructive discharge, retaliatory discharge, hostile work environment, breach of contract (whether express or implied), and breach of the implied covenant of good faith and fair dealing;

e. any and all Claims for employment discrimination or retaliation on the basis of age, race, color, religion, sex, national origin, veteran status, disability and/or handicap, marital status, sexual orientation, or any other characteristic protected by law, and any and all claims in violation of any federal, state or local statute, ordinance, executive order, or common law doctrine including, but not limited to, Claims for discrimination under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act, as amended; the Americans with Disabilities Act; the Americans with Disabilities Amendments Act of 2008; the Genetic Information Nondiscrimination Act of 2008; , and any other applicable federal or state statute relating to employee benefits or pensions; 29 U.S.C. Sec. 1001; the Electronic Communications Privacy Act; the Consolidated Omnibus Budget Reconciliation Act; the Occupational Safety and Health Act; 42 U.S.C. Sec. 1981; the National Labor Relations Act; the Fair Labor Standards Act; the Rehabilitation Act of 1972; the Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Law Against Discrimination; , all New Jersey wage and hour, disability and leave laws; the New Jersey Constitution; the U.S. Constitution; and any other federal, state, foreign, or local laws or regulations prohibiting employment discrimination of any kind;

f. any and all Claims in tort (including, but not limited to, any Claims for misrepresentation, fraud, defamation, libel, slander, interference with contract or prospective economic advantage, intentional or negligent infliction of emotional distress, duress, loss of consortium, invasion of privacy, and negligence);

g. any and all Claims for compensatory, emotional distress, personal injury or punitive damages; and

h. any and all Claims for attorneys' fees and costs.

i. The Board, its successors and assigns, and its present and former Board members, employees and officers hereby agree to release and forever discharge Hare from any and all past, present and future claims, suits, disciplinary charges, actions at law or in equity of any kind, in any forum that it may have against her as of the date of this Agreement. The Board will take the following action with respect to Hare's employment with the Board: See Paragraph 2. The release recited in this paragraph shall include any and all claims which the Board may have for any type of damages cognizable under any of the laws referenced herein, including, but not limited to any and all claims for compensatory damages, punitive damages, and/or attorneys' fees.

2. Consideration. At the next regularly scheduled Board meeting, (as discussed in paragraph 17, below), the Board agrees to:

a. Restore Hare's employment at Tabernacle, and place her on Step 7 of the current salary guide for the 2020-2021 school year.
b. Restore her unused sick/personal days as of June 30, 2018.
c. Provide her seniority credit retroactive to November 3, 2014, which was her first day as an employee in Tabernacle.
d. Permit her to return to employment immediately upon her release from her current employer, or within 60 days, whichever is sooner.
e. Provide her with insurance coverage in accordance with the applicable collective bargaining agreement beginning on the day she returns to work for the Board;

In exchange for the above, and Hare's withdrawal of the lawsuit, Hare releases the Board from any and all claims, as discussed in paragraph 1, above, and the Board releases Hare as discussed in paragraph 1, above.

3. Acknowledgment of Consideration. Hare acknowledges that, in return for executing this Agreement and Release, she is receiving the consideration described herein, to which she may not otherwise be entitled.

4. No Admission of Liability. Neither the execution of this Agreement by the Released Parties, nor the terms hereof, constitute an admission by the Released Parties, or by any principal, agent, or employee of the Released Parties, of liability or the extent of damages with respect to any possible claim that was or could have been made by the other. By entering into this Agreement, the Released Parties do not admit, and expressly deny, that they have violated any contract, rule, law, statute or regulation, including, but not limited to, any federal, state or local law, statute, or regulation relating to employment or employment discrimination, or that the actions of the Released Parties were unwarranted, unjustified, retaliatory, discriminatory, or otherwise unlawful.

5. All Payments Due. Hare agrees that, upon receiving the Settlement benefits described herein, she will have been paid all compensation due and owing and arising out of their employment with the Board, as defined above, including but not limited to wages, overtime, vacation, sick, bonuses, commissions, and any other forms of compensation. Hare acknowledges that the Board has settled all obligations to them and agree to seek no further payment from the Released Parties, as defined above, or their insurers or reinsurers.

6. Confidentiality. The Released Parties each agree to keep the terms of this Agreement, including the terms of the Settlement and the negotiations leading to this Agreement (the "Confidential Information"), **strictly confidential**, except as required by law.

7. Non-Interference and Non-Disparagement. The Released Parties each agree that they will not in any manner whatsoever, directly or indirectly, interfere with the others business or other third-party relationships.

8. Breach. Hare understands that all issues which were the subject matter of the petition of appeal have been settled and she will not bring any action in the future seeking to relitigate the claims set forth in her petition. If she does so, the Board will be entitled to recover any damages proven to result from such breach and shall be entitled to be reimbursed by Hare for all reasonable legal fees, costs, and expenses, incurred by the Board in defending itself in enforcing its rights relative to such matters. The Parties agree that either party may bring an action to enforce the terms of this Agreement.

9. Dismissal of All Litigation. Any and all litigation will be dismissed with prejudice as soon as is reasonably possible following the Board's approval (as discussed in paragraph 17, below) and Hare's receipt of Monetary Consideration. The Released Parties will jointly work diligently to dismiss all pending litigation and confirm that the litigation referenced in Paragraph 1(a), above, is the only pending or contemplated matter.

10. Right to Consult Counsel and Understanding of Agreement. The Released Parties have been represented by counsel in coming to this agreement and have had the opportunity to question, edit, and amend the same. The Released Parties have carefully read this Agreement and fully understand the terms thereof, and each sign this Agreement voluntarily as their own free act.

11. Governing Law and Forum Selection. This Agreement shall be governed by and construed under the laws of the State of New Jersey, without regard to conflict of law principles. Any disputes relating to this Agreement shall be resolved exclusively in the Superior Court of New Jersey, Law Division, Burlington County.

12. Entire Agreement. This Agreement contains the entire agreement of the Released Parties with respect to the subject matter hereof and supersedes any prior agreements or understandings with respect to the subject matter hereof. The Released Parties acknowledge that in signing this Agreement they do not rely upon and have not relied upon any representation or statement made by either of the Released Parties or their agents with respect to the subject matter, basis or effect of this Agreement, other than those specifically stated in this written Agreement.

13. Legally Binding. The terms of this Agreement contained herein are contractual, and not a mere recital. This Agreement shall be binding upon the Released Parties hereto and upon their heirs, administrators, representatives, executors and assigns. Hare expressly warrants that she has not transferred to any person or entity any rights, causes of action or claims released in this Agreement. The Released Parties further represent and agree that they are not impaired, by bankruptcy or otherwise, from signing this Agreement or releasing any of the rights or claims.

14. Severability. If any term or provision of this Agreement shall be held to be invalid or unenforceable for any reason, the validity or enforceability of the remaining terms or provisions shall not be affected, and such term or provision shall be deemed modified to the extent necessary to make it enforceable.

15. Amendments. Neither this Agreement nor any term hereof may be orally changed, waived, discharged, or terminated, and may be amended only by a written agreement between the Released Parties hereto.

16. Counterparts. This Agreement may be signed in counterparts, each of which when executed and delivered, including by telecopy or email, shall be deemed to be an original and all of which together shall constitute one instrument. Photographic (including Adobe Acrobat formatted or other PDF documents) and/or facsimile copies of such signed counterparts may be used in lieu of the originals for any purpose.

17. Board/Court/Commissioner Approval. This Agreement requires Board approval. The Board will endeavor to have the Agreement, once executed by Hare, presented to the Board for approval, at the Board's next scheduled meeting. The Board's Business Administrator will recommend approval. The Board will make all reasonable efforts to promptly provide a certified copy of the Board minutes and Board resolution to the OAL (see Paragraph 1(a), above), specifically The Honorable Patricia Caliguire and the Commissioner of Education. The Parties will jointly work to obtain a final decision approving settlement from the OAL.

Signatures on Following Page

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

DANIELLE HARE

Danielle Hare

By: Danielle Hare, on her own behalf

On **July 21, 2020**, 2020, before me personally came **Danielle Hare**, known to me to be the individual who executed the foregoing Confidential Settlement Agreement and General Release, and duly acknowledged to me that she executed the same.

NOTARY PUBLIC
Daniel R. Dowdy
Attorney at Law of the State of New Jersey
Attorney No. 276072018

The Notarization of the Signature of Danielle Hare was performed utilizing communication technology in accordance with the provisions of PL220 c.26, A3903 Sa (1R) and Executive Order 103 or 2020.

THE TABERNACLE TOWNSHIP BOARD OF EDUCATION

Megan Chamberlain

By: , President

On August 18, 2020, before me personally came Megan Chamberlain, known to me to be the individual who executed the foregoing Confidential Settlement Agreement and General Release, and duly acknowledged to me that she executed the same.

Marlene M. Walls

NOTARY PUBLIC

4850-3428-1396, v. 1

MARLENE M. WALLS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires
October 14, 2023

TABERNACLE SCHOOL DISTRICT

132 New Road, Tabernacle, NJ 08088

CERTIFIED BOARD MINUTES

I, Patricia Palmieri, Board Secretary to the Tabernacle Township Board of Education, hereby certify that this is a true and exact copy of the Resolution adopted at the regularly scheduled Board of Education meeting held on August 3, 2020 through Zoom.

1. **RESOLVED** that the Board of Education to accept Settlement Agreement and General Release between former employee #4687 and the Tabernacle Township Board of Education.

Member	Motion	2nd	Yeas	Nays	Abstentions	Absent
Ms. Chamberlain,President			✔			
Ms. Corey		✔	✔			
Mr. Dilks			✔			
Col. Henske			✔			
Dr. Jones			✔			
Mr. Lepsis						✔
Dr. McCloy			✔			
Ms. Sailer, Vice President			✔			
Ms. Shoemaker	✔		✔			
MOTION CARRIED 8-0-0						

Patricia Palmieri
School Business Administrator/Board Secretary

8/3/2020
Date

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	::	DOE DOCKET NO. 227-8/19
between	::	
SCHOOL DISTRICT OF THE TOWNSHIP OF MIDDLESEX,	::	
Petitioner,	::	**CONSENT AWARD**
-and-	::	
ROBERT DeLUDE,	::	
Respondent	::	

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE OF CONSENT AWARD: November 17, 2020

APPEARANCES:

For the Petitioner:

Ari D. Schneider, Esq., BUSCH LAW GROUP, LLC

For the Respondent:

Nicholas Poberezhsky, Esq., CARUSO, SMITH PICINI, PC

WHEREAS, following the preferring of tenure charges by Petitioner to the Commissioner of Education the undersigned was designated as Arbitrator by the DOE Bureau of Controversies and Disputes on November 12, 2019; and

WHEREAS, counsel subsequently agreed to hold the arbitration proceedings in abeyance, pending the disposition of the related DCF matter before the Office of Administrative Law, with an extension granted by the DOE until January 15, 2021; and

WHEREAS, on August 26, 2020, the DCF issued a NOTICE OF CHANGE OF CHILD ABUSE OR NEGLECT FINDING from "substantiation" to "not established" leading to the Board withdrawing the instant tenure charges at its

October 12, 2020 Meeting, due to a belief that it could not sustain its burden of proof at hearing, with counsel providing evidence of the foregoing as attached and incorporated by reference herein; therefore,

BE IT RESOLVED, that the Board's withdrawal of the tenure charges as memorialized in the within CERTIFICATION of Board Secretary Michele Loree is accepted in full and final resolution of the instant tenure charges, with a recommendation made to the DOE that the same be adopted, as it complies with the *Cardonick* criteria set forth at N.J.A.C. 6A:3-5.6a, as applicable.

Dated: November 17, 2020
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQUIRE
ARBITRATOR

STATE OF NEW JERSEY
SS)
COUNTY OF HUDSON

ON THIS 17TH DAY OF NOVEMBER, 2020, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

ANGELICA SANTOMAURO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 7/29/2024

BUSCH
LAW GROUP LLC

ARI D. SCHNEIDER
PARTNER
ASCHNEIDER@BUSCHLAWGROUP.COM

October 19, 2020

VIA ELECTRONIC MAIL (mjpecklers@aol.com)
Michael Pecklers, Arbitrator
8900 Boulevard East, 6EN
North Bergen, New Jersey 07047

RE: Robert Delude
AGENCY DOCKET NO. 227-8/19

Dear Arbitrator Pecklers:

As you are aware, this office represents the Middlesex Borough Board of Education (the "Board").

Consistent with my prior representations, attached please find a Certification executed by Michele Loree, the Board Secretary, summarizing the Board's directive to me to withdraw the pending tenure charges as a result of new information obtained – *i.e.*, IAIU amending its finding of child abuse and neglect to "unsubstantiated"; statements from and conversations with the victims wherein they vehemently deny the conduct alleged in the Tenure Charges.

I trust that this will be sufficient to finalize the dismissal of these Charges.

As always, please do not hesitate to contact me with any questions or concerns.

Sincerely,

THE BUSCH LAW GROUP LLC

Ari D. Schneider, Esq.
Partner

cc: Frederick Williams, Ed.D., superintendent of schools (via email)
Nicholas Poberezhsky, Esq. (NPoberezhsky@carusosmith.com- via email)

THE BUSCH LAW GROUP LLC
450 Main Street
Metuchen, New Jersey 08840
P: (732) 243-9588; F: (732) 243-9590
Attorneys for Petitioner
Middlesex Borough Board of Education

IN THE MATTER OF THE TENURE PROCEEDING OF ROBERT DELUDE, MIDDLESEX BOROUGH BOARD OF EDUCATION, MIDDLESEX COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO.: 227-8/19

CERTIFICATION OF MICHELE LOREE

I, Michele Loree, hereby certify as follows:

1. I am employed by the Middlesex Borough Board of Education ("Board") as the Business Administrator and Board Secretary.

2. On August 26, 2019, the Board certified tenure charges against Mr. Delude.

3. The charges were then placed in abeyance as both a criminal investigation was completed and an appeal of an IAIU finding of child abuse and neglect was considered.

4. On or about August 26, 2020, IAIU amended the "substantiated" finding of child abuse or neglect to "not established," largely due to the fact that the two (2) victims recanted their prior alleged statements to an IAIU investigator.

5. On Monday, October 12, 2020, the Board met in executive session to discuss how to proceed with this matter in light of the following factors: (a) the foregoing IAIU amendment; (b) Board counsel's interview with the two victims who Mr. Delude allegedly had sexual

relationships with; and, (c) the sufficiency of the remaining evidence available to the Board for presentation during a hearing.

6. Importantly, the aforementioned victims credibly informed Board counsel, consistent with the statements they provided to Mr. Delude's counsel's investigator, that they did not engage in a sexual relationship and/or sexual acts with Mr. Delude prior to graduating from High School. Moreover, they vehemently denied having any relationship with Mr. Delude, other than a teacher student relationship, at any point in time prior to graduation.

7. A majority of the Board agreed that the Board did not have viable evidence to contradict the foregoing statements/positions of the two victims, and therefore, would be unable to sustain its burden of proof at a hearing.

8. Thus, a majority of the Board agreed that Board counsel should notify the Arbitrator that the Board wishes to withdraw the tenure charges against Mr. Delude.

I hereby 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 by law.

Michele Loree

Michele Loree, Business Administrator/
Board Secretary
Middlesex Township Board of Education

10/16/2020
Date

CARUSO SMITH PICINI
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
60 Route 46 East, Fairfield, New Jersey 07004
973-667-6000 973-667-1200 facsimile

Nicholas Poberezhsky, Esq.
npoberezhsky@carusosmith.com

September 10, 2020

Via E-Mail to: mjpecklers@aol.com
& Regular Mail
Michael J. Pecklers, Esq., President
Pecklers ADR, L.L.C.
8900 Boulevard East
Suite 6E North
North Bergen, New Jersey 07054

Re: I/M/O Tenure Hearing of Robert DeLude, School District of the Township of Middlesex, Middlesex County
Agency Dkt. No.: 227-8/19

Dear Arbitrator Pecklers:

As you may recall, this firm represents Respondent Robert DeLude ("Mr. DeLude") in the above-captioned matter. Please accept this letter as notice that a resolution has been reached in Mr. DeLude's interrelated appeal of the Findings Report issued by the Department of Children and Families, Institutional Abuse Investigation Unit ("IAIU"). More specifically, IAIU amended the "substantiated" finding of child abuse or neglect to "not established," as reflected in the enclosed disposition notice dated August 26, 2020.

I understand that Ari Schneider, Esq., legal counsel for Petitioner Township of Middlesex Board of Education ("the Board"), is discussing this development with his client and will notify us as to whether the Board intends to continue its prosecution of the tenure charges in the near future.

Thank you for your time and attention this matter.

Respectfully submitted,
CARUSO SMITH PICINI, PC

By:_____
Nicholas Poberezhsky, Esq.

Enclosure
cc: Robert DeLude (via regular mail)
Ari Schneider, Esq. (via e-mail only)
Brain Furry, UniServ Field Representative **(w/o encl.)**
NJEA Legal Dept. (via e-mail only)

State of New Jersey

PHILIP MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

DEPARTMENT OF CHILDREN AND FAMILIES
INSTITUTIONAL ABUSE INVESTIGATION UNIT
CENTRAL OFFICE
PO BOX 717
50 E. STATE STREET-5TH FLOOR
TRENTON, NEW JERSEY 08625-0717
(609) 888-7440
CONFIDENTIAL

CHRISTINE NORBUT BEYER, MSW
Commissioner

RECEIVED
AUG 3 1 2020
BY:.....

August 26, 2020

NOTICE OF CHANGE OF CHILD ABUSE OR NEGLECT FINDING (IAIU)

RE: DCF REFERENCE NUMBERS: CaseID#: 17274379 NJS Investigation#: 20558842
Intake ID#: 20557274 AHU#: 19-0109
OAL Docket#: HSV 07327-19

This notice shall serve to advise you that an investigative finding of "substantiated child abuse or neglect" was **CHANGED** following a stipulation of settlement.

The Comprehensive Child Abuse Prevention and Treatment Act (CCAPTA), P.L. 1997, c. 175 and N.J.A.C 3A:10-7.6 and 7.8 require that the Department of Children and Families (DCF) provide abuse or neglect finding notifications to parents, alleged perpetrators, local law enforcement officials, institutions in which the abuse or neglect was alleged to have occurred, and others, as specified in the law. You are receiving this notice because the Department's Institutional Abuse Investigation Unit (IAIU) previously advised you of a **"SUBSTANTIATION"** findings of child abuse or neglect. The finding has been changed to **"NOT ESTABLISHED".**

Based on the change in the finding, **please destroy the child abuse or neglect information that was provided to you regarding the incident and the individuals identified below:**

Date of report: January 31, 2019
Name of previously identified perpetrator/appellant: Robert DeLude
Incident Location: Middlesex High School
Children Names: Lauren Burke

Information regarding child abuse or neglect must be kept confidential by all individuals or agencies (N.J.S.A. 9:6-8. 10a).

Because the "substantiated" finding has been changed, DCF will not keep a record of the results of this investigation on its central registry of confirmed perpetrators of substantiated incidents of child abuse or neglect.

A record of the investigation will be retained in DCF files.

Please contact me at (609) 888-7440, if you have any questions.

Notice **posted by:** Greta M. Anderson

Greta M. Anderson
Director of Institutional Abuse Investigations Unit

NOTICE RECIPIENTS:

Robert Delude, Appellant
Paul W. Tyshchenko, Esq., Caruso Smith Picini Attorneys at Law
Kyle Anderson, Interim Executive County Superintendent, Middlesex County
Prosecutor, Middlesex County
Elisa Billups, Corrective Action Coordinator, IAIU/CO

269-20

SELIKOFF & COHEN, P.A.
700 East Gate Drive, Suite 502
Mt. Laurel, NJ 08054-3823
(856) 778-6055
Fax: (856) 778-6056
Keith Waldman, Esq. (020921988)
kwaldman@selikoffcohen.com
Hop T. Wechsler, Esq. (231332017)
hwechsler@selikoffcohen.com
Counsel for Petitioner Paula Melnyk

PARKER McCAY, P.A.
9000 Midlantic Drive, Suite 300
Mt. Laurel, NJ 08054-5054
(856) 596-8900
Andrew W. Li, Esq. (36001997)
ali@parkermccay.com
Counsel for Respondent Board of Education of the
Delsea Regional High School District, Gloucester County

PAULA MELNYK, Petitioner, v. BOARD OF EDUCATION OF THE DELSEA REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Docket No. 161-7/15 **FINAL AGENCY DECISION (CONSENT ORDER)**

This matter comes before the Commissioner of Education on remand from the New Jersey Supreme Court following its decision reported at 241 N.J. 31 (2020). On October 7, 2020, the parties entered into a Settlement Agreement (Agreement) liquidating Petitioner's claim for back pay, pursuant to which Respondent shall make payment to Petitioner in the amount of $13,000 within thirty (30) days following execution of the Agreement. This payment represents the following:

a. Full back pay for the Alternative Program Position for the 2015-2016 school year, which totals $4,230;
b. Full back pay for the Alternative Program Position for the 2016-2017 school year, which totals $4,570; and
c. Full back pay for the Alternative Program Position for the 2017-2018 school year, which totals $4,200.

Upon review, the Commissioner approves the terms of the Agreement. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

We consent to the form and substance of the above Final Agency Decision. We further consent to the submission of digital copies of our signatures in lieu of original signatures.

SELIKOFF & COHEN, P.A.

By: H Wedlick

Dated: 10/14/2020

PARKER McCAY, P.A.

By:

Dated: 10/15/20

Date of Decision: 11/25/2020
Date of Mailing: 11/25/2020

269-20

270-20E

OAL Dkt. No. EDU 09416-20
Agency Dkt. No. 210-9/20

New Jersey Commissioner of Education

Order on Emergent Relief

Alfonso Mastofilipo, Jr.,

Petitioner,

v.

Board of Education of the Borough of Lodi,
Bergen County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to each of the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

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

Date of Decision: November 27, 2020
Date of Mailing: December 1, 2020

271-20

New Jersey Commissioner of Education

Final Decision

M.D., on behalf of minor children, O.D.-G and Y.D.-G.,

Petitioner,

v.

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

Respondent.

Synopsis

Pro Se petitioner appealed the determination of the respondent Board that O.D.-G. and Y.D.-G. were not domiciled in Deptford and therefore were not legally entitled to a free public education in the Deptford Township School District (District) as of November 2019 and thereafter. Petitioner – the uncle of the two students – submitted a lease for a Deptford rental property that included the students' names as proof of residency, contending that the children lived with him in Deptford and were therefore entitled to a free public education in Deptford Township schools. The Board filed a motion for summary decision, asserting that the petitioner had failed to meet his burden of evidence to prove that the children were domiciled with him in Deptford, and further failed to provide proof that he was caring and providing for them as if he were their parent. The children never attended school in Deptford, and M.D. did not respond to the motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:22-3.2(a), a student is eligible to attend a school district if he or she is kept in the home of a person other than the student's parent or guardian, if that person is domiciled in the school district and is supporting the student without remuneration, as if the student were his or her own child; in this case, however, petitioner failed to submit the required documentation supporting his claim; further, petitioner failed to respond to the respondent's motion for summary decision. Accordingly, the ALJ concluded that O.D-G. and Y.D-G. were not entitled to a free public education in the respondent's district. Summary decision was granted in favor of the respondent Board.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

271-20

OAL Dkt. No. EDU 00483-20
Agency Dkt. No. 315-12/19

New Jersey Commissioner of Education

Decision

M.D., on behalf of minor children,
O.D.-G. and Y.D.-G.,

Petitioner,

v.

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

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner, the minor children's uncle, failed to sustain his burden of establishing that the minor children were domiciled with him in Deptford or that he was caring and providing for them as if he were their parent. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in Deptford Township at the time petitioner sought to enroll them in the district's schools in November 2019 or thereafter.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board's motion for summary decision is granted and the petition of appeal is hereby dismissed.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 27, 2020
Date of Mailing: December 1, 2020

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

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 1, 2020

Jessika Kleen, Esq.
Machado Law Group
1 Cleveland Place
Springfield, New Jersey 07081

Mark G. Toscano, Esq.
Alexandra A. Stulpin, Esq.
Comegno Law Group, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Re: *Board of Education of the Township of Barnegat, Ocean County v. Board of Education of the Freehold Regional High School District, Monmouth County,* Commissioner's Decision No. 214-20, OAL Dkt. No. EDU 16397-10, Agency Dkt. No. 294-11/19

Dear Counsel:

I have reviewed the materials filed in connection with the Freehold Regional High School District Board of Education's (Freehold's) Motion to Stay the October 6, 2020 decision of the Commissioner, pending appeal to the Superior Court, Appellate Division. The Commissioner's decision directs Freehold to reimburse the Barnegat Township Board of Education (Barnegat) for one-half of the cost of T.M.'s out-of-district placement for the 2019-20 school year and to share equally in the future costs of T.M.'s placement at the American School for the Deaf, so long as the present circumstances remain the same.

Pursuant to *N.J.A.C.* 6A:3-1.15(a) and *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that the movant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that Freehold has failed to meet the standard required for a stay of the October 6, 2020 decision. Most notably, Freehold has failed to establish irreparable harm. In its papers, Freehold argues that it will suffer irreparable harm because it has not budgeted the funds to pay Barnegat, which could lead to the elimination of

positions or programs given its recent significant cuts in state aid. Freehold also contends that as Barnegat is also experiencing state aid cuts, it will be unlikely that Barnegat will be able to repay Freehold when Freehold is ultimately successful on the merits of its appeal. Finally, Freehold maintains that paying Barnegat would be inappropriate as Barnegat has failed to provide an accurate calculation of the costs.

Harm is considered irreparable "if it cannot be redressed adequately by monetary damages." *Crowe*, *supra*, 90 *N.J.* at 132-33. Here, Barnegat's alleged injury is entirely monetary, which is not considered irreparable. Any harm Freehold may suffer due to budget cuts, or any contention that Barnegat would be unable to reimburse Freehold if Freehold is successful on appeal, are speculative in nature and fail to meet the threshold of irreparable. Finally, whether the parties have determined the exact costs at issue is irrelevant to the issue of irreparable injury. As a result, Freehold has failed to demonstrate that it will suffer irreparable harm.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, Freehold's request for a stay of the October 6, 2020 decision is hereby DENIED.[1]

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: County Superintendent

VIA E-MAIL

272-20L

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

273-20

New Jersey Commissioner of Education

Final Decision

Marian DeJesus,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection, and Board of Education of the City of Vineland, Cumberland County,

Respondents.

Synopsis

Petitioner – a school bus driver for the Vineland Board of Education (Vineland) – challenged the suspension of her school bus endorsement by the New Jersey Department of Education, Office of Student Protection (OSP), and the termination of her employment by Vineland. These actions followed an incident that occurred in September 2019, wherein a three-year-old preschool student remained on the bus after petitioner had disembarked at the end of her route. The respondents filed separate motions to dismiss the petition, which petitioner opposed.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:39-28, school bus drivers are required to conduct a visual inspection at the end of their transportation route to confirm that no pupils are left on the bus; there is no dispute that a preschool student was left on the bus after petitioner finished her route on September 13, 2019; petitioner admittedly left the bus at the garage and proceeded to use the restroom and pick up her updated schedule before she was informed by a maintenance worker that a preschooler was still on petitioner's bus; *N.J.S.A.* 18A:39-29 mandates a six-month suspension of petitioner's school bus endorsement for such actions; Vineland is a civil service jurisdiction, and petitioner's rights and duties are governed by the Civil Service Act and accompanying regulations; and the Civil Services Commission issued a final agency decision terminating petitioner from her employment effective September 18, 2019. The ALJ concluded that: petitioner's school bus endorsement was properly suspended pursuant to *N.J.S.A.* 18A:39-29; and the Commissioner lacks jurisdiction to decide whether petitioner's termination by Vineland was proper. The petition was dismissed.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed and OSP was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement for six months pursuant to *N.J.S.A.* 18A:39-26 *et seq.*

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

273-20

OAL Dkt. No. EDU 16890-19
Agency Dkt. No. 267-10/19

New Jersey Commissioner of Education

Decision

Marian DeJesus,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection, and Board of Education of the City of Vineland, Cumberland County,

Respondents.

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

On September 13, 2019, petitioner, a bus driver for respondent Vineland Board of Education (Vineland), transported pre-school students home from school pursuant to her afternoon bus route. Near the end of the route, petitioner pulled over to assist a child off the bus, then walked the length of the bus to confirm that B.A. was not on board before proceeding to drop off the last two students. Petitioner then returned to the garage and disembarked from the bus for five minutes to use the restroom and pick up her updated bus route. During that time, a maintenance worker saw a student on the bus, and petitioner subsequently found B.A. standing in the aisle.

Thereafter, respondent New Jersey Department of Education, Office of Student Protection (OSP) notified petitioner that her "S" endorsement to operate a bus would be suspended for six months as she failed to conduct a visual inspection at the end of her transportation route to confirm that no pupils were left on the bus, as required by *N.J.S.A.* 18A:39-28. Additionally, Vineland notified petitioner that it was seeking to remove her from her position as a bus driver. Following a Board hearing, Vineland issued a final notice of disciplinary action removing petitioner.

As Vineland opts to be governed by the Civil Service Act, *N.J.S.A.* 11A:1-1 *et seq.*, petitioner appealed that decision to the Civil Service Commission, where it was dismissed as untimely. Petitioner filed the instant appeal with the Commissioner challenging both the suspension of her "S" endorsement and her termination.

Upon review, the Commissioner concurs with the ALJ that petitioner failed to inspect the bus as required, which resulted in a student being left on the bus at the end of her route. As such, the Commissioner agrees with the ALJ's conclusion that *N.J.S.A.* 18A:39-29 mandates a six-month suspension of petitioner's school bus endorsement as this was her first offense. Additionally, the Commissioner is in accord with the ALJ that the Commissioner lacks jurisdiction over petitioner's termination, which has already been the subject of a final agency decision by the Civil Service Commission.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed. OSP is directed to notify the Motor Vehicle Commission of its obligation, pursuant to *N.J.S.A.* 18A:39-28 *et seq.*, to suspend petitioner's school bus "S" endorsement on her driver's license for six months. Additionally, should petitioner be hired by a new employer, OSP is directed to notify the employer that petitioner is ineligible during the period of suspension to continue employment as a school bus driver.

IT IS SO ORDERED. [1]

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

Date of Decision: December 2, 2020
Date of Mailing: December 2, 2020

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

274-20
State Board of Examiners Docket No. 1718-215
OAL Dkt. No. EDE 11406-18
Agency Dkt. No. 1-2/20A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension
of the Certificates of James A. Smith
by the State Board of Examiners.

Order of Suspension by the State Board of Examiners, January 23, 2020

For the Respondent-Appellant, James W. Boyan, III, Esq.

For the Petitioner-Respondent State Board of Examiners, Sadia Ahsanuddin, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that his actions warranted the suspension of his Supervisor Certificate and Principal Certificate of Eligibility for four months.

In this matter, appellant was the Athletic Director at the Mountain Lakes School District (District). After a hearing before the Office of Administrative Law, the Board found that the appellant failed to complete his required coach and teacher evaluations and failed to report a parent's harassment, intimidation and bullying (HIB) complaint as required by the District's HIB policy. Concluding that this conduct amounted to inefficiency and unbecoming conduct, the Board suspended appellant's Supervisor Certificate and Principal Certificate of Eligibility for four months.[1] This appeal followed.

[1] Appellant's Teacher of Social Studies Certificate was not suspended.

On appeal, the appellant argues that the Board's decision to suspend his certificates was contrary to law because the evidence did not satisfy the statutory requirements for a charge of inefficiency. Appellant points out that *N.J.S.A.* 18A:6-17.3 requires two annual summative evaluations – with ratings of ineffective or partially ineffective – to warrant a charge of inefficiency. Appellant maintains that he only had a summative evaluation in the 2016-17 school year, and one summative evaluation cannot support a charge of inefficiency.

Appellant also contends that the Board acted contrary to law when it suspended his certificates for unbecoming conduct because it relied on inadmissible evidence that should not have been considered. According to appellant, the finding that he failed to complete coach and teacher evaluations over a five-year period was based on hearsay that was not corroborated by a residuum of competent evidence, as required by *N.J.A.C.* 1:1-15.5. Appellant explains that the Board relied on a chart created by the Director of Curriculum that documented appellant's assigned observations for physical education teachers, but such a document is a hearsay statement that fails to fall within a hearsay exception.

Finally, appellant argues that his alleged conduct fails to rise to the level of egregious conduct required for a finding of conduct unbecoming. Appellant maintains that he did not show a disregard for his duties, even when he did not complete all evaluations. Appellant also contends that the Board fails to explain how his failure to report a complaint about the girls' basketball coach supports a charge of unbecoming conduct. Accordingly, appellant urges the Commissioner to reverse the findings of inefficiency and conduct unbecoming, as well as the four-month suspension of his supervisory certificates.

In opposition, the Board argues that it proved by a preponderance of the competent and credible evidence that appellant engaged in unbecoming conduct that warrants a

four-month suspension of his supervisory certificates. According to the Board, the evidence demonstrates a pattern of behavior in not completing evaluations over a five-year period, as well as failing to follow state law and District policy by not reporting an HIB complaint. The Board further maintains that the chart documenting the appellant's assigned evaluations was properly considered as it was supported by a residuum of competent evidence, specifically the testimony of the Superintendent as well as the Director of Curriculum. Additionally, the Board contends that it was within its authority to suspend appellant's supervisory certificates on the basis of inefficiency.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

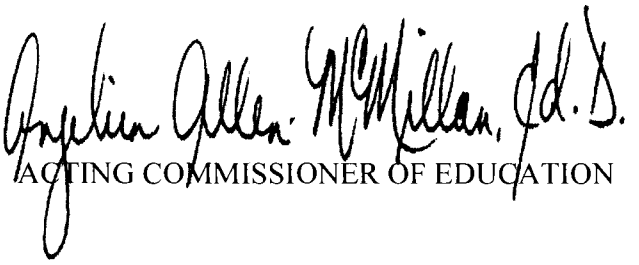
Initially, the record reflects that the appellant was afforded the necessary due process throughout the proceedings before the Board prior to the suspension of his supervisory certificates. The matter was transmitted to the Office of Administrative Law in accordance with *N.J.A.C.* 6A:9B-4.6(d), and appellant was afforded a hearing.

After full consideration of the record and all submissions, the Commissioner concurs with the Board that the appellant engaged in unbecoming conduct. The testimony and evidence demonstrate that appellant failed to complete coach and teacher evaluations over a five-year period, even after he was placed on a corrective action plan. Failing to complete such a fundamental responsibility over an extended time demonstrates a pattern of disregard for his duties. Additionally, the record demonstrates that appellant failed to follow State law and

District policy when he did not report an HIB complaint raised by a parent. Such a failure to abide by this responsibility puts the District in violation of the statutorily-mandated timeframe by which it is required to investigate HIB matters, as outlined in the Anti-Bullying Bill of Rights Act at *N.J.S.A.* 18A:37-15. The Commissioner further finds that the record adequately supports the Board's determination that a four-month suspension of appellant's supervisory certificates was the appropriate penalty.[2]

The Commissioner does not find appellant's arguments on appeal to be persuasive. The Board's decision did not violate the residuum rule set forth at *N.J.A.C.* 1:1-15.5. The Board's determination that appellant failed to complete evaluations was not solely based on a chart, but was instead supported by the testimony of both the Superintendent and Director of Curriculum. As such, the Board's determination was based on the sufficient, credible evidence in the record, and was not arbitrary, capricious, or contrary to law.

Accordingly, the decision of the State Board of Examiners is affirmed.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 2, 2020
Date of Mailing: December 2, 2020

[2] As the Commissioner finds that appellant has engaged in unbecoming conduct which warrants a four-month suspension of his supervisory certificates, the Commissioner declines to reach the issue of inefficiency.

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

275-20
State Board of Examiners Docket No. 1718-171
Agency Dkt. No. 9-12/19A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Revocation
of the Certificates of Lynderia Mansfield
by the State Board of Examiners.

Order of Revocation by the State Board of Examiners, November 1, 2019

For the Respondent-Appellant, Eugene G. Liss, Esq.

For the Petitioner-Respondent State Board of Examiners, Sadia Ahsanuddin, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that her actions warranted the revocation of her Teacher of Pre-K through Grade 3 Certificate of Eligibility, Teacher of Pre-K through Grade 3 Certificate, and Supervisor Certificate.

In this matter, appellant was a teacher in the Newark School District (Newark). Newark certified tenure charges against appellant for unbecoming conduct, corporal punishment, insubordination, and other just cause. Newark alleged that appellant was abusive toward her second-grade students, including yelling at them on a continuous basis, grabbing students by their collars or clothing, and restricting bathroom use, which resulted in children urinating on themselves. Following an arbitration, the Arbitrator found just cause to terminate appellant based on the credible testimony of eyewitnesses, including students and parents. Thereafter,

accepting the facts as found in the tenure hearing, the Board found that appellant's behavior constitutes conduct unbecoming a certificate holder and revoked appellant's certificates. This appeal followed.

On appeal, appellant argues that there is a dichotomy between the Arbitrator's findings and those made by the Institutional Abuse Investigation Unit (IAIU). According to appellant, the IAIU report found that she did not abuse her students and students were not forced to urinate on themselves. Appellant maintains that while she may have been short with her students due to having a difficult class at a stressful time in her life, she did not harm her students. Appellant also contends that her termination put a strain on her financially, causing her to lose her home and car. As such, appellant requests that the Commissioner reduce the penalty to a suspension rather than a license revocation.

In opposition, the Board argues that it properly applied the principle of collateral estoppel to bar re-litigation of the issues that were previously decided in the tenure hearing. With respect to appellant's argument about the IAIU report, the Board points out that the report specifically says that it is solely investigative and is not making adjudicative findings. As such, given appellant's pattern of abusive behavior, the Board maintains that it correctly found that a revocation of appellant's certificates was the appropriate penalty.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

Initially, the record reflects that the appellant was afforded the necessary due process throughout the proceedings before the Board prior to the revocation of her teaching certificates. Pursuant to *N.J.A.C.* 6A:9B-4.6(e), the Board determined that it was constrained by collateral estoppel to accept the facts as found in the tenure hearing, so it was not necessary to transmit the matter to the Office of Administrative Law as no material facts were in dispute. Nevertheless, the appellant was given an opportunity to submit a written brief for the Board's consideration and appear in person before the Board.

After full consideration of the record and all submissions, the Commissioner concurs with the Board that the appellant engaged in unbecoming conduct. The record demonstrates that the appellant engaged in a pattern of abusive behavior, including yelling at students and grabbing them by their shirts or collars. The Board's determination in connection with the characterization of appellant's behavior as unbecoming conduct is fully supported by the record and consistent with applicable law. While appellant disagrees with the Board's finding that she abused her students, the facts set forth in the tenure hearing – including credible witness testimony and the weight of the evidence – support the Board's determination. The IAIU report, which is solely investigative, is not persuasive.

Additionally, the Commissioner finds that the record adequately supports the Board's determination that a revocation of appellant's certificates was the appropriate penalty given the disturbing and abusive nature of appellant's conduct toward second-grade students. The financial strain that appellant argues she will suffer is unconvincing and in no way demonstrates that a revocation is unwarranted. While appellant obviously disagrees that she engaged in unbecoming conduct and with the determination that her certificates should be revoked, there is nothing in the record to suggest that the Board's decision was arbitrary,

capricious or unreasonable; therefore, the Commissioner finds no basis upon which to disturb the Board's decision.

Accordingly, the decision of the State Board of Examiners is hereby affirmed.[1]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 2, 2020
Date of Mailing: December 2, 2020

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

278-20

OAL Dkt. No. EDU 05520-20
Agency Dkt. No. 93-5/20

New Jersey Commissioner of Education

Final Decision

L.M. and J.S., on behalf of minor child, R.M.,

Petitioners,

v.

Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County,

Respondent.

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 3, 2020
Date of Mailing: December 4, 2020



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05520-20
AGENCY REF. NO. 93-5/20

L.M. AND J.S. ON BEHALF OF R.M,
Petitioners,

v.

RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL BOARD OF EDUCTION,
Respondent.

L.M. and J.S., parent of **R.M.,** Petitioners, pro se

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

Record Closed: October 27, 2020 Decided: October 28, 2020

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

NATURE OF PROCEEDINGS

Petitioners filed a petition seeking an order that Respondent Board provide a tailored online course consistent with N.J.A.C. requirements and student's IEP, among other things.

The Office of Controversies and Disputes of the Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on June 3, 2020.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

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

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

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

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

October 28, 2020
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 10-29-20

Date Mailed to Parties: 10-29-20
db

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Facsimile
Attorneys for Respondent,
Ramapo Indian Hills Regional High School District
Board of Education

L.M. and J.S. o/b/o R.M. Petitioners, v. Ramapo Indian Hills Regional High School District Board of Education Respondent.	State of New Jersey Office of Administrative Law Department of Education Office of Controversies and Disputes OAL Dkt. No.: EDU 05520-20 Agency Ref. No.: 93-5/20

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter referred to as the "Agreement") is made this 30th day of September 2020, between the Ramapo Indian Hills Regional High School District Board of Education, which has offices located at 131 Yawpo Avenue, Oakland, New Jersey 07436 (hereinafter referred to as the "Board"), and L.M. and J.S. o/b/o R.M. (hereinafter referred to as the "Parents") who are residents of Oakland, New Jersey 07436 (collectively referred to herein as the "Parties").

WHEREAS, R.M. is a seventeen-year-old 12th grade student residing within the Ramapo Indian Hills Regional High School District (the "District"), a ninth through twelfth grade public school district operated by the Board; and

WHEREAS, a dispute arose between the Parties regarding the provision of home instruction to R.M. and R.M.'s final grades issued in the 2018-2019 school year; and

WHEREAS, the Parties are desirous of reaching an amicable resolution pursuant to the terms herein to avoid the time and expense associated with litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. **Terms of Resolution.** The Board agrees to revise R.M.'s official transcript to reflect a grade received of "C" in Chemistry for the 2018-2019 school year, based on R.M.'s combined grades in Chemistry for the 2018-2019 school year and the recovery course completed during the summer of 2020, in order to resolve all claims raised by the Parents against the Board.

2. **Attorneys' Fees and Costs.** Each party shall bear their own attorneys' fees, expert witness fees, and other costs for the entirety of any matter or matters related to the subject matter of this Agreement. It is expressly acknowledged that neither the Board, the Parents, nor R.M. is the prevailing party for any purpose, including attorneys' fees, expert/witness fees, or other costs. The Parents waive any other financial claims that they or R.M. may have against the Board in this matter.

3. **No Admission.** The terms of this Agreement represent the compromise of disputed claims between the Parties. The Parents agree that under no circumstances shall this Agreement be deemed an acknowledgment by the Board that it did not offer R.M. an appropriate educational program. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any party.

4. **No Further Action.** The Parents, or any persons or entity acting on their behalf, agree not to file any suit, or cause any suit, demand, administrative, judicial or other proceeding, claim, complaint or other action of any kind against the Board or its officers, agents, employees or assigns for the Board's alleged failure to provide adequate instruction to R.M. It is expressly understood and agreed, however, that the Parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under the terms and conditions of this Agreement.

5. **Release.** As of the effective date of this Agreement, and apart from the Board's obligation under this Agreement, the Parents release and discharge the Board from any duties, obligations or other responsibilities, under any State or federal law, known or unknown, with respect to the claims raised through the Parents' Petition of Appeal in this matter pertaining to R.M.'s education and grades. The Parents further agree to withdraw the Petition of Appeal filed in this matter and bearing Docket No. EDU 05520-20 and Agency Ref. No. 93-5/20 with prejudice.

6. **Mutual Confidentiality.** The terms of this Agreement shall remain strictly confidential and shall not be divulged to any third party, except the Parties' attorneys and/or accountants/auditors, unless such disclosure is required under applicable law and/or legal process. In response to any direct inquiry about the outcome of the above-described action, the Parties shall indicate only that the matter has been concluded. In the event that the terms of this provision are violated, the non-breaching party may take all reasonable measures (including, but not limited to, court proceedings) to restrain the

prohibited or unauthorized disclosure of said information. Any and all costs incurred in connection with such proceedings, including, but not limited to, reasonable attorneys' fees, shall be charged to the breaching party.

7. **Indemnification.** The Parents agree to indemnify and hold forever harmless the Board, its officers, employees, administrators, and/or agents for any claim, complaint, suit, demand, cost, expense or legal fee, penalty, loss or judgment (collectively "liability") or any challenge successful or unsuccessful, brought or made by R.M. or anyone on behalf of R.M. at any time subsequent to the effective date of this Agreement and in any judicial or administrative court, tribunal or other forum in connection with the duties and responsibilities of the Board for an alleged failure to provide home instruction to R.M. or regarding any other claim raised in the Petition of Appeal filed in this matter.

8. **Governing Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

9. **Authority.** The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party.

10. **Counterparts.** The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original.

11. **Ratification.** This Agreement is subject to ratification by the Board and is without prejudice to any party if the terms are not agreed upon. The representatives of the District shall recommend the terms of this settlement to the Board for approval at its next regularly scheduled meeting.

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

13. **Modifications and Waivers.** A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable, only if made in writing and executed with the same formality as this Agreement. The failure of any party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature, or of a continuation of an existing default.

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

15. **Legal Counsel.** The Parties recognize that each had the opportunity to be represented by legal counsel, that if they are represented they are satisfied with the representation of counsel, and that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein. Each party carefully read this Agreement, fully discussed the terms and conditions set forth herein with counsel, and each party fully understands their duties and obligations contained in this Agreement.

16. **Section Headings**. Section headings are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth.

WITNESS:

FRANK CEURVELS
Business Administrator/
Board Secretary

DATED: Oct 15, 2020

RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL BOARD OF EDUCATION

BY: John Kinney
JOHN KINNEY
Board President

DATED: Oct 15, 2020

WITNESS:

DATED: 9-22-2020

L.M., on behalf of R.M.

DATED: 9/22/20

WITNESS:

DATED: 9-22/2020

J.S., on behalf of R.M.

DATED: 9-22-20

BOARD OF EDUCATION
RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT

131 Yawpo Avenue
Oakland, New Jersey 07436
201-416-8100
(fax) 201-416-8123

RAMAPO HIGH SCHOOL
Franklin Lakes, N.J. 07417
201-891-1500

INDIAN HILLS HIGH SCHOOL
Oakland, N.J. 07436
201-337-0100

EDUCATION; E10

Move to approve, as recommended by the Interim Superintendent of Schools, the resolution as follows:

BE IT RESOLVED by the Ramapo Indian Hills Regional High School District Board of Education (hereinafter referred to as the "Board") that the terms, stipulations, and conditions as established in the Settlement Agreement and release (hereinafter referred to as "Agreement") between the Board and the Parents of a student whose name is on file in the Superintendent's Office, and which Agreement is located in the Student's file, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Settlement Agreement and Release, and any other documents necessary to effectuate the settlement.

Moved by: Carolan Seconded by: Becker

RC): Becker √ Butto √ Carolan √ Fortunato √
Laforgia √ Sullivan Abstain Zammitti Shaw √ Kinney √

I do hereby certify that the foregoing is a true and exact copy of a resolution adopted by the Ramapo Indian Hills Board of Education on Wednesday, September 30 , 2020.

Frank Ceurvels / Board Secretary

279-20
OAL Dkt. No. EDU 00484-20
Agency Dkt. No. 321-12/19

New Jersey Commissioner of Education

Final Decision

M.S., on behalf of minor child, C.G.,

Petitioner,

v.

Board of Education of the Borough of Seaside Park, Ocean County,

Respondent.

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

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

IT IS SO ORDERED.

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

Date of Decision: December 3, 2020
Date of Mailing: December 4, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00484-20
AGENCY DKT. NO. 321-12/19

M.S. ON BEHALF OF MINOR CHILD, C.G.,
Petitioner,
v.
BOROUGH OF SEASIDE PARK BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

M.S., petitioner, pro se

Robert D. Budesa, Esq., for respondent (Berry, Sahradnik, Kotzas & Benson, attorneys)

Record Closed: October 14, 2020 Decided: November 2, 2020

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 10, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

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

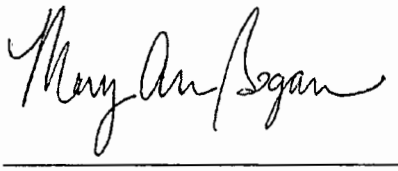
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

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



November 2, 2020
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 11/2/2020

Date Mailed to Parties: 11/4/2020

MAB/cb

M.S. on behalf of Minor Child C.G., Petitioner, vs. Board of Education of the Borough of Seaside Park, Respondent.	:	Before the Commissioner of Education of NJ Docket No.: 324-12/19 Settlement Agreement

WHEREAS, C.G. was enrolled in the Lavallette School District for the 2019-2020 school year since it was thought that C.G. lived in the Borough of Seaside Park; and

WHEREAS, upon further check of the records, it was discovered that C.G. was residing with his mother in an area commonly known as South Seaside Park which is a part of Berkeley Township and C.G. should have been enrolled in the Berkeley Township School District; and

WHEREAS, the respondent herein has paid tuition to the Lavallette School District for C.G.'s attendance in that school district since all Seaside Park elementary school children attend either the Lavallette elementary school system or the Toms River Regional elementary school system; and

WHEREAS, a residency appeal was filed with the department; and

WHEREAS, the parties have discussed resolution of this matter;

NOW, THEREFORE, BE IT RESOLVED by and between the parties as follows:

1. It is agreed that C.G. attended the Lavallette School District for the entire 2019-2020 school year.

RECEIVED
2020 SEP -8 P 2:32
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2. It is understood by and between parties that, if C.G. were to continue to attend the Lavallette Elementary School following the 2019-2020 school year, it shall be the responsibility of the petitioner to make arrangements with the Lavallette School District for said attendance and any tuition payments shall be the responsibility of the petitioner.

3. In connection with this settlement, it is agreed that respondent shall not seek reimbursement for any monies expended for tuition for C.G. for the 2019-2020 school year from the petitioner.

4. This agreement is a full and final settlement of all issues outstanding regarding C.G.'s attendance at the Lavallette Elementary School for the 2019-2020 school year and both parties agree that this is a final resolution of any and all claims that can be asserted by either party.

5. M.S. on behalf of minor child C.G. has had the right to consult with any attorney or other individual of her choice and has entered into this agreement voluntarily knowing the full and complete nature of this settlement.

Dated: August 13th, 2020

Robert D. Budesa, Esq., on behalf of the Board of Education of the Borough of Seaside Park

Dated: August 16th, 2020

M.S. on behalf of minor child C.G.

Prepared by:

BERRY, SAHRADNIK, KOTZAS & BENSON
212 Hooper Avenue
P.O. Box 757
Toms River, New Jersey 08753

Transmission Report

Date/Time 11-02-2020 02:27:47 p.m. Transmit Header Text
Local ID 1 6096894076 Local Name 1 Office of Administrative Law

This document : Failed
(reduced sample and details below)
Document size : 8.5"x11"

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00484-20
AGENCY DKT. NO. 321-12/19

M.S. ON BEHALF OF MINOR CHILD, C.G.,
Petitioner,
v.
BOROUGH OF SEASIDE PARK BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

M.S., petitioner, pro se

Robert D. Budesa, Esq., for respondent (Berry, Sahradnik, Kotzas & Benson, attorneys)

Record Closed: October 14, 2020 Decided: November 2, 2020

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 10, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

New Jersey is an Equal Opportunity Employer

Total Pages Scanned : 5 Total Pages Confirmed : 0

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	643	*96092924333	02:25:46 p.m. 11-02-2020	00:00:00	0/5	1	--	HS	FA

Abbreviations:
HS: Host send
HR: Host receive
WS: Waiting send
PL: Polled local
PR: Polled remote
MS: Mailbox save
MP: Mailbox print
RP: Report
FF: Fax Forward
CP: Completed
FA: Fail
TU: Terminated by user
TS: Terminated by system
G3: Group 3
EC: Error Correct

280-20

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION – COMMISSION OF EDUCATION

In the Matter of the Tenure Charges Against:

THOMAS ROLSTON,	X
	X
RESPONDENT,	X
	X
-By-	X
	X
OCEAN COUNTY VOCATIONAL	X
TECHNICAL SCHOOL DISTRICT BOARD	X
OF EDUCATION,	X
	X
CLAIMANT.	X
	X
Agency Docket No.: 87-4/20	X
	X

OPINION AND DECISION

Before:		Patrick R. Westerkamp, Arbitrator
Appearances:	Thomas A. Ralston	Edward A. Cridge, Esq., Mellk O'Neill
	The Ocean County Vocational School District Board of Education	Robert C. Shea, Esq., R. C. Shea & Associates
Dates of Hearings:		June 25, 2020; June 26, 2020; July 17, 2020; July 23, 2017; August 17, 2020; August 25, 2020; September 21, 2020, & October 2, 2020

Statement of Decision: Based upon the evidence presented herein, I find that the School District has substantiated the charge against Respondent Thomas A. Rolston that he engaged in a pattern of conduct unbecoming a staff member, and there is just cause to terminate his employment on this basis. Charge I is **sustained**. Charge II is **sustained**. Charge III asserting Respondent lacks the capacity to perform his duties as a teacher is **denied** in its entirely as unfounded in the record.

I. INTRODUCTION

This matter was brought to arbitration before the undersigned pursuant to P.L. 2012 Chapter 26 of Title 18A *N.J.S.A.* It involves three seperate charges filed on April 2, 2020 against the Respondent, Thomas A. Rolston, by the Ocean County Vocational Technical School District Board of Education ("Petitioner" or "OCVTS"). The charges seek to remove Mr. Rolston from his position as a teacher for the School District. A document entitled Statement of Evidence (including supporting Certification of Frank J. Frazee) ("March 11th statement") was served on Respondent's attorney on March 11, 2020. It was designated by Petitioner as its compliance with N.J.S.A. 18A:6-17.1(b)(3), which mandates providing Respondent with "all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative." Respondent consistently has rejected Petitioner's assertion that the March 11th statement met Petitioner's obligation to serve him with a separate Statement of Evidence, hereinafter referred to as a "17.1 (b)(3) Statement."

Respondent propounded his Statement of Evidence on June 15, 2020. On this same day, Petitioner submitted its witness list to Respondent's attorney.

Before the hearings started, joint discussions were held with the advocates parsing their respective positions about whether each party's pre-hearing submissions complied with N.J.S.A. 18A:6-17.1(b)(3). Neither side was in full compliance with the statute. The Arbitrator, however, did not conclude either was deprived of procedural due process, or the ability to fully and fairly present its case.

Procedure

Eight hearings were held over an interval of three months. The parties and their legal counsel appeared and participated on June 25, 2020; June 26, 2020; July 17, 2020;

July 23, 2020; August 17, 2020; August 25, 2020; September 21, 2020; and October 2, 2020. This three month interval is attibutable to: convening a hotly contested matter during the COVID-19 Pandemic; conflicting legal and personal obligations of counsel; limited availability of two experts witnesses; varied procedural and evidentiary objections; and counsels' zealous advocacy. Multiple challenges were put forward to bar witnesses and/or documentary evidence under 17.1(b)(3).

Toward the close of the October 2, 2020 hearing Petitioner's attorney suggested:

> whatever ultimately the decision of the Arbitrator may be, that would be formulated based upon those --in some part, upon those decisions that were made. So it really should be formally part of this hearing process, and again, I would agree that it would probably make sense if we have one joint exhibit, J-1 right now, we just make all of that, the motion practice and the opinions relative to that as J-2.

(T. 10-2-20, page 78.) Respondent's attorney accepted this suggestion. The Arbitrator noted, "I'll consider it to be part of my duties to make certain that you captured everything, and if for some reason there's a piece of paper missing, I'll let you folks know and that can easily be incorporated." Id. at 79. Neither counsel submitted the tentative exhibit (i.e., J-2) for the Arbitrator's review, and approval for entry into the record.

Petitioner called as witnesses: Lillian Zavattieri, Prinicpal of the District's Toms River Center; Irene Malifitano, Tenured Teacher, and Medical Assistant Instructor; Nicholas Szymanki, part-time CPR Instructor; Thomas Pernal, Electrical Trades Tenured Instructor; Christy Shenloogian, Service Occupation Instructor; Dr. Michael Maschi, Assistant Superintendant; Patrolman William Resetar (#428) Toms River Police; and as an expert witness Dr. Brett Prince of Neurobehavioral Rehabilitation Associates, L.L.C.

Respondent called as witnesses: Avram Mack, M.D. , Children's Hospital of Philadelphia and Linda Bogan. Mr. Rolston also testified on his own behalf. Dr. Mack testified as an expert.

Petitioner called Tierney Meeker as a rebuttal witness.

Subsequently, each party timely filed a post-hearing brief.

II. CONDUCT OF THE HEARINGS

New Jersey's tenure resolution procedure minimizes discovery, and can reduce procedural wrangling among counsel. Such was not the case herein. Procedural and evidentiary rulings were occassionally met with cautions from the non-prevailing attorney that the ruling was sufficiently erroneous that any eventual award might be headed toward vacation. When counsel thus preserved their right to appeal, the Arbitrator moved forward gathering admissible evidence to render an award based on the facts and the law. A strongly contested evidentiary question touching the admissiblity of evidence of alleged student abuse, and whether it was properly addressed by the OCTVS administration some years before the tenure charge is later referenced herein.

The record in this matter shows Respondent engaged in conduct unbecoming through untoward comments—some of which were in the presence of students—to faculty and administrators. The comments worried his fellow teachers, disrupted the workplace, and had a tendency to destroy public respect for the school system. This same behavior was contrary to Policy Nos. 3281 and 3251.

III. FACTUAL INFORMATION COMMON TO ALL CHARGES

Paragraphs 1 through 133 below list facts garned from the hearing record. E.g., from exhibits, credible testimony, and the reconciliation of conflicting testimony. As with any series of hearings, some witnesses were more credible than others. Credibility determiniations touching three witnesses are touched *infra*. The facts cited below have been established from careful purusal of the records. They should not be expansively construed.

III A.1 Words of Caution

This caution especially applies to references to a District Teacher, hereinafter referred to as "DT." Some speculated he courted a female student as far back as 2015. While agnostic to these conjectures, Respondent Thomas A. Ralston, in 2019, voiced concern to teaching colleagues that he was professionally obligated to alert officials after receiving an unsoliciated communication from a parent. The report was passed on to him via telephone on April 2, 2019. The parent asked him to investigate the possiblity of inapprorpiate conduct in the form of student abuse.

Weeks later, after being temporarily suspended, Mr. Rolston reported the parent's concerns to the State of New Jersey, Department of Children and Families, Institutional Abuse Investigation Unit ("IAIU" or the "Unit"). Subsequently, the IAIU opened a case and interviewed him. Fourteen months later, on the eve of the within tenure hearing, Respondent sought the Unit's records. He urged they would "corroborate and lend credence to his version of one, or more, of the conversations which are the subject of these tenure charges."

IAIU records being confidential, Respondent requested an arbitral order permitting the Unit to release parts of its DT files for the Arbitrator's *in camera* review. Petitioner opposed that motion, which was denied on June 19, 2020. Counsel were notified that the request for such information,

> appears at the periphery of the Tenure Charge. Directing the IAIU to produce portions of its investigative file goes beyond what is needed to understand context and strays in the direction of probing the [matter's] whole history.

Occassionally, throughout the hearings, questions and/or arguments verred in the direction of what transpired in the years from 2015 to 2019 as to the parental notice of a student/teacher relationship. Counsel were not permitted to probe this irrelevant area,

except for exploring how Mr. Rolston's *belief* that he had a "mandatory reporting" obligation intertwinned with his behaviors between April 10, 2019 and April 12, 2019. The Arbitrator declined to have a "trial within a trial" about what may have occurred, or not between the student and her teacher. This is not within his jurisdiction.

III B. Facts About the Three Critical Days, as Determined by The Arbitrator After a Careful Perusal of the Record

Below are the Arbitrator's findings-of-fact following a complete review of the hearing record. The Arbitrator also studied the parties' post-hearing briefs. Each brief emphasizes different points, and varies in its factual descriptions. Paragraphs 1 through 133 list facts determined by the Arbitrator, beyond peradventure, to have been proven. Factual assertions in those briefs, not encompassed in these paragraphs, are not accepted as part of the record.

III B.1 Introduction

1. The OCVTS provides full and shared time programs for students in Ocean County and is comprised of schools located in Toms River, Brick Township, Lakehurst, Ocean County College Campus, Stafford Township, Waretown, and Jackson Township.

2. Respondent Thomas A. Rolston holds an Associate's Degree in Creative Writing, and a Bachelor's Degree in Literature from SUNY Purchase.

3. Following graduation, he was a proof reader/technical writer/editor in private industry for several years.

4. Thomas Rolston has been an OCTVS employee since September 1, 2000.

5. He received a full teachers' certification in 2005, and gained tenure at OCTVS.

6. At all relevant times Respondent worked as a tenured English Teacher for the Shared Time Program at the Toms River Center (the "Center") on Old Freehold Road, Toms River.

7. In 2017, a medical examination revealed a "black spot" on his stomach.

8. When asked "Should I do anything?" a physician advised waiting.

9. In March 2018, Mr. Rolston had tumor removal surgery for stomach cancer, which was followed by 9-months of treatment with Gleevec.

10. He testified to experiencing unpleasant, physiological and psychological side effects from this pharmaceutical.

11. Around January 2019 he stopped taking Gleevec.

12. A few months later, Respondent re-experienced vomiting and feared his stomach cancer was returning.

13. Around this time, Mr. Rolston told colleagues he "felt like a dead man walking."

14. A medical consultation about a possible relapse was scheduled for Wednesday, April 17, 2019.

15. Approximately two weeks before this consultation, Mr. Rolson received an unsoliciated telephone call from Linda Bogan.

16. Several years prior, Respondent tutored one of her two daughters.

17. She testified to learning from them of a social media posting alleging DT was engaged to marry a former student.

18. Ms. Bogan sent Respondent a "screen shot" of a single page from the post.

19. Respondent Rolston testified to being stunned and "taken aback" by the posting.

20. When Ms. Bogan asked him to investigate, Respondent replied affirmatively.

21. He never personally explored the issue.

22. Mr. Rolston, however, started expressing concern about *his* obligation to report possible student abuse, and what he conjectured could have been a "cover-up" by school administrators.

23. The record is clear that Karen Homiek was one of the administrators he had in mind.

24. He testified, "If I brought this forward, I was afraid of what would become of me"

25. Within a few days, Mr. Rolston broached the matter with Union President Christine Smith who--he hoped—might potentially shield him from reprisal.

26. They again discussed his concerns on April 11, 2019.

III. B.2 The School Week That Started on April 8, 2019

27. Throughout the week of April 8, 2019 Rolston was assigned to his normal teaching schedule at the Toms River Center.

28. The relevant work days during this week were Wednesday-April 10, 2019, Thursday-April 11, 2019, and Friday-April 12, 2019

III B.3 Wednesday - April 10, 2019

29. Respondent characterized his emotional state on April 10th, as follows

> I now had the weight of the world, these concerns [a cancer relapse & , information from Ms. Bogan] hanging over me. I have to report them, [i.e., potential student abuse] like I said, because like Mr. Maschi testified, we are mandatory reporters...I'm waiting on April 17th, I have seven more days to wait until I found out is my cancer back, or do I have to start taking these [Gleevec] pills.

30. He reported for work at the Toms River Center, which was administered by Principal Lillian Zavattieri.

31. She holds a NJ State teaching certificate, a master's degree in education, and a Doctorate in Medicine.

32. On arriving around 7:15am, Mr. Rolston opened a conversation with Electrical Trades Instructor Thomas Pernal, whom he characterized as a "friend," and "elder statesman."

33. He showed Mr. Pernal text messages on his phone "indicative of improper relationships between students/staff at PAA, i.e., Performing Arts Academy."

34. Mr. Rolston asked for Mr. Pernal's input in the context of using the information to "bring down" a school administrator.

35. Mr. Pernal demurred, understanding that Respondent was referring to Karen Homiek, who then was Acting Superintendant.

36. Later that morning, Respondent Rolston entered Irene Malifitano's classroom.

37. He routinely visited her room when he was scheduled--the following day--to teach these students English.

38. These regular visits were with Ms. Malifitano's approval, and designed to remind the students of outstanding homework that he previously had given them.

39. Ms. Malifitano is a full-time medical assistant instructor.

40. 24-students were in the classroom, and were participating in hands-on CPR training.

41. Part-time CPR instructors Eve Adams and Nicholas Szymanski (mother and son) were the training leaders.

42. Mr. Szymanski also is full-time Lieutenant with the Marlboro Township Police Department.

43. Ms. Malifitano, although present, was not directly supervising either instructor.

44. She was aware when Respondent Rolston--who she characterized as a colleague and friend--entered the classroom as the lesson was proceeding.

45. Over the next several minutes Ms. Malifitano, having a clear line of sight, occassionally saw Thomas Rolston engaging with her students.

46. She was on her computer operating an overhead projector, and heard little of what was said.

47. Lt. Szymanski was doing the actual training, while his mother took notes at the rear of the classroom.

48. Ms. Malifitano said Mr. Rolston's tone was "joking," and got an impression that he and the instructors were friendly.

49. Mr. Rolston, who is of Hispanic heritage and bi-lingual, talked with two groups of Hispanic students. He knew the students in one group from the prior year, and conversed with them in Spanish.

50. *Inter alia*, they discussed "what I was going to make for dinner that weekend, I believe."

51. 13-days later, at the administration's request, Lt. Szymanski submitted an E-mail. It stated Respondent "made numerous comments about the food they were eating and what they should be smelling while performing cpr."

52. At one point, indeed, Mr. Rolston referenced the impact of eating garlic on CPR training.

53. Mr. Rolston additionally told one student she was pressing too hard on a CPR manikin; and he also placed a tissue over another manikin's head.

54. Hearing Respondent speak with female students in Spanish about Hispanic food made the Lieutenant uncomfortable, as did Respondent's comments about their implementation of the CPR training protocol.

55. The Lieutentant did not intervene, even though his uncorroberated testimony alluded to some purported "off-color" comments by Mr. Rolston.

56. Neither part-time instructor talked to him, nor did Respondent initiate a conversation with them.

57. Respondent exited the classroom after approximately 20-minutes.

58. Mrs. Adams later asked Irene Malfitano, "Who was that man?" She stated he had been inappropriate.

59. Ms. Malfitano identified Thomas Rolston by name.

60. Sometime after Noon, Mrs. Adams approached Principal Zavattieri who was in a hallway.

61. She complained about "a Tom Rolston," having been loud and disruptive during the CPR class.

62. Ms. Zavattieri promised to "look into" the situation.

63. Toward 12:50pm she walked to Mr. Rolston's office, and knocked.

64. The resulting exchange was "heated," and they had different recollections about what transpired.

65. Principal Zavattieri testified Respondent was aggressive, loud, confrontational, screamed she was not listening, and announced an intention to immediately speak with the two instructors.

66. Mr. Rolston, in turn, testified Prinicipal Zavattieri initially named Ms. Malfitano as accussing him of inappropriate language, but later identified Mr. Syzmanski and Mrs. Adams as the complainers.

67. They concur he called Mrs. Adams "the old bag," and referenced Nicholas Szymznski as the "fat fuck."

68. Principal Zavattieri admonished Mr. Rolston not to use such language, and forbade him from approaching either instructor until after students had departed the Toms River Center for the day.

69. Asserting he would say what he wants, Mr. Rolston again used FF, and "Old Bag."

70. After that meeting ended, Mr. Rolston returned to Irene Malfitano's classroom around 1:15pm.

71. He found his colleague preparing for a previously scheduled post-observation conference with Principal Zavaterri.

72. Leaning over her desk, he asked what she had told the Principal.

73. Ms. Malfitano had not spoken with her, and told him so.

74. Mr. Rolston did not accept this denial, and then pressed the question.

75. Ms. Malfitano testified Respondent was angry, and continued leaning over her desk.

76. She also testified that he divulged knowing of "a teacher or teachers" having affairs with students.

77. And, Respondent stated he was going to "the Board office with this information ...and burn the place down, or torch the place down."

78. He forewarned he could disclose a "lot of information" concerning

the District, commenting "I won't go down like Stan."

79. Stan was a district teacher who has passed from cancer.

80. These exchanges did not initially register with Ms. Malfitano. She explained, "I just took it as words of conversation that we had...I didn't even process at that time because I was pressed to go somewhere [i.e., the post evaluation interview] and I had other things that I was working on at the time."

81. Later that evening, however, she informed her fiancé of the encounter.

82. Around 1:20pm, after visiting with Irene Malfitano, Respondent had another "heated" discussion with Principal Zavaterri.

83. They talked in her office, with the door closed, for no more than 10-minutes.

84. Clerical staff member Barbara Frischman was in the adjourning Main Office. Ms. Zavateri was apprehensive she could hear the commotion.

85. Having just departed from Ms. Malfitano, Mr. Rolston challenged the Principal's statement about who initially reported CPR training distruptions, and yelled "Why can't you get your facts straight?"

86. Ms. Zavaterri affirmed that she had not earlier spoken with Irene Malfitano.

87. Declaring "This meeting is over," Mr. Rolston left the Principal's office.

88. Immediately afterward, Ms. Malfitano reported to the Principal for their scheduled conference.

89. Mr. Zavaterri appologized for having forgotten about the conference, and steered the discussion to the CPR class.

90. As the two women talked, Ms. Malfitano shared Mrs. Adams' earlier criticism of Mr. Rolston.

91. She acknowledged his behavior, as reported by Mrs. Adams, could have been disruptive.

92. Ms. Malfitano, 48-hours later, again met with the Principal. See paragraph 112.

III B.4 Thursday - April 11, 2019

93. On Thursday April 11, 2019 Mr. Rolston was scheduled to teach english--between 8:05 & 8:40am--to one of Mr. Pernal's classes.

94. Sometime after Respondent entered the classroom--and apropos of Wednesday's request for advice--Mr. Pernal volunteered, "I'm ill-equipped to give you any guidance."

95. Within "ear shot" of the students, Respondent shared his version of events during, and following Wednesday's CPR class.

96. For 3 or 4 minutes he paced back & forth in front of the students talking in a loud voice.

97. At one point, he admitted having given Principal Zavaterri "a piece of my mind."

98. Mr. Rolston expressed his present intent as "bringing down" the administrator, and reference was made to "shooting the head off that fucking snake."

99. After Respondent exited the room Mr. Pernal said to the class that Mr. Rolston was "having a bad day."

100. Mr. Pernal later told others that Respondent had "flipped his lid."

101. In an E-Mail to Irene Malfitano, he opined, "I think his cancer is winning and has caused him to become unhinged."

102. Around 10:15am on Thurdsay, Mr. Rolston entered a room where Christy Shenloogian, a Service Occupation Instructor, was on lunch break.

103. Respondent's objective was to speak with Union President Smith who also was in the room.

104. Ms. Shenloogian testified Thomas Rolston "seemed angry," as he recounted the prior day's exchanges with Principal Zavaterri.

105. Further, he made reference to taking this place down, and burning it to the ground.

106. Although not interpreting "buring it" down literally, Ms. Shenloogian cautioned him, "You shouldn't say things like that in a school building."

107. Thomas Rolston replied, "I'm not going out like Stan I don't care."

108. Mr. Rolston expressed his view that Karen Homiek, then Acting Superintendent, may have "covered-up" the DT matter; which Mrs. Bogan asked him to investigate.

109. He asked Christine Smith how this might be broached without his being subject to retaliation.

110. On hearing her response, he replied "So you're not going to support me." Ms. Smith was not called as a witness.

111. In her adjoining classroom, Ms. Malfitano overheard snipits of the Rolston-Smith-Shenloogian conversation.

112. Thinking about it later, she decided to speak with Principal Zavatteri the next day. In fact she did so; among other things expressing concern for her personal

safety.

113. After Mr. Rolston left Ms. Shenloogian's room, she and Ms. Smith had a brief conversation.

114. Ms. Sheloogian testified, "we weren't comfortable with what just happened."

III B.5 Friday - April 12, 2019

115. On Friday morning--prior to the start of classes--Thomas Pernal approached Ms. Shenloogian about Respondent's statements.

116. Mr. Pernal shared discomfort with her about what had occurred with Mr. Rolston.

117. Irene Malfitano joined the discussion saying she had heard similar statements from Mr. Rolston.

118. A school administrator, the three teachers concurred, must be notified.

119. Christy Shenloogian summarized their collective mindset. She testified,

> the puzzle pieces were put together, when the three of us spoke, it became clear that this might be something more than just being angry and making off the cuff statements.When two other colleagues are saying the same thing you heard, it did make me feel even more uncomfortable being in space so close to Mr. Rolston.

120. Between 9:10am and 12:30pm, various OCVTS administrators held several separate meetings about Mr. Rolston's actions over the prior 48-hours.

121. In addition to Principal Lillian Zavatteri, Assistant Principal Michael Tash and Assistant Superindent Michael Maschi participated.

122. Union representative Christine Smith attended two of the meetings.

123. Just before 12:50pm, Dr. Maschi telephoned the Toms River Police Department.

124. He testified calling the police "to fulfill my mandatory reporting obligation, but also, to rule out that there was a potential threat to the school district."

125. Next, he telephoned Christine Smith to advise he would be requiring Thomas Rolston to attend a 1:30 p.m. meeting.

126. Patrolman William Resetar, accompanied by two other Toms River Police Officers, arrived at the Center and talked with Dr. Maschi.

127. The 1:30pm conference was convened on schedule by Dr. Maschi.

128. Mr. Rolston, Union President Smith, Superintendent Homiek, and the three Toms River officers were in attendance.

129. The Superintendent read a suspension letter aloud.

130. Among other things, it stated Mr. Rolston had been placed on paid, administrative leave, and was to have no contact with OCTVS personnel.

131. Thomas Rolston invoked his right to counsel, and was not arrested.

132. Patrolman Resetar notified the Psychiatric Emergency Screening Services Unit ("PESS") to contact Respondent at home.

133. PESS visited his residence on April 12, 2019, and then transported Mr. Rolston to Southern Ocean Medical Center for a psychiatric evaluation. He was thereafter transferred to a Saint Barnabas facility.

IV. FACTUAL INFORMATION ABOUT REBUTTAL WITNESS, AND EXPERT WITNESSES

This section summarizes information garnered in connection with the testimony of two psychological experts, and of one rebuttal witness. Each of these witnesses testified to events transpiring *after* Respondent Rolston's suspension.

A. Rebuttal Witness Tierney Meeker

IV A. 1 Events Preceding Testimony by Rebuttal Witness Tierney Meeker

Toward the end of the September 21, 2020 hearing, during Thomas Rolston's recross examination, Petitioner's attorneys raised an evidentiary challenge. The District announced it wished to open a line-of-questioning about whether Respondent Rolston violated Superintendant Homiek's directive--issued at the time of his suspension--restricting him from having contact with OCVTS staff members. See paragraph 130, *supra*. Mr. Rolston's attorney objected. Following a colloquy, the objection was sustained.

After the Arbitrator's ruling, Petitioner's counsel again pursued this inquiry. Its attorney asked, "Subsequent to the tenure charges being filed against you, Mr. Rolston, did you have any communication with [OCTVS staff member] Ms. Tierney Meeker?" Respondent answered "No," and his attorney reiterated the previous objection. Counsel for the Board pressed pursuing the

question. He argued had become an allowable foray into credibility since Mr. Rolston had just falsely denied under oath speaking with Ms. Meeker. Respondent's attorney scoffed at this analysis. He urged, "There was no testimony of Mr. Rolston which would be impeached by that testimony [from Ms. Meeker if she was called] because my objection to that line of questioning was sustained. So where the inquiry to Mr. Rolston was not permitted, there can be nothing to impeach Mr. Rolston from that witness.

Briefs were filed over whether Ms. Meeker would be called as a witness. They were read and reviewed. The Arbitrator then notified the parties' lawyers:

> Petitioner's case rises, or falls on which April 2019 events it proves. There is no logical, or legal reason to add the alleged Meeker/Ralson encounter for this purpose to the historical mix of proofs.
>
> *However*, earlier in Respondent's September 21st testimony, several questions and answers shed light on the ultimate issue of why the Arbitrator should, or should not permit Mr. Rolston to return to work as a tenured teacher. The record shows,
>
> Q. Mr. Rolston, you have been here through the entirety of this multi day hearing, correct?
> A. Yes, sir.
> Q. You have heard the concerns that members of district staff have brought up about you, correct?
> A. Yes, I have.
> Q. You have heard the arguments that have been made regarding the district's concerns, correct?
> A. I have.
> Q. Okay. Why should the Arbitrator permit you to stay in your position
> A. I have never been a threat to any child or fellow teacher ever. This was a moment of high stress, high tension, that it -- some aspects of it got away from me, and that -- that's not me. It's not a true reflection or an accurate reflection of me. My career has been nothing but helping kids. As Ms. *sic* Vogan testified, her daughter wasn't the only one that I helped home school. So it was a bad moment. It was just a culmination of perfect storms.
> Q. Mr. Rolston, during the period from April the 10th through April the 12th of 2019, were you contemplating hurting anyone?
> A. Never once.
> Q. Were you contemplating doing any kind of damage to the premises of the school district?
> A. Never once.
> Q. Did you want anyone to think that's what you wanted to do?
> A. Never once.
> Q. Were you trying to scare people into thinking that you were some kind of threat?

A. Never once.

Tierney Meeker's allegations, if true, rebut Mr. Rolston's assertions that his in-school actions between April 10 and April 12, 2020 are not true, or accurate reflections of him.

Under these circumstance, the District may issue a *subpoena duces tecum*, and call Ms. Meeker as a witness about the events on August 17, 2020.

IV A. 2 Rebuttal Witness Meeker's Testimony

Tierney Meeker is the non-tenured Vice Principal of the Performing Arts Academy ("PAA"). She testified at Hearing No. 8 about an interaction--on August 17th--soon after the adjournment of Tenure Hearing No. 5. The encounter occurred on her arrival at the PAA to cover nightime supervisory duties. While driving into Parking Lot No. 2. she saw Respondent Rolston enter a vehicle. After exiting her car. a voice behind her said "Hey." She turned, and saw Respondent. Greeting one another. Ms. Meeker immediately asked about his health. He replied,

> "Tierney, we're not friends. He said you're going to lose your job just like everyone else here. He said you were a mandatory reporter with the whole [DT] thing, and now you're all going down. "

On hearing this, Ms. Meeker said she felt her employment was being threatened, and telephoned Superintendant Homiek. Sur-rebuttal testimony was not offered.

IV B. Expert Witnesses Brett J. Prince, Ph.D & Avram H. Mack, M.D.

Brett J. Prince, Ph.D, and Avram H. Mack, M.D. were respectively retained as experts by Petitioner and Respondent. Each prepared a professional opinion--as to Thomas A. Rolston--relying on findings from their independent examinations. This said, each doctor was retained to answer a different question.

Following Respondent's April 12th suspension, Dr. Prince was contracted by Petitioner to conduct a fitness-for-duty evaluation. The doctor was to determine if Respondent had the capacity to perform the essential functions of teaching English at the

Toms River Center. He was not apprised of these essential functions either generally, or as an English Teacher in a Shared Time Program.

Such inquiries require a "health care provider" to examine an employee's physical, or mental condition within the scope of his essential duties. Dr. Prince determined that Respondent lacked the capacity to perform as a teacher. This determination was adopted by Petitioner, and became one of the three prongs for its conclusion that Respondent merited dismissal from his tenured position.

Dr. Mack, in contrast, was retained after the within charges were filed. His task was "to perform an independent medical examination on the subject of these tenure charges...as to the degree, if any, that he [Thomas Rolston] suffers from any psychitratic disorder that would pertain to any incapacity as a teacher."

The below paragraphs summarize each expert's qualifications, procedures, and professional opinion.

IV B. 1 Brett J. Prince, Ph.D.

Petitioner retained Dr. Prince to conduct a psychological evaluation of Respondent Rolston's fitness to return to work for the District. Dr. Prince was trained--and practices--as a neuropsychologist. He is licensed in New Jersey, and reports seeing approximately 2,500 patients annually.

On August 20, 2019 Dr. Prince clinically interviewed Thomas A. Ralston. Prior to the interview he reviewed several documents furnished by Petitioner. They included: a job description, two police reports, and several statement of OCTVS personnel.

As a result of the interview the doctor initially ruled out that Respondent had a Pre-Existing Anexiety Disorder, or an Adjustment Disorder with Mixed Emotional Features. He then concluded an Objective Psychological Examination

was indicated to develop a "patient profile for predicting medical/surgical/prescriptive success, and compliance issues." Such testing Dr. Prince explained is the sole objective means for "Determining the need for guiding and structing mental health treatment (Psychiatric medication and/or Psychotherapy); Evaluating work capacity, Return to School/Work, or MMI [i.e., Meaning-Making intervention] issues."

The same day, i.e., August 20th Dr. Prince conducted an "objective psychological examination" ("OBE") of Mr. Rolston. The OBE primiarily consisted of administering several "paper and pencil" psychological tests. They were the: 1) Trauma Symptom Inventory (TSI). 2) Millon Behavioral Medicine Diagnostic (MBMD); 3) Personality Assessment Inventory (PAI); 4) Symptom Checklist-90 (SCL-90R); and 5) Fear Survey Schedule III (FSS-III). Additionally, Dr. Prince conducted a medical records review. At the time, Respondent still was taking Lexapro first prescribed for anxiety after his stomach cancer diagnosis.

Although Dr. Prince observed that Mr. Ralson "demonstrated a motivated and concerted effort throughout" he concluded "one of the measures evidenced test distortion." This was the PAI. Its results showed a "Pathologically extreme level of 'Positive Impression Management', indicating a consistent and deliberate attempt to distort test results by portraying oneself in a clinically invalid manner." Dr. Prince summarized Mr. Rolston's overall test results as demonstrating a choice to answer questions in an "inconsistent, invalid, and misleading manner." Also, Dr. Prince testified Respondent personally misled him about prior mental health treatment, and his use of medical marijuana. Someone of such unpredictable behavior, Dr. Prince concluded, " is not fit to work with children as the role of a teacher is integral to

the well-being and safety of the students."

At hearing, the doctor testified Mr. Rolston's inconsistent replies also made a true diagnosis "only a guess on my part." On balance, he guessed that Respondent has a "Pre-Existing Personality Disorder features (Narcissistic)," and could not return to work. Dr. Prince explained this, as follows:

> *When an individual chooses to repeatedly, consistently mislead and deceive, when he was clearly instructed not to*.....And most people are honest or fairly honest. It is a well known in forensic circles and clinically that people who consistently, deliberately mislead and deceive, and *that profile is not someone who should be around innocent children, should be teaching.* He never should have.

(Emphasis added.)

IV B. 2 Avram H. Mack, M.D.

Avram H. Mack, M.D. was asked to determine if Respondent had a psychiatric disorder impacting his capacity as a teacher. Dr. Mack conducted a video interview, and examination of Respondent on May 15, 2020. A transcript of the interview was made by Condiotti & Associates Court Reporting Services. An 18-page IME Report dated June 15, 2020 was prepared by Dr. Mack, and entered into evidence.

The Report lists as information sources: 1. The May 15th Zoom interview and examination of Respondent Ralston; 2. Statement of Evidence included in the tenure charges; 3. Memorandum from Ed Cridge, Esq.; 4. Interview with Judy DeFrancesco; and 5. Medical Records from Monmouth Medical Center[1]. Dr. Mack challenged Dr. Prince's earlier report as containing "methodogical and reasoning defects." (R. 25, page 12.) Dr. Prince objected to this conclusion as defamatory and slanderous.

[1] In excess of 1,000 pages, marked as R. 45 in evidence.

Dr. Mack's overall psychiatric opinion in the context of the tenure charges was:

> Mr. Rolston exhibited unwanted behaviors in the school setting in a 3 day period in April 2019. Mr. Rolston's mental health has been examined by me and by others in connection with this matter. *Generally, speaking my opinion is that Mr. Rolston is healthy in terms of his psychiatric status.* And.
> my opinion is that the report by Dr. Prince in this matter should not be relied upon for the topics that arise in this matter.

(Emphasis added.)

Additionally, he concluded "Mr. Rolston was neither suicidal nor did he intend to harm anyone at the school." At the time of writing these conclusions, Dr. Mack was unaware that Respondent had been disagnosed in April 2019 with a depressive disorder.

Placing his report in context, Dr. Mack also wrote:

> This is not to say that it was appropriate for a teacher to display any disruptive, sarcastic, angry, intrusive behavior or state violent content in Front of students or in interactions with peer teachers. But here there is not psychiatric evidence that portrays any disruptive, or disobedient behavior outside of these circumscribed events occurring over 1-3 days (depending on on one's definition of objectional behavior). Furthermore, this is not to condone any violence or threat thereof in the school setting. *They may have demonstrated temporary unwarranted behaviors but do not represent a serious mental illness and they do not represent personality disorder that would affect Mr. Rolston's abilites and mental health and his capacity to serve as a teacher.*

(Emphasis added.)

Dr. Prince's report is of considerable relevance to the analysis of Charge III (Incapacity). Dr. Mack, however, warned about relying on the report. He cautioned, "One should not credit Dr. Prince's report due to several methodological and reasoning defects. In defense of its expert, Petitioner Post-Hearing Brief urged that Dr. Mack's report should be deemed inadmissable, or in the alternative disregarded as an irrelevent a net opinion.

V. DISCUSSION

The tenure charges for the Arbitrator's consideration are:

V A. Specification Of Charges

Charge I – Conduct Unbecoming

Thomas Rolston engaged in unbecoming conduct by making several comments to other faculty members and in front of students that he intended to "burn the building," and "go down in a blaze of glory." Further, Mr. Rolston explicitly threatened then Acting Superintendent Karen Homiek by stating he was going to "cut the head off the...snake," thus insinuating he was planning on attacking the school system at its highest level.

Charge II – Other Just Cause

"Other just cause" exists as the result of separate violations by Thomas Rolston violation of OCVTS' Teacher Code of Ethics. The Code specifically states that an "educator accepts the responsibility to adhere to the highest ethical standards." Respondent failed to adhere ethical standards in that he:

> Violated Policy # 3281 by engaging in inappropriate language, or expression in the presence of students;
>
> Violated Policy # 3351 by failing to interact with other staff with dignity and respect;
>
> Violated Policy # 3211 by purposefully and knowingly make malicious statements concerning a colleague, specifically, then Acting Superintendent Karen Homiek, in stating that he was "going to shoot the head off the snake...what do I have to lose".

Charge III – Incapacity

Mr. Rolston lacks the capacity to perform his duties as a teacher based on the August 20, 2019 report of Dr. Brett J. Prince.

V B. The Parties' Position

Petitioner OCTVS submitted a post-hearing brief of 100-pages, while Respondent's post-hearing brief was 65-pages in length. Numerous factual assertions and arguments were advanced by each party's attorneys. All of them will not be

analyzed, or even refererenced. In part, this flows from overlaps among the three tenure charges, and clear evidence of Mr. Rolston's actions between April 10 and April 12, 2019. Each party's principal contentions appear below in the words of their respective attorneys.

V B. 1 The District's Position

Petitioner Ocean County Vocational Technical School summarized its position in the concluding pages of its post-hearing brief. Its attorneys wrote:

> Through the Respondent's actions and conduct, the **Respondent has violated no less than (3) OCVTS Policies**: The Code of Ethics – Policy 3211; Inappropriate Staff Conduct
> – Policy 3281; and Healthy Workplace Environment – Policy 3351. The Respondent's conduct over the course of April 10, 11, & 12, 2019 have also been determined to be unbecoming.
>
> The **Respondent's actions over the course of April 10, 11, & 12, 2019 consisted of significant loss of self-control and irrational behavior, resulting in multiple confrontations with fellow employees and the OCVTS administration**. During these confrontations, the Respondent consistently threatened, screamed, yelled, and promised retaliation against Malfitano, Zavattieri, Pernal, Shenloogian, Smith, Adams, Szymanski, Homiek, Meeker, and the OCVTS administration itself. The Respondent's threats were so severe that a reasonable person would only consider them malicious and egregious in nature. The Respondent's demeanor was so erratic and illogical that Shenloogian, Pernal, Smith, Zavattieri, and Malfitano believed that the Respondent was capable of following through on his threats to the OCVTS staff and students. Based upon **the totality of the Respondent's conduct, the relevant competent evidence, and all corroborating evidence, the balancing test, as set forth in Cowan, weighs in favor of revoking the Respondent's Tenure.**
>
> **Further, Prince has established that the Respondent's mental state should be ruled incapacitated**. Prince's Expert Report utilized (5) separate objective test, that all confirmed that the Respondent suffers from multiple forms of psychosis and mental health conditions, including but not limited to: Manic Grandiosity; poor control over anger; Narcissism; and Positive Impression Management. These conditions make the Respondent pathologically untruthful, habitually defensive, and very quick to assume a victim role, by blaming others for real or imagined shortcomings. Based upon these diagnosis, Prince determined that the Respondent was unfit to return to work and teach children. **As in McCoy, the Respondent has been found to suffer from severe misperceptions and misconceptions about reality, therefore causing him to engage in bizarre and incoherent behaviors, and must be ruled incapacitated.**
>
> Lastly, the **Respondent's Medical Report must be deemed inadmissible as evidence, and/or determined to be a Net Opinion**. The Respondent's Medical Report simply consists of bare conclusions and speculation, and is unsupported by factual evidence. Mack has failed to review the medical documents/notes/history of no less then (10) licensed medical professionals that treat the Respondent for various ailments.

> Respondent's Medical Report failed to review the Respondent's family medical history. Respondent's Medical Report failed to review the Respondent's history of violence and aggression. Respondent's Medical Report failed to review the Respondent's involuntary commitment medical documentation regarding violent and suicidal ideation. Mack failed to perform any due diligence regarding the Respondent's graphic nightmares. Mack failed to perform any due diligence regarding the Respondent's work history of bullying and harassment. And Mack failed to perform any objective based testing, but instead relied upon a Video Conference whereby minimal physical observations were possible.
>
> For the aforementioned reasons as listed above, the Respondent's Tenure should be revoked.

(Emphasis added.)

V B. 2 Respondent's Position

Mr. Rolston's attorneys prepared an introduction to, and summary of their brief. They argue, as follows:

> Mr. Rolston is a tenured English teacher, with a long and commendable record of service to the Board, and the students who attend its schools. **The events which precipitated these tenure charges took place on the Board's premises during a 3-day period** of time: April 10-12, 2019.
>
> During that period of time, **Mr. Rolston was experiencing three significant, personal stressors.** First, **Mr. Rolston, a cancer survivor, was deeply concerned about the potential reoccurrence of his stomach cancer**. He was awaiting further information from his doctors regarding the status of his disease, and faced the possibility of undergoing additional, very difficult treatment. Second, **Mr. Rolston had recently been notified by a parent, Linda Bogan of a deeply concerning allegation** involving the Board's Superintendent, Karen Homiek. The allegation was **that a teacher...had been involved in an inappropriate relationship with a student at the Board's Performing Arts Academy ("PAA") when Superintendent Homiek was the Principal**, and that she had failed to properly address the issue at that time. Finally, **Mr. Rolston had a somewhat contentious interaction with his Principal, Lillian Zavattieri: he thought that he was unfairly accused of misbehaving in another teacher's classroom**, and that the Principal had assumed that he was in the wrong.
>
> **Mr. Rolston** was worried about what would happen when he reported the PAA Concern, and **discussed the issue with several of his co-workers,** including his union president, Christine Smith. **He used figurative language during those conversations**. (Emphasis added.)
>
> The Board alleges that he used the phrases "burn down," "blow up," and "shoot the head off the fucking snake." Based upon that alleged language, **the Board argues that Mr. Rolston made "terroristic threats," and "verbal assaults," that he frightened people, and that he is somehow a danger** to the Ocean County Vocational Technical School District. This is the gravamen of the Board's charge of unbecoming conduct against Mr. Rolston.

As all of the evidence, reviewed, *infra*, demonstrates, **the extrapolations that the Board asks the Arbitrator to draw from Mr. Rolston's words on April 10-12, 2019, are overwrought, hysterical, and simply untrue.** This is the case for several reasons. **First**, Mr. Rolston caused no actual harm to anything. He did not burn anything down, blow anything up, or shoot anything. **Second**, it is manifestly clear that Mr. Rolston never intended to embark upon any such course of action. He does not own any firearms or bomb-making materials. He was investigated by, and cooperated fully with, law enforcement. He was never charged with any criminal offense in connection with his words or actions. In the 18 months that have passed since his suspension from his position, Mr. Rolston has not perpetrated any of the actions that the Board wants the Arbitrator to think might be "right around the corner." **Third**, it is manifestly clear that Mr.Rolston never intended whatever he said to be taken or perceived as a threat. Rather, all of his co-workers, who were called as witnesses by the Board, testified that they understood that Mr. Rolston's florid, metaphorical language was referencing, not some violent plot, but rather the potential fallout that would occur if he reported the PAA Concern to the authorities. **Fourth**, Mr. Rolston's words did not have impact of making his co-workers feel threatened. Rather, as Tom Pernal testified, *infra*, they reported his words to District administration not out of fear, but rather out of concern for Mr. Rolston's own well-being.

Mr. Rolston's speech to his co-workers addressed an issue of substantial public concern: the reporting of child abuse allegations in the public school setting. As such, **the imposition of any punishment upon Mr. Rolston based upon the subject matter of those conversations would infringe Mr. Rolston's First Amendment Rights.**

Mr. Rolston's behavior from April 10-12, 2019 might be characterized as agitated, or dramatic It **cannot sincerely be characterized as insubordinate or threatening**. For this, and all the reasons set forth, *infra*, it cannot form the basis for his termination from his tenured teaching position.

Besides its allegations of unbecoming conduct, the Board also charges Mr. Rolston with incapacity; i.e., it alleges that he is medically unable to discharge the duties and functions of a teacher. The basis of this charge was the testimony of neuropsychologist Brett Prince.

As further set forth, *infra*, **Dr. Prince's testimony and opinion were completely unreliable, and did not establish that Mr. Rolston is "incapacitated" for purposes of N.J.S.A. 18A:6-10:** the Board has failed to prove its incapacity charge, and it should consequently be Dismissed.

(Emphasis Added.)

V C.1 Charges I & II

The three tenure charges may be viewed in seratim, or as a collective whole. To best consider what happened throughout three consecutive days, Charges I & II will be simultaneously examined. Charge III requires a separate analysis.

Charge I addresses New Jersey's the question of unbecoming conduct, while Charge II references overlapping OCTVS Policies that give context to the first charge. These policies within Petitioner's school district help demonstrate what is encompassed within the common law unbecoming conduct ban against behavior having "a tendency to destroy public respect for [school] employees and competence in the operation of services." Karins v. City of Atlantic City, 152 N. J. 152, N.J. 532, 554 (1988). See IMO Ernest Tordo, School District of Jackson Twp. 1974 S.L.D. 97, 98-99 (teachers hold the public's trust to inform and mold the habits and opinions of their students. Violations will result in dismissal, or other sever penalty.) Fulsomely, Policy No. 3351 notifies and cautions OCTVS staff that:

> A significant characteristic of a healthy workplace environment is that employees interact with each other with dignity and respect regardless of an employee's work assignment or position in the school district. Repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile or offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment. This unacceptable conduct may include, but is not limited to, repeated infliction of verbal abuse such as the use of derogatory remarks; insults; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act of such conduct shall not constitute the unacceptable conduct prohibited by this policy unless it is especially severe and egregious.

And, Policy # 3281 unequivocally bans inappropriate language, or expression in the presence of students.

Under these interrelated principles, the Arbitrator has determined that Respondent's behavior was continuously inappropriate over three days. His actions,

- had a tendency to weaken public respect for OCTVS;
- modeled immature behavior to students;

- caused anexiety in peers;
- risked parents lossing trust in the school system;
- demeaned and depricated Mrs. Adams;
- insultingly and profanely described a law enforcment officer;
- disrespected Principal Zavaterri during two meetings;
- challenged an express order to delay speaking with the CPR Instructors;
- included entering Irene Malfitano's classroom unbidden;
- raised his voice to Ms. Malifitano, and yelled at Principal Zavaterri;
- intimidatingly leaned over Ms. Malfitano's desk;
- disregarded her requests to leave;
- divulged alleged student/teacher affairs to persons without need to know;
- warned this information would burn the Board office down;
- sought guidance from Thomas Pernal about "bringing down" a school administrator;
- used profane language in front of Mr. Pernal's students;
- paced up & down before those students complaining of Principal Zavaterri;
- talked of "shooting the head off that fucking snake";
- told Union President Smith without corroberation that Karen Homiek may have "covered-up" the DT matter.

Such behaviors are generally unbecoming for any worker, and most certainly unbecoming of a public employee who has substantial obligations to students and their parents. Mr. Rolston's years ofcompetent and cooperative teaching, in this case, do not mitigate his actions between April 10, 11, and 12, 2019. How may parents knowing of Respondent's litany of behavior would be comfortable entrusting their children to his tutelage?

Witnesses and documents combine to demonstrate a uniform picture of the critical events. Testimony covering the April 2019 dates is generally consistent with minor discrepancies as to non-critical facts. Documentary evidence supports witness recollections of past events.

The roots of the case stretch back 2018, when Mr. Rolston entered a "bad patch." With the onset of stomach cancer (followed by surgery, and powerful medication) he came under profound physical and psychological stress. He developed a morbid fear of a painful death as happened to Stan, his deceased colleague. Then, Linda Bogan re-entered his world. She telephoned Respondent to share triple-hearsay accusing a District Teacher ("DT") of past student abuse. Mr. Rolston allowed himself to be drawn in, and agreed to help investigate. He came to view the issue through a "mandatory reporter" lens. Although he had received training covering this duty, it was not apparent to the Arbitrator that he understood the mechanics of the process. The more Mr. Rolston thought and stewed, the more confusing the issue appeared to him. No doubt, this was exacerbated by the angst of having to wait until April 17th to learn if the cancer had reoccured. In his words,

> I now had the weight of the world, these concerns hanging over me. I have to report them...because like Mr. Maschi testified, we are mandatory reporters...I'm waiting on April 17th, I have seven more days to wait until I found out is my cancer back, or do I have to start taking these [Gleevec] pills.

On the morning of April 10, 2019. Entering Irene Malfitano's classroom, Respondent was pre-occupied with Mrs. Bogan's tattle, and fearful his stomach cancer might be returning. CPR instructors (Adams & Syzmanski) were in the room. They had not been given advance notice of this probable visit to remind the students of their English homework. Mr. Rolston conversed with two groups of female students. He spoke to one group in Spanish. These informal

conversations were in the midst of Lt. Syzmanski's CPR instructions, and without his consent. Mr. Rolston's "playfulness" was disruptive, but not sufficiently so that either the Lieutenant, or Mrs. Adams intervened. Mr. Rolston exited the room after 20-minutes; apparently unaware of the resentment in his wake.

Having remained silent until that point, Mrs. Adams sought out Principal Zavatteri to share a few words of dissatisfaction. In short order, the Principal visited Mr. Rolston's office for his input. However, he came to believe Ms. Zavaterri was unfairly accusing him of misbehaving in Irene Malfitano's classroom. His words and tone became unprofessional when reacting to the Principal's perceived acceptance of Mrs. Adams' allegation. This was the first of several outbursts of unreasonable anger i.e., tirades, over the next 48-hours.

These outbursts reached their zenith on Thursday, April 11, 2019. The prior day Respondent had sought Thomas Pernal's guidance about potentially "bringing down" a highly placed administrator over a possible "inappropriate relationship between a faculty member and/or students." Mr. Pernal realized that the faculty member was DT, and the administrator was then Acting Superintendent, Karen Homiek. He demurred replying to Respondent's request for help. On Thursday morning, before class was to start, Respondent again broached this request. Mr. Pernal replied he was "ill-equipped" to give such counsel.

Respondent then entered the classroom. With students present, he raised the CPR training incident, and his subsequent confrontations with Principal Zavattieri. Although initially speaking in a normal tone, some students were in earshot. Mr. Rolston's voice and actions ramped-up to a higher level. He paced

back and forth in front of the students. While so doing, Mr. Pernal testified that his colleague averred "he was going to shoot the head off the snake, and was making hand gestures as though he were holding a gun." After Respondent finally exited the classroom, Mr. Pernal observed to his class that Mr. Rolton was "having a bad day."

Since Mr. Pernal had declined to guide him, Respondent made his way to Christy Shenloogian's room in search of Union President Christine Smith. The two women were having lunch. Mr. Rolston remained with them sharing his frustrations about the recent happenings. At one point, reacting to his rhetoric, Ms. Shehloogian cautioned "You shouldn't say things like that in a school building." These "things" included sharing "stuff" he had on Karen Homiek and on Ms. Zavaterri in a manner that would "take this whole place down," and "burn it to the ground." *Inter alia* he voiced an intent to report what he suspected was Ms. Homiek's "cover-up" of the DT matter. His tone was aggressive. Irene Malifitano was in an adjoining room, and heard small parts of their conversation.

Mr. Rolston asked Ms. Smith for her support bringing forward the "mandatory reporting" question. Ms. Smith declined. After he left the room Smith and Shenloogian concurred they "weren't comfortable with what just happened." Discomfort also was brewing among others in the academic community as rumors about Mr. Rolston spread.

Petitioner has proven Respondent engaged in conduct unbecoming, and violated Policy Nos. 3281 and 3351. However, there is no evidence that he intended to burn, blow-up, cut, or shoot anything or anyone. Mr. Rolston talked too much, with little or no thought about how his words might be interpreted. His angry and impassioned

statements caused some to be worried about his mental health, others to be anxious, and those charged with safeguarding student welfare to consider how best to deal with the unraveling situation.

The onus always was on Respondent to stop acting out. A visit to EAP may have defused the situation, and returned him to his regular behavioral pattern.

V C.2 Ruling on Charges I & II

Over the 3-days in April 2019 the record shows that *feeling extreme pressure Mr. Ralston behaved atypically.* Before then, he had been a competent, respected teacher for 16-years. Several witnesses labeled him as "friend," and expressed surprise as his behavior went into a steep and sustained tailspin. One thought he had "flipped-out," while another speculated the battle against cancer was impacting him. None of them testified that his words/actions appeared pre-mediated, or intentionally malevolent. His driving motivation flowed from Mrs. Bogan's communication, which triggered a perceived duty to mandatorily report what he concluded had been student abuse. Mr. Rolston wrestled ineffectively with how to implement this self-imposed task. Throughout the process he disturbed the workplace, its staff, and endangered the public's perception of OCTVS.

Figurative Language

During three school days, Mr. Rolston told others what he could do in pursuit of this duty. He defended these discussions by explaining his words were figurative, not literal. This excuse is particularly unpersuasive when voiced by a certified English Teacher.

Metaphors are forms of figurative language framing a situation as something else to "punch home" the speaker's message. Groucho Marx's metaphor that a "hospital bed is a parked taxi with the meter running" might be particularly telling. In this age of

COVID-19, however, it also could be interpreted as an insensitive rebuke of institutions and the health care workers who are doing much to help America. So too, Mr. Rolston's colorful "shooting the head off the snake" and "blowing it up" metaphors might have (but did not) punch home his point. Instead, they made people anxious, and caused some administrators to reason that anyone making such *threats* should not work with us. Neither group can be faulted for its reaction. Someone with a degree in creative writing might readily anticipate that his colorful words might have a bommerang effect.

Respondent, of course, possesses a creative writing degree, has worked as an editor, and taught English for years. It ill behooves him to defend using figurative language by saying, "But, I didn't mean for anyone to take my words literally." Maybe so. However, his words evoked emotional reactions. They caused Ms. Malfitano to speak with her fiancé, and resulted in Ms. Shenloogian cautioning against saying those things in school. Mr. Pernal thought Mr. Rolston might be "unhinged," not that he was being a clever wordsmith. Union President Smith became "uncomforable" after his lunch hour visit. Dr. Maschi summoned the police "to rule out a potential threat."

The record does not support a conclusion that Thomas Rolston meant to harm person, or property. This is reflected in his expresssions of remorse. These are not devalued by Tierney Meeker's testimony. She testified about a 60-second encounter with him on August 17, 2020. Clearly, Ms. Meeker found his comment displeasing. Her shifting characterizations of the encounter give pause about how much, if any, weight this testimony merits.

Initially, Tierney Meeker professed feeling fright because Mr. Rolston acted "crazy," and was unpredictable. At another moment she asserted believing her employment was in jeopardy, and later again that her good reputation might be damaged. These conflicting accounts prevent Ms. Meeker from being a particularly

credible witness on the relevant question of whether she had been threatened. While subjectively she felt insecure, Respondent's statement does not easily lend itself to classification as a threat, or an attack.

The Arbitrator does not accept Petitioner's argument that Mr. Ralston's "demeanor [on August 17th] is a clear example of the Respondent's extreme irrational behavior." Rather, it was Ms. Meeker who melodramatically telephoned the Superintent after a non-emergent event.

Difficult Circumstances

Everyone has difficult choices to make. Everyone goes through life's ups and downs. Frustrations and hardships result from divorce, hurricanes, false accusations, and distracted bank tellers. Society asks us not to redirect our negative emotions to others, when coping with life. OCTVS Policy No. 3351, applying to healthy workplaces, affirms this principle. It bars abuse, derogatory remarks, or insults that reasonable people would find intimidating, or humiliating. These bad behaviors can fall within conduct unbecoming, and may result in discipline, or discharge. Even a single act, if especially severe and egregious, may lead to discharge. Thomas Rolston's confrontations with Principal Zavatteri were serious acts, as was his meltdown in Mr. Pernal's classroom. Also, he made lesser, but still unacceptable, comments on other occassions. Petitioner was within its rights not to accept the totality of this behavior.

Charges I and II are sustained.

V C.3 Ruling on Charge III

Petitioner in Charge III asserts that Thomas A. Rolston lacks the capacity to perform teaching duties based on the August 20, 2019 report of Dr. Brett J. Prince.

On balance, the Arbitrator cannot credit Dr. Prince's conclusion about Mr. Rolston's incapacity to return to teaching. The Doctor opined that Respondent's inconsistent, invalid, and misleading manner severly hindered his arriving at an accurate diagnosis. Similarly, Dr. Prince offered that at least one objective tests revealed a consistent and deliberate attempt to distort the results by inaccurate self-portrayal. The Arbitrator interprets these findings as standing for the proposition that Mr. Rolston is a trickster who should not be permitted to teach "innocent children."

This conclusion might have been easier to accept if the record included data about validity scales in any of the objective tests. Such scales help detect those who want to be seen in the best possible light, as well as persons (such as malingers) who are interested in presenting themselves as feeling worse than actually is the case. Arbitrators depend on expert witnesses to be educated about such matters beyond their ken. While Dr. Prince feverently supported his diagnosis, the Arbitrator would have benefitted from an enhanced explanation for the net opinion that Respondent had been highly deceptive during interviewing and testing.

Absent such information, Dr. Mack's internally consistent conclusion jibes with the facts presented by others. Based on the fulnessness, and documentation of his report, the Arbitrator accepts Dr. Mack's conclusion that Mr. Rolstons unwarranted behavior was not the result of serious mental illness, or of a personality disorder.
Charge III is dismissed.

For these reasons the Arbitrator must conclude that the evidence of record establishes unbecoming conduct under Charges I and II that warrants dismissal from employment.

December 4, 2020 /S/ Patrick R. Westerkamp

281-20

NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF
TENURE CHARGES BY

THE WOODBRIDGE TOWNSHIP
BOARD OF EDUCATION
MIDDLESEX COUNTY, NEW JERSEY,
Petitioner

and Agency Dkt #282-10/19

NICHOLAS CILENTO,
Respondent

Appearances:

For the Petitioner: Ari Schneider, Esq.
Busch Law Group

For the Respondent: Edward A. Cridge, Esq.
Mellk O'Neill

Before: Barbara C. Deinhardt
Arbitrator

Hearing held August 31 and September 1, 2020

INTRODUCTION

In accordance with the TeachNJ statute, NJSA 18A:6-16, the tenure charges brought by the Woodbridge Township Board of Education, Middlesex County, New Jersey ("the Petitioner," "the Employer," "the

District" or "the Board") against Nicholas Cilento ("Respondent'") were referred to me for review by the Commissioner of Education. A hearing was held on August 31 and September 1, 2020, during which the parties were accorded the right to examine and cross-examine witnesses, the right to present evidence, and the right to make arguments in support of their respective positions in this matter. The hearing was closed upon the receipt of post-hearing briefs on October 23, 2020.

ISSUE

Has the Board proven by the preponderance of credible evidence that Respondent is guilty of conduct unbecoming a teaching staff member, insubordination and/or other just cause warranting his dismissal? If not, what discipline, if any, is warranted?

BACKGROUND

The facts are essentially undisputed. Respondent, Nicholas Cilento, is a tenured teacher who has been employed by the School District since September 2007. His evaluations were effective to highly effective. Prior to May 2019, the only negative conduct reference in his record was a memorandum in April 2017 for holding a cell phone while testing was taking place.

On the morning of May 21, 2019, Mr. Cilento was assigned to front lobby supervision, beginning at around 7:30 AM, after which he was to perform his regular teaching. That day was a testing day, so classes didn't start until 10:00. Around 7:20 that morning, a department chair brought to the attention of Principal Kenneth Pace that she had been

told that Mr. Cilento had been drinking alcohol on duty the morning before. Principal Pace went to where Mr. Cilento was sitting and noticed a small water bottle on the floor by his seat. Mr. Cilento first said, "That's not mine." Mr. Pace smelled the bottle and concluded that it was alcohol. The bottle was almost full, with what Mr. Pace described as perhaps a few mouthfuls gone.

He took Mr. Cilento to his office and, once there, admonished him not to lie. Mr. Cilento requested access to the Employee Assistance Program and was tested for alcohol at approximately 10:00, when he tested negative (0.00%). He was driven home and put on leave.

Respondent testified that he had been struggling with alcoholism for many years. He sought treatment for his illness four or five times, including Alcoholics Anonymous and Employee Assistance Program, but eventually relapsed each time. He had been sober for several years prior to the events at issue here, but following a particularly stressful interaction with his wife, from whom he was separating, he began drinking again on May 19. He admits that he brought a small plastic water bottle of vodka to school on the mornings of May 20 and 21 and had several sips of vodka each day.

He enrolled in an inpatient rehabilitation program, followed by an outpatient program, several months in a sober living facility and then into active participation in Alcoholics Anonymous.

On or about October 22, 2019, the Board certified its tenure charges against Mr. Cilento to the Commissioner of Education, as follows: `

Charge I: Unbecoming conduct and/or other just cause, including insubordination—consuming alcohol during work in violation of established standards of professional behavior.

Charge II: Unbecoming conduct, insubordination, and/or other just cause—publicly consuming alcohol during work in violation of state law.

Charge III: Unbecoming conduct, insubordination, and/or other just cause—possessing alcohol during on [sic] school grounds in violation of municipal law.

Charge IV: Insubordination and unbecoming conduct and/or other just cause—violations of District policy

Charge V: Pattern of course of unbecoming conduct over protracted period of time

I find, based on the undisputed evidence, including Mr. Cilento's own admissions, that Respondent possessed and used alcohol on school premises while on duty on May 20 and 21, 2019. Respondent did not contest that drinking on duty on school grounds is prohibited. I find that such conduct is contrary to established standards of professional behavior, Board policies, New Jersey State Law, and Woodbridge Municipal Code, and constitutes conduct unbecoming a teacher, but not insubordination. I also find that Respondent knew that such conduct was improper. He had been trained in the Board policies and he engaged in behavior on May 20 and 21 that demonstrated that he was trying to hide his conduct, itself evidence that he knew what he was doing was wrong. Charges I-IV are sustained.

I do not find, however, that Respondent engaged in a "pattern or course of unbecoming conduct over a protracted period of time." The only evidence is that he had a few sips of alcohol at school on two consecutive days. The Board describes this as "at least two independently egregious acts over the course of one school years [sic]." I disagree. He is charged with, and I find that he committed the act of misconduct on two occasions over the course of two days. This is not a "protracted period of time."

The Board asserts that it has defined a "pattern of unbecoming behavior, not over a course of years [as discussed in the cases precedent], but over a course of days—i.e. the 20th and 21st of May, as well as every day thereafter until he was caught if he had not been caught on the 21st." I decline to infer simply from the fact that Cilento had had an alcohol problem that extended over a protracted period of time that he engaged in a pattern of unbecoming conduct during that same time. I similarly decline to assume, as the Board would have me do, that Mr. Cilento would have continued to drink at school had he not been caught. Maybe he would have and maybe he wouldn't have. There is no evidence and he is not charged with any days other than May 20 and May 21. Charge V is dismissed.

The only real question before me is whether dismissal is the appropriate penalty under all the circumstances.

POSITIONS OF THE PARTIES

According to the District, Respondent's conduct was so egregious as to necessitate dismissal. On two days he brought vodka to school in a

water bottle and consumed it on the premises while in charge of supervising the front door and hallways. On the first day he also taught 20 special education students after or while consuming the alcohol and then drove himself home. Had he not been caught, he "absolutely intend[ed] to continue such a pattern," the District argues. His conduct was premeditated and implemented in such a way as to permit him to surreptitiously consume alcohol while on duty. By his own admission, this was his fourth or fifth alcohol-related relapse. Arbitration decisions and court decisions have held that a teacher cannot rely on a medical condition to excuse and/or mitigate such misconduct, the District asserts. There is no guarantee that Respondent will not start drinking again. This is not a one-time mistake, but "an unmistakable pattern of poor judgment and unlawful behavior that would certainly have continued had Respondent not been caught."

To return him to the classroom would send a dangerous message to young and impressionable students and would put them at risk, given the likelihood of future misconduct, the District argues. Mr. Cilento's conduct directly injured not only his own reputation, but the reputation of the District and undermined the trust of the District and the parents. Further, according to the District, Mr. Cilento exhibited "no remorse" for his misconduct. His alcohol addiction should not serve to mitigate the penalty warranted. The welfare of the children must be paramount.

Therefore, the District argues, dismissal is the only appropriate penalty. Mr. Cilento cannot "get a free pass to violate the law, on multiple occasions," just because he has a disability related to alcohol. To not dismiss him would send a message to the students and parents

and to Respondent that he can use and possess alcohol at school with no serious repercussions, so long as he can rely on his alcoholism to get him off the hook. The Board's decision to terminate Respondent must be upheld, Petitioner argues.

Respondent, on the other hand, argues that the Board has not demonstrated that he has engaged in conduct unbecoming a teacher, warranting his removal from his position. Rather, Respondent contends, some lesser penalty, if any, should obtain.

Mr. Cilento was not intoxicated, there is no evidence that he failed to perform his teaching duties, no student was aware of his conduct, and, once confronted, he accepted responsibility and got help. According to Respondent, citing *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967), when evaluating whether dismissal is appropriate, the arbitrator must consider the nature and gravity of the offense, the impact on the teacher's career, any extenuating or aggravating circumstances, and the harm or injurious effect the conduct may have had on the proper administration of the school system. "The touchstone of the determination lies in the teacher's fitness to discharge the duties and functions of her position," Respondent contends.

Respondent argues that in making this determination, the arbitrator should consider Mr. Cilento's many years of exemplary service and outstanding evaluations, all earned while he was managing his alcoholism. Also significant are the efforts he has made throughout that time to manage his disease and the efforts he has made since the events of May 20 and 21, 2019. He is "doing the work" necessary to

make himself capable of continuing to provide exemplary service to the students of the Woodbridge Township School District, Respondent asserts.

Respondent also notes that he was not aware that his conduct would result in termination. He was not trained on the specific consequences of having alcohol on school grounds and other teachers with substance abuse-related misconduct at school were afforded second chances.

OPINION

There is no contention that there was any problem with Mr. Cilento's performance as a teacher. His evaluations were all effective or highly effective. He was described as a very good special education teacher by Superintendent Robert Zega. The Board is correct, however, that even a good teacher, one protected by tenure and with long years of service, may still be dismissed even for a first offense if the misconduct is sufficiently egregious and the other factors for evaluating just cause are met. I must therefore review these factors and the *Fulcomer* standards.

In evaluating the egregiousness of the conduct, I note that while there can be no question that ***any*** consumption of any amount of alcohol at school, especially while on duty, is unacceptable, Mr. Cilento consumed a very small amount on May 21—four sips--such that he did not register any alcohol in his system when he was tested. His testimony was that he consumed the same amount the day before. There is no evidence to the contrary. He did not demonstrate any signs of

impairment and there is no evidence that his teaching or his performance of other duties was impaired.

There is no evidence in the record that any student or parent was aware of what had happened.

The factors listed by the Board in evaluating just cause for dismissal include whether the employee was forewarned of the consequences of his actions and whether the rule was applied fairly and without discrimination. There is no evidence that he was given any training on the specific consequences of consuming alcohol at school. While he certainly knew (or should have known) that it was prohibited and that there would be penalty, there is no evidence that he was advised in advance that dismissal would necessarily follow. In fact, Policy 4419.23, which prohibits "[u]se of alcohol beverages in school worksites," lists a number of possible disciplinary actions, including "nonrenewal, suspension or termination at the discretion of the board." Thus it appears that termination is not the automatic penalty.

There were no cases precedent cited that were identical to the one before me, i.e. a tenured employee found to have used or possessed alcohol at work. The cases that came the closest involved tenured employees who were found to be under the influence of alcohol while at work. Tenured secretary TM was suspended for suspicion of being under the influence of alcohol at work. She was returned to work. Then after testing positive again for alcohol while at work, she was given a Last Chance Agreement. The third time she failed an alcohol test she was terminated. According to the District, this case was distinguishable

because the employee did not use the illegal substance at work nor did she use on two consecutive days.

JP, a tenured teacher, was suspended for being under the influence of alcohol at work. He went into a rehabilitation program and following his release was permitted to return to work.

JS, a tenured teacher, was suspended for suspicion of being under the influence of alcohol at work and was allowed to return to work under a Last Chance Agreement. When she subsequently failed a drug test, she was terminated.

(The only other cases cited involved employees arrested for use or possession of illegal drugs on a weekend, not on school property, and bus drivers who failed random drug tests who were terminated or suspended and then resigned.) The above cases, which occurred during Mr. Cilento's tenure, would not put him on notice that any use of alcohol at work would lead to immediate dismissal for a first offense. I do not find the District's attempted distinction between intoxication at work as opposed to use of alcohol at work to be persuasive. Rather, It appears to me that Mr. Cilento was treated unjustifiably more harshly than others in similar circumstances.

While the District asserts that Cilento was not at all remorseful, the record proves otherwise. He immediately went through inpatient and outpatient rehabilitation programs, moved into sober living for several months, is working through the AA 12 steps and faithfully attending AA meetings, and has kept in close contact with his AA sponsor. At the hearing he testified, "It was totally unprofessional. I let a lot of people down." I find that his actions after the events of May 20 and

21, 2019 reflect an acceptance of responsibility and a sincere desire to live a sober life.

The District also argues that Respondent could relapse. That is true. Mr. Cilento admits that it is true. He cannot guarantee that he will never drink again. However, he was sincere and persuasive in his commitment to immediately call out of work and seek treatment were he to relapse and not to report to school either under the influence or in possession of alcohol.

I find after a review of the entire record, and considering the arguments cited by both parties, that dismissal is not warranted in this case. While I agree with the District that Mr. Cilento cannot think that he can violate the school policies and state and municipal laws with impunity, I believe that a three-month unpaid suspension and reinstatement on a Last Chance basis, is the appropriate penalty for Mr. Cilento's misconduct. This penalty is sufficient to make clear to Mr. Cilento that his conduct was unacceptable and that a recurrence could lead to dismissal. The District has the right to impose whatever random testing requirements it feels are necessary to ensure that Mr. Cilento does not use alcohol at school or report to work under the influence of alcohol.

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been duly designated by the Commissioner of Education from the Panel of Arbitrators in accordance with the TeachNJ statute, NJSA 18A:6-16, and having considered the evidence and arguments presented by the parties, awards as follows:

1. Petitioner has met its burden of proving, by a preponderance of the evidence, the allegations in Charges I-IV, with such conduct constituting conduct unbecoming and providing just cause for discipline, but not dismissal;
2. Petitioner has not met its burden of proving the allegations in Charge V;
3. Respondent Nicholas Cilento shall be reinstated to his position as a tenured teacher in the Woodbridge Township Public School District and resume his duties in the District, such reinstatement being on a Last Chance basis;
4. Respondent shall be made whole for all loss for his time out of service, with the exception of a three-month unpaid disciplinary suspension;
5. The undersigned shall retain jurisdiction for the limited purpose of resolving any disputes concerning the remedy herein.

SO ORDERED.

Barbara C. Deinhardt
Neutral Arbitrator

Dated: December 5, 2020

STATE OF CONNECTICUT)

: ss

COUNTY OF LITCHFIELD)

On this the 5th day of December, 2020, I, Barbara C. Deinhardt, swear that I have executed and issued the foregoing as my Opinion and Award in the above matter.

_____

Barbara C. Deinhardt

On this the 5th day of December 2020 before me personally came and appeared Barbara Deinhardt, known to me to be the individual described herein, who executed the foregoing Opinion and Award and she acknowledged that she executed the same.

_____

Notary Public

STATE OF CONNECTICUT)

: ss

COUNTY OF LITCHFIELD)

On this the 5th day of December, 2020, I, Barbara C. Deinhardt, swear that I have executed and issued the foregoing as my Opinion and Award in the above matter.

Barbara C. Deinhardt

On this the 5th day of December 2020 before me personally came and appeared Barbara Deinhardt, known to me to be the individual described herein, who executed the foregoing Opinion and Award and she acknowledged that she executed the same.

Notary Public

Jill C. Russell
NOTARY PUBLIC
My Commission Expires 11/30/2023

282-20

OAL Dkt. No. EDU 04829-20
Agency Dkt. No. 60-3/20

New Jersey Commissioner of Education

Final Decision

M.W., on behalf of minor child, A.W.,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled October 22, 2020 OAL hearing, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 11, 2020
Date of Mailing: December 14, 2020

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

283-20

New Jersey Commissioner of Education

Final Decision

Trenton Education Association, Karin Davis, Michele Fekete, Ben Kenion, Inger Morin, Debjit Mitra, Wendy Lockhart, Bernadette Piscopo, Tiffani Finley, Wanda Perry, Janice Phillips, Stephanie Shaffer, Cheryl Caruso, Heather Baron, Elizabeth Manzi, and Alexa Sherman,

Petitioners,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

Synopsis

The Trenton Education Association (TEA) and several of its members challenged a 2016 reduction in force (RIF), implemented by the Trenton Board of Education (Board) as the result of a budget shortfall. Specifically, the Board abolished the individual petitioners' occupational, physical, and speech-language therapy positions, and subsequently contracted with the Monmouth-Ocean Educational Services Commission (MOESC) to provide these mandated special education services to its students. The MOESC, in turn, provided these services through private agencies that entered into contracts with MOESC rather than services provided directly by MOESC employees. Petitioners appealed, arguing that this arrangement was improper, and sought reinstatement and other remedies. The TEA and the Board filed cross-motions for summary decision.

The ALJ found, *inter alia,* that: *N.J.A.C.* 6A:14-5.1(c)1.v prohibits public school districts from contracting with private providers for speech-language therapy services unless the district is financially unable to hire sufficient staff to provide the services; one of the speech-language therapists, petitioner Caruso, was not tenured at the time of the RIF and the Board is largely unrestricted in its ability to non-renew non-tenured employees; the Trenton Education Association's claim regarding the remaining speech-language therapists can be severed and continued; however, there is no restriction on a district's ability to contract with private providers for occupational and physical therapy services; therefore, the Board's utilization of MOESC to arrange for private occupational and physical therapy providers was lawful. Accordingly, the ALJ: dismissed the petitions of Caruso, occupational therapists Kenion, Fekete, and Mitra, and physical therapist Lockhart; denied the parties' cross-motions for summary decision pertaining to the tenured speech-language therapists: and granted the Board's motion regarding the provision of occupational and physical therapy services through MOESC.

Upon review, the Commissioner granted the Board's motion for summary decision, finding. *inter alia,* that: the Board's decision to implement a RIF was not arbitrary, capricious, unreasonable or undertaken in bad faith; the Commissioner lacks jurisdiction to determine if and how the limitation on a board of education's ability to contract with private providers for speech-language therapy services is applicable to the Board's contract with MOESC and whether that contract is valid; such jurisdiction lies with the Office of Special Education, not the Commissioner. Accordingly, 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.

283-20

OAL Dkt. No. EDU 13998-16
Agency Dkt. No. 183-7/16

New Jersey Commissioner of Education

Final Decision

Trenton Education Association, Karin Davis, Michele Fekete, Ben Kenion, Inger Morin, Debjit Mitra, Wendy Lockhart, Bernadette Piscopo, Tiffani Finley, Wanda Perry, Janice Phillips, Stephanie Shaffer, Cheryl Caruso, Heather Baron, Elizabeth Manzi, and Alexa Sherman,

Petitioners,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by both parties pursuant to *N.J.A.C.* 1:1-18.4, and the replies thereto by both parties, have been reviewed.

This matter involves a reduction in force (RIF) implemented by the Board in 2016, when it was facing a budget shortfall of $5.9 million. The Board abolished the individual petitioners' occupational, physical, and speech-language therapy positions.[1] However, recognizing that it was still legally obligated to provide these special education services to its students, the Board contracted with the Monmouth-Ocean Educational Services Commission

[1] The remaining individual petitioners are Ben Kenion, Michele Fekete, Debjit Mitra, Wendy Lockhart, and Cheryl Caruso.

(MOESC) to provide the services, through private agencies that entered into contracts with MOESC rather than services provided directly by MOESC employees. Petitioners appealed, arguing that this arrangement was improper, and sought reinstatement among other remedies.

Following discovery at the OAL, the parties filed cross-motions for summary decision. The ALJ found that *N.J.A.C.* 6A:14-5.1(c)1.v prohibits public school districts from contracting with private providers for speech-language therapy services unless the district is unable to hire sufficient staff to provide the services. The ALJ concluded that the Board's contract with MOESC, which in turn provided for MOESC to contract with private agencies, was invalid unless the Board can meet the regulatory exception by showing that it was unable to hire sufficient staff to provide speech-language therapy services due to its financial circumstances. The ALJ dismissed the petition of speech-language therapist Caruso, because she was not tenured at the time of the RIF, and the Board is largely unrestricted in its ability to non-renew non-tenured employees. The ALJ found that the Trenton Education Association's (TEA) claim regarding the provision of speech-language therapy services could be severed and continued, and denied the TEA's and the Board's cross-motions for summary decision.

As to the provision of occupational and physical therapy services, the ALJ found that there is no restriction on a district's ability to contract with private providers for these services, and therefore the Board's utilization of MOESC to arrange for private occupational and physical therapy providers was lawful. Accordingly, the ALJ dismissed the petitions of occupational therapists Kenion, Fekete, and Mitra, and physical therapist Lockhart.

In their exceptions, petitioners argue that the ALJ improperly accepted the Board's allegedly unsubstantiated assertion that the RIF was necessitated by the district's overall budgetary shortfall. According to petitioners, *N.J.S.A.* 18A:28-9 and associated case law permit

a RIF "for reasons of economy," and because the Board did not provide any evidence that the therapist positions at issue were abolished for reasons of economy or that the RIF would actually save money, summary decision in favor of petitioners should have been granted. Petitioners assert that the ALJ incorrectly permitted the Board to enter into a "sham transaction" with MOESC for occupational and physical therapists, because the county superintendent did not approve the contracts between MOESC and the private providers, which is required by *N.J.S.A.* 18A:6-63. Finally, petitioners argue that the Board violated the tenure rights of the tenured occupational and physical therapists by using non-tenured therapists – the private providers contracted by MOESC – to provide the same occupational and physical therapy services previously provided by the tenured therapists.

In reply, the Board argues that it provided extensive evidence of a budget shortfall of nearly $6 million for the 2016-17 school year and that its fiscal decisions related to the shortfall were made in collaboration with the State Monitor appointed by the Commissioner. According to the Board, petitioners were required to prove that the RIF was arbitrary, capricious, or unreasonable, or undertaken in bad faith, and they failed to meet that burden. Moreover, the Board asserts that *N.J.S.A.* 18A:6-63 does not apply to the contract between the Board and MOESC, but only applies to contracts between MOESC and private providers, and that the Board should not be responsible for verifying to what extent MOESC may or may not have complied with statutes or regulations regarding contracts to which the Board was not a party. Finally, the Board argues that the petitioners were properly RIF'ed and their positions were outsourced through MOESC, and, as such, there are no vacancies to which the tenured petitioners would have a right of reemployment. The Board also notes that petitioners'

exceptions do not dispute the ALJ's conclusion that the claims of the non-tenured petitioners should be dismissed.

The Board also filed its own exceptions, arguing that the petition of appeal does not seek any relief other than damages personal to the individually named petitioners, and the only possible relief that could be awarded to the TEA as the sole remaining petitioner would be a finding that the Board violated regulations regarding the provision of special education services – relief which was not sought in the petition. Therefore, according to the Board, the Commissioner does not have jurisdiction to hear this matter, both because jurisdiction over the alleged violation of *N.J.A.C.* 6A:14-5.1 lies with the Office of Special Education rather than the Commissioner, and because the petition is now moot since all relief requested therein pertains to petitioners whose claims have subsequently been dismissed. Alternatively, the Board argues that the TEA does not have standing to pursue the action because damages are not available to it, such that the petition should be dismissed in its entirety. The Board further asserts that the ALJ improperly determined that the Board was prohibited from outsourcing its speech-language therapy services unless it established that it was unable to hire sufficient staff. According to the Board, the Initial Decision improperly conflated two independent provisions of the relevant regulation, and the restriction of *N.J.A.C.* 6A:14-5.1(c) – related to the district's inability to hire sufficient staff – only applies to outsourcing services directly to private providers, and not to outsourcing to an educational services commission, as the Board did here. Finally, the Board argues that it presented ample evidence of the district's budget shortfall, proving that its RIF was undertaken in good faith for reasons of economy, and that by ruling that there were unresolved issues of facts on this issue, the ALJ improperly shifted the burden of proof from petitioners to the Board.

In reply, petitioners argue that the Commissioner has jurisdiction because the underlying claim in this matter relates to whether the individual petitioners' tenure rights had been violated, an issue properly raised by the TEA as the majority representative of a negotiations unit consisting of hundreds of district employees. Petitioners also maintain that the case is not moot, and that the TEA has standing to pursue it, based on the conclusions made by the ALJ related to the Board's obligations in implementing the RIF and entering into the contract with MOESC for speech-language therapy services. Petitioners assert that the Board knew at the time it entered into the contract with MOESC that MOESC would need to contract with private providers for services, such that the Board's action was unlawful. Finally, petitioners argue that while the Board presented evidence of an overall budgetary shortfall, it presented no specific evidence that its abolition of speech language, physical, and occupational therapy positions saved any money.

Upon a comprehensive review, the Commissioner concludes that the Board's motion for summary decision must be granted. A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b); *see also Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29 (1995). Here, the material facts are not in dispute, as both parties acknowledge that the Board implemented a RIF that affected petitioners, that the Board subsequently outsourced special education services which had previously been performed by petitioners to MOESC, and that MOESC used private providers to deliver special education services to the Board's students.

First, the Commissioner concludes that the Board's decision to RIF 236 employees, including the individual petitioners here, was not arbitrary, capricious, or unreasonable, or undertaken in bad faith. The ALJ concluded that in the face of an undisputed economic crisis, facing a serious budget gap and with an economic motivation, the Board legally abolished the positions of the occupational and physical therapists. The Commissioner concurs and finds petitioners' arguments to the contrary to be unpersuasive. Pursuant to *N.J.S.A.* 18A:28-9, the Board may abolish positions for reasons of economy. Petitioners bear the burden of proof to demonstrate that the Board's decision to implement a RIF was arbitrary, capricious, or unreasonable, or undertaken in bad faith. *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960); *see also Wollman v. Bd. of Educ. of the City of Trenton, Mercer County*, 1995 *N.J. Agen. LEXIS 506* (May 3, 1995). Given the evidence of the district's financial circumstances, petitioners have not met that burden.

Petitioners argued, and the ALJ agreed, that even a lawful RIF may violate employees' tenure rights if the board of education enters into an illegal arrangement to provide mandatory services that were previously provided by tenured employees. Therefore, the Commissioner must address the Board's contract with MOESC. With regard to the claims of the occupational and physical therapists, the Commissioner concurs with the ALJ's conclusion that these claims must be dismissed. The New Jersey Supreme Court has held that the threshold question in determining whether a board of education has violated an employee's tenure rights by outsourcing services performed by a tenured employee to an educational services commission (ESC) is whether the board has the authority to contract with an ESC to provide those services. *Impey v. Bd. of Educ.*, 142 *N.J.* 388, 392 (1995) (holding that the board of education did not violate the tenure rights of a speech correctionist when it abolished her position and entered into

a contract with an ESC to provide those services). *See also Anders v. Bd. of Educ. of the Twp. of Lakewood, Ocean County*, Commissioner Decision No. 2-01 (Jan. 2, 2001) (holding that the board of education was permitted to abolish its in-district child study teams and enter into a contract with MOESC for those services, and that the board did not violate the tenure rights of the petitioners); *Trigani v. Bd. of Educ. of the Borough of Monmouth Beach*, Commissioner Decision No. 415-02 (Dec. 2, 2002) (holding that a school psychologist, social worker, and speech therapist were not unlawfully terminated and that the board of education had the authority to contract with MOESC for those services); *Becton Ed. Ass'n v. Bd. of Educ. of Carlstadt-East Rutherford Regional Sch. Dist.*, Commissioner Decision No. 513-04 (Dec. 20, 2004), *aff'd* State Board of Education, Decision No. 3-05 (May 4, 2005) (holding that the board did not unlawfully terminate a school psychologist and learning disabilities teacher-consultant and that the board's contract with an ESC for those services was compliant with statutory and regulatory requirements).

In assessing the Board's authority to contract with MOESC for occupational and physical therapy services, the Commissioner looks to *N.J.S.A.* 18A:6-63, which allows ESCs to enter into contracts to provide special education services to public school districts. Furthermore, *N.J.A.C.* 6A:14-5.1(c) allows boards of education to contract with private providers for occupational and physical therapy services, and the only restriction is that the providers must be certified and licensed according to State statutes and rules.[2] There is no allegation that the private providers with whom MOESC contracted did not meet these requirements. Petitioners have argued that the Board entered into a "sham transaction" with MOESC to avoid regulatory

[2] Petitioners have argued that *N.J.A.C.* 6A:14-5.1(c)1.v, restricting a district's ability to enter into contracts with private providers, applies to contracts for occupational and physical therapy services. That provision clearly states that it applies to contracts for speech language therapy services, and the Commissioner declines to expand its meaning beyond its plain language.

requirements prohibiting boards of education from contracting with private providers. However, because the Board could have contracted directly with private occupational and physical therapy providers under *N.J.A.C.* 6A:14-5.1(c), the Commissioner concludes that there is no impropriety in the Board's decision to contract with MOESC, who in turn contracted with private providers.[3]

Next, the Commissioner concludes that the claim of petitioner Caruso, the sole remaining speech-language therapist in the matter, must be dismissed. A board of education has virtually unlimited discretion in hiring or renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447, 456 (App. Div. 1982). As such, where non-tenured staff members challenge a board's decision to terminate their employment on the grounds that the reasons provided by the board are not supported by the facts, they are entitled to litigate that question only if the facts they allege, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Truncellito v. Bd. of Educ. of the Twp. of Lyndhurst*, Commissioner Decision No. 271-19+, decided December 3, 2019, citing *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd* Docket #A-3316-85T6 (App. Div. 1986). Petitioner Caruso has not alleged any violations of her constitutional or legislatively-conferred rights. Therefore, the Commissioner finds that the Board's non-renewal of Caruso was proper.[4]

---

[3] Petitioners' argument that the county superintendent did not approve of the Board's use of MOESC to contract with private occupational and physical therapy providers is unpersuasive. *N.J.S.A.* 18A:6-63, on which petitioners rely for this assertion, requires the county superintendent's approval of contracts between ESCs and private agencies. The Commission cannot conclude that the Board violated petitioners' tenure rights based on the actions of MOESC, which is not a party to this matter and over which the Board has no authority.

[4] This principle also applies as a secondary reason for the dismissal of the claim of petitioner Mitra, who was not tenured at the time of the RIF.

The final issue for the Commissioner to decide is whether the TEA may continue to pursue its claim regarding the validity of the Board's contract with MOESC for speech-language therapy services. In *Long Beach Island Education Association and John Puljer v. Bd. of Educ. of the Long Beach Island Consolidated School District and Dawn Watson*, Commissioner Decision No. 330-09 (Oct. 13, 2009), the Commissioner held that in the absence of underlying claims of infringement of tenure and seniority rights or other rights and responsibilities under the school laws, the Commissioner has no jurisdiction to adjudicate a claim that a board of education's contract for the provision of special education services violated New Jersey's special education regulations because such review falls exclusively within the purview of the Department's Office of Special Education Programs.[5] *N.J.A.C.* 6A:9-14.2.

While the question of the validity of the Board's contract in light of the special education regulations and the tenure and seniority rights of the Board's employees were intertwined at the time the petition was filed, jurisdiction is an ongoing question and the Commissioner concludes that it is appropriate to assess her jurisdiction based on the current posture of the case. Here, with the dismissal of petitioner Caruso's claim, there is no active claim that the Board has violated the tenure or seniority rights afforded to any speech-language therapist. If the Commissioner allowed the TEA's claim regarding speech-language therapy services to proceed and that claim was ultimately successful, there is no relief that the Commissioner can order. The record demonstrates that ten speech-language therapists were subject to a RIF. One of the therapists never joined in this matter, and of the remaining nine, eight have withdrawn their claims during the pendency of this proceeding. Petitioner Caruso's

[5] The name of the relevant office has subsequently been changed to the Office of Special Education Policy and Dispute Resolution (SEPDR).

claim has been dismissed for the reasons stated herein. Therefore, there are no speech-language therapists affected by the RIF whose tenure interests the TEA can represent.[6]

Furthermore, the only possible outcome of permitting the TEA's claim to proceed would be a ruling on the validity of the Board's contract with MOESC – a ruling that could only be rendered with regard to the regulations governing the provision of special education and related services. Accordingly, the Commissioner lacks jurisdiction to determine whether and how the limitation on a board of education's ability to contract with private providers for speech-language therapy services is applicable to the Board's contract with MOESC, and whether that contract is valid.

Accordingly, the Board's motion for summary decision is granted and the petition is hereby dismissed.

IT IS SO ORDERED.[7]

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

Date of Decision: December 14, 2020
Date of Mailing: December 15, 2020

[6] To the extent that the validity of the Board's contract with MOESC may affect the rights of other members of the TEA, those claims are purely speculative.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED ORDER GRANTING
PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 13998-16
AGENCY DKT. NO. 183-7/16

TRENTON EDUCATION ASSOCIATION; KARIN DAVIS, MICHELE FEKETE, BEN KENION, INGER MORIN, DEBJIT MITRA, WENDY LOCKHART, BERNADETTE PISCOPO, IFFANI FINLEY, WANDA PERRY, JANICE PHILLIPS, STEPHANIE SHAFFER, CHERYL CARUSO, HEATHER BARON, ELIZABETH MANZI AND ALEXA SHERMAN,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioners (Detzky, Hunter & DeFillippo, LLC, attorneys)

Sandra Varano and Howard M. Nirenberg, Esq., for respondent (Nirenberg & Varano, attorneys)

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

This contested case involves a limited challenge by the Trenton Education Association and several of its members to a reduction in force (RIF) instituted by the Trenton Board of Education in the spring of 2016, which, according to the Board, resulted in the reduction of 236 employees. The instant matter addresses not that large group, but instead several petitioners who lost their positions as speech/language, physical or occupational therapists who provided mandatory therapeutic services to special education students in the District. The Board contends that it lawfully abolished these positions in good faith for economic reasons. The petitioners, who argue that the Board had other choices for saving money rather than riffing their positions, also argue that when the Board eliminated their positions it knew that its intended plan for continuing to provide these legally-mandated speech/language, physical and occupational therapy involved the Board's plan to enter into a contract with the Monmouth-Ocean Educational Services Commission (MOESC). Further, the Board acknowledged in that contract that in order to fill the needed positions and provide adequate services MOESC would be not be utilizing employees of the MOESC, but instead independent contractors, thus using contracts with private agencies to provide the services. The petitioners contend that under applicable law the local Board of Education was itself barred by N.J.A.C. 6A:14-5.1(c) from engaging private contractors to provide these services, unless, as the regulation provides, the District was unable to provide such services through in-district employees, and that the contractual arrangement to obtain such private contractors to work in the District's schools through the MOESC contract was illegal. In response, the Board contends that its arrangement with the MOESC conformed with clear legal authority, codified in N.J.S.A 18A:6-63, which allows local districts to contract with Educational Services Commissions (ESC) for the provision of services and additionally permits such ESCs to contract with private agencies to provide such services. It contends that authorization permitted the use of such private agencies within the local district. In addition, it points to N.J.A.C. 6A:14-5.11, which requires that districts either "employ or contract" for speech-language specialists and other school personnel and authorizes this to be accomplished via "joint

agreements" with ESCs. Each party moves for summary decision, as authorized by N.J.A.C. 1:1-12.5.

The Petition of Appeal was filed on July 6, 2016. Originally it listed fifteen individual petitioners, in addition to the Education Association. According to information supplied recently by the Board, sixteen therapists were noticed that their positions would be abolished as of July 1, 2016. One speech/ language therapist resigned on May 11, 2016, and was not included among the petitioners. From the remaining fifteen noticed, one speech/language therapist, Bernadette Piscopo, and one occupational therapist, Inger Morin, each retired as of July 1, 2016. It is apparent that these two were included amongst those who received notices that their positions would be riffed as of July 1. Thus, eight speech/language therapists, three occupational therapists and one physical therapist, were noticed and then became petitioners. However, as of the date of this opinion, besides the Association, there are only five remaining individual petitioners. These are occupational therapists Ben Kenion and Michele Fekete, each tenured, and Debjit Mitra, non-tenured; Wendy Lockhart, a tenured physical therapist, and Cheryl Caruso, a non-tenured speech language therapist.

The several therapists received notice on April 25, 2016, that they were to be riffed, effective at the end of the 2015-2016 school year, June 30, 2016. Their petition sought a finding that their tenure rights had been violated by their RIF; that they were entitled to employment in their full-time therapist capacities, that they be reinstated retroactive to July 1, 2016, that the Board make them whole for their losses attributable to the unlawful RIF, and that the Board make them aware of their seniority and reemployment rights, where applicable, pursuant to N.J.S.A. 18A:28-12, "if the Board of Education subsequently determines to end its outsourcing of Therapists to provide state-mandated 'related services' and decides to either use 'in-district' Therapists again, and for such other relief as the Commissioner deems just and appropriate."

After the Board filed an answer to the petition, the contested case was transferred to the Office of Administrative Law. Discovery disputes were managed by the then

assigned administrative law judge. On April 15, 2019, the Board moved for summary decision, as permitted by N.J.A.C. 1:1-12.5. The petitioners responded on June 21, 2019, cross-moving for summary decision. The Board replied on August 14, 2019. The contested case was transferred to this judge, retired and serving on recall, on June 25, 2019. Oral argument was held on October 30, 2019, at which time the record concerning the cross-motions closed. However, due to the need for further information with which to assess the cross-motions, the record was reopened. Information sought by the judge was supplied by letters received from the Board and petitioners, respectively, on February 20 and March 2, 2020. The record concerning the motion then re-closed. Subsequent discussions concerning a possible settlement resulted in a request to delay issuance of this Order. However, on May 15, 2020, the judge was informed that the Order should proceed.

In order to fully understand the arguments concerning the cross-motions, it is necessary to review certain undisputed facts. Initially, the Board contends that in the spring of 2016, it faced a clear economic crisis. It notes the minutes of its March 21, 2016 meeting, where the proposed budget for the 2016-2017 school year was discussed and a 5.9 million-dollar shortfall identified. Seeking to deal with this situation, the Board riffed hundreds of employees. The Board agrees that even after abolishing the positions of the riffed petitioners, it was not relieved of its legal duty to provide the legally-mandated therapeutic services of speech/language, occupational and physical therapy that the petitioners had previously provided. In order to continue to do so, the Board entered into a contract with the Monmouth-Ocean Educational Services Commission under which the ESC was to provide the services. The language of the contract affirms the petitioners' argument that the Board knew at the time that it entered into this agreement that the ESC did not have therapists in its own employ and thus would of necessity have to contract with outside, private vendors to provide the therapy services that were to be delivered in the Trenton schools.[1] According to the Board's recent letter, as of July 1, 2016, the first day that the riffed employees were no longer on the Board's payroll, the MOESC contract was providing five occupational therapists, two physical therapists and seven

[1] As opposed to providing such services in schools operated by the ESC.

speech/language therapists. As the parties agree, after the date the petitioners filed their petition, it became clear that the arrangement that the Board made with the ESC had not produced sufficient personnel needed to provide the level of services necessary to meet the demands of the Trenton school population. As acknowledged by the Board and as noted in the Certification provided by Lester Richens, the appointee of the Commissioner of Education as the State Monitor for the Trenton Board of Education during the 2015-2016 school year and thereafter, at the Board's October 24, 2016, meeting it was announced that the ESC "would not be able to provide a sufficient number of speech therapists." As Richens then noted, and as counsel confirmed at oral argument, the Board then recalled three of the riffed speech/language therapists to supplement the services being provided by the ESC's private contractors, thus bringing to ten the number of speech/language therapists working in the District.[2] However, at that same Board meeting, Richens noted that in addition to the recall of these three therapists, the Board was "also contracting out for another group to come and provide a service so we can get the compensatory time in."[3] Thus, as the Board does not dispute, as of at least October 24, 2016, the District, while utilizing both recalled, in-district personnel and MOESC-provided contractors, was seeking to provide at least a portion of the mandated therapy services by entering into its own direct contract with outside vendors, rather than through additional recalls of its own employees. In its recent letter, the Board appears to seek to clarify the situation existing after the recall of the three speech/language therapists, explaining that after the recall it had "resolved the deficiency," however, Richens' statement at the time of the recall of these three does not exactly tally with this statement. Nevertheless, as explained by the Board in response to my request for additional information,

---

[2] One of the three recalled speech/language therapists was Janice Phillips. She retired in June 2018. According to counsel for the petitioners, her position was not filled by a "District employed" Therapist.

[3] Richens also notes that he was "aware" that the Board had entered into the contract with the MOESC dated June 28, 2016, and that pursuant to that agreement, the MOESC was "going to utilize independent contractors for these services." Richens' Certification is silent as to any "approval" that he may have granted for such an arrangement. As will be discussed below, the Board acknowledges it did not obtain any approval for either the June contractual arrangement of the later October arrangements from the county superintendent, but it notes Richens' role as the Commissioner's appointed monitor for the Trenton District.

> sometime thereafter in the 2016-2017 school year, a MOESC speech language pathologist resigned. As such, Kaleidoscope was asked to provide two part-time speech language pathologists. One started in mid-April and worked for approximately 7 weeks in the spring of 2017. The other worked approximately 4 weeks from the end of May through the remainder of the school year.

Kaleidoscope is a private contractor, not associated with the MOESC's efforts to fulfill the agreement that the Commission had with the Board.

The record does not contain any similar information about any action by the Board to recall physical or occupational therapists after July 1, 2016.

Based upon this, it appears that the Board claims that the need for speech/language therapy in the District after July 1, 2016, was fully met by the utilization of ten speech/language therapists, that number made up of the seven MOESC-procured therapists, the recalled three in-house therapists, and eventually, the substitution of two part-time Kaleidoscope personnel for the resigned MOESC therapist.

Although their petition was filed immediately after the effective date of the RIF, the petitioners contend in their briefs that the Board has continued to fail to provide adequate services ever since the spring 2016 reduction.

The Legal Framework

Several relevant statutes and regulations must be considered in assessing these motions. Initially, the Tenure Act, N.J.S.A. 18A:28-9, addresses the right of a board of education to reduce teaching staff, including tenured employees.

> 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.

However, N.J.A.C. 6A:14-5.1(c) mandates that boards provide certain therapeutic services for students. The regulation provides specific directions and limitations as to the manner in which the services of these therapists may be procured.

> (a) Each district board of education, independently or through joint agreements, shall employ or contract with child study teams as set forth in N.J.A.C. 6A:14-3.1(b), speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.
>
> 1. Joint agreements for child study team services may be entered into with local education agencies including other local school districts, educational services commissions, jointure commissions and county special services school districts
>
> . . . .
>
> (c) For the services listed below, district boards of education may contract with private clinics and agencies approved by the Department of Education, private professional practitioners who are certified and licensed according to State statutes and rules, and agencies or programs that are certified, approved or licensed by the Department of Human Services or by the Department of Health to provide counseling or mental health services. For the related services listed in (c)1iii and v below, approved private schools for students with disabilities may contract with private clinics and agencies approved by the Department of Education, private professional practitioners who are certified and licensed according to State statutes and rules, and agencies or programs that are certified, approved or licensed by the Department of Human Services or by the Department of Health to provide counseling or mental health services. All instructional, child study team and related services personnel provided by approved clinics and agencies and private professional practitioners shall be fully certified . . .
>
> 1. For public school students: . . .
>
> iii. Related services

> (1) Certified occupational therapy assistants . . . shall work under the supervision of an appropriately licensed, and where applicable, certified provider of such services.
>
> (2) Physical therapy assistants shall work in the presence of and under the supervision of a certified physical therapist.
>
> . . .
>
> v. Speech-language services provided by a speech-language specialist when a district or private school for students with disabilities is unable to hire sufficient staff to provide the service.

N.J.S.A. 18A:6-63 addresses the authority of ESCs. It provides that such

> 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 noted the remaining individual petitioners include both tenured and non-tenured personnel. And of these, only one is a speech/language therapist, and she was non-tenured. As a general rule, a school board may dismiss a non-tenured employee for practically any reason. Unlike a tenured employee, the Board need not have good cause for such a dismissal, or failure to renew a nontenured employees' contract for another school year.

Parties' Contentions

In moving for summary decision, the Board argues that in the face of a substantial deficit clearly identified at its March meeting, it had to take significant steps to economize. Thus, for reasons directly involving this economic necessity, it exercised its authority to

reduce force, as allowed under N.J.S.A. 18A:28-9, in order to abolish over 200 positions. As it faced a legitimate economic crisis, and as the existence of that economic motivation is not in dispute, the petitioners have no basis for asserting the impropriety of the reduction in force affecting their positions. Further, as the Board exercised its legal right to enter into a contract with the MOESC, which had the legal authority to contract with private contractors to provide the services needed by Trenton, its means of providing those services after the RIF was lawful. As the petitioners' petition only asserts the impropriety of the reduction, the Board's motion must be granted and the petition must be dismissed.

The petitioners do not appear to directly dispute that the Board had an economic problem at the time that it considered and decided to reduce the force. The Education Association does not here object to the reduction of positions held by other than these therapists, that is, those originally included in the petition. However, in their brief and arguments, the petitioners advert to the idea that the Board could have made up its shortfall, or at least that part that purportedly required the abolition of their particular positions, by other reductions, such as in the administrative ranks of the District. But it appears that the main thrust of the petitioners' arguments do not challenge that the Board faced an economic crunch. Instead, they contend that since the arrangement that the Board sought to utilize to provide the required services involved an illegal attempt to use private contractors as therapists within the District's schools, the abolition of the petitioners' positions could not be carried out through such a scheme. In effect, if the services rendered by those whose positions were abolished were not legally provided subsequent to the RIF, then, as the services could not themselves be abolished, the initial attempt to abolish the positions must be deemed to have failed and the positions must be deemed to have remained open. In such case, the Board was then legally required to offer the positions to the tenured employees who had been riffed, in accordance with their seniority for such positions. If the Board's attempt to fill these positions through its contract with the ESC violated the law, then summary decision is warranted for the petitioners.

One of the petitioners' contentions is that when the Board noticed them that their positions were to be abolished, it did not provide any specific economic justification for the action. It did not provide any analysis of the costs, direct or indirect, of the continued employment of the petitioners as against the costs associated with the plan to provide the services through the ESC, or any other such plan. Thus, it baldly claimed an economic motivation, without any details to demonstrate that the reduction in force of these positions would actually save money. At oral argument, counsel for the petitioners conceded that he was not aware of any statute, rule or caselaw that specifically required such information to be provided at the time when employees are noticed of a reduction in force. However, he points to caselaw which he asserts at least suggests such a necessary and also supports the propriety of considering the legality of a Board's plan to replace the services provided by riffed employees who provided mandated services and the right of such employees to a remedy if that plan is found to be illegitimate.

McKenna v. Board of Education of the Andover Regional High School District, Sussex County, an unpublished and therefore not binding decision of the Appellate Division, 2013 N.J. Super. Unpub. Lexis 435, involved two tenured members of the District's Child Study Team (CST) who challenged the abolition of their positions in a reduction in force justified as a cost-saving measure. In lieu of the employment of these two, the Board intended to arrange for CST services provided by the Sussex County Educational Services Commission. One of the employees resigned when she learned of the plan. The other employee did not resign. A month after the Board authorized the RIF, it authorized the District's superintendent to enter into a contract with the ESC to provide CST services. The Board later replied to a request from the appellant's labor union for details of the Board's staffing plan, and the response was that the Board intended to provide the CST services through "both employees of the SCESC" and also by "third party consultants." The petitioners then filed a verified petition with the Commissioner of Education, claiming that the Board's decision to eliminate their positions violated their tenure rights. They contended that the Board's plan to enter into an agreement with the ESC was "arbitrary, capricious and/or unreasonable" and violated N.J.S.A. 18A:46-5.1 and N.J.A.C. 6A:14-3.1.

The Board defended the legality of its action as cost-saving, and the legality of the shared-service arrangement with the ESC. Additionally, it challenged the petitioners' standing to complain about its action. The administrative law judge who heard the contested case dismissed the petitioner's challenge solely on the basis of standing. The Commissioner adopted that decision. On appeal, the Appellate Division agreed that the petitioner who had resigned lacked standing and dismissed that challenge. However, it reversed as to the remaining petitioner, McKenna, finding that she had standing and remanded the case for consideration on the merits.

In its analysis of the standing question, the court noted that the petitioners acknowledged that the Board's abolition of the CST "in a vacuum would not be actionable." However, given what they argued was an illegal arrangement to replace the CST, their "vested rights as tenured educators" were sufficient to give them legal standing to challenge the arrangement. The ALJ and Commissioner had assumed that any "proven defects in the Agreement between the Board and the SCESC could be cured in a manner that would not involve the possible reinstitution of the CST unit in the school district." But the court found "[T]hat conclusive assumption . . . unwarranted."

> Assuming, for the sake of argument, that it was shown that . . . the Agreement with the SCESC does not, in fact, save the district money, or that the Board otherwise lacked "good cause" to displace the in-house program, the continued legal viability of the arrangement might be suspect . . .
>
> Moreover, if it were shown that the Agreement's reliance upon the services of private contractors does not fully comply with applicable statutes or regulations, there is no guarantee that the SCESC would be able to achieve such compliance, or could do so without raising the contractual charges to the Board. There is also no assurance that the SCESC would be willing to renegotiate the terms of the Agreement.
>
> Depending upon how these or other scenarios of a nullified Agreement would unfold, it is entirely conceivable that the Board might consider reinstating its in-house CST.

. . .

> We are mindful of the "managerial prerogative[s]" of a school districts to reduce its teacher personnel . . . Even so, that does no it mean that the district can fire its tenured staff and replace the CST with what is proven to be an illegal arrangement.

The Board argues that since McKenna only decided the standing issue and did not rule on the merits of Ms. McKenna's claims, and as the decision is unpublished and therefore not precedential, it has no bearing here. But the case does offer the persuasive argument that if a board, having reduced staff who provided mandated services for purported economic reasons, resorts to arguably unlawful means in order to continue to provide such mandated services, then the legality of the Board's arrangements can be considered to determine if the replaced employees may have claims to the positions necessary to provide those services in a lawful manner. In other words, if a board's plan to economize involves unlawful action, such action cannot be sustained even in the face of the economics involved.

Here, the undisputed facts are that the Board riffed these petitioners and proposed to replace their part in providing mandatory services by means of a contract with the MOESC. As events developed, even if that initial contractual arrangement may have been legal, at least in regard to one of the forms of therapeutic services these petitioners provided, the MOESC was unable to provide adequate replacements, providing the Board with only seven speech/language therapists, thereby necessitating the Board's recall of three tenured, riffed speech/language therapists. And then, when the Board was faced with the resignation of one of the MOESC-provided speech/language therapists, the Board resorted to contracting directly with Kaleidoscope, an outside, private contractor, in order to supplement the services of remaining MOESC-contracted private providers and the newly-recalled tenured employees, a plan much akin to the one the Board utilized in McKenna. It can be argued that both the first plan, the MOESC contract, and the second plan, the direct contracting with outside speech/language contractors, involved the Board in unlawful actions. If that is the case, it can then be argued that the Board, having the legal obligation to adequately provide the therapeutic services, had to reinstate

the abolished positions, or at least some of them, in order to lawfully service its students. (It may be that the Board could find another, legally secure plan that did not necessitate reinstitution of abolished positions, but that is purely speculative). And, as the tenured petitioners had the legal right under N.J.S.A. 18A:28-12 to be placed on a preferential rehiring list, the Board would then have been obligated to offer some, or all, of the petitioners those reinstated positions.

The Board contends that it is entitled to summary decision simply due to the essentially undisputed existence of a large economic problem which underlay the decision to RIF these employees, a reduction thus supported by N.J.S.A. 18A:28-9. Indeed, if the arrangement with the MOESC arrangement is deemed lawful, then, in absence of any meaningful challenge to the existence of a legitimate economic motivation, summary decision would result in favor of the Board, at least regarding the initial decision to RIF. The decision to resort to its own contracting with the private contractor, Kaleidoscope, to fill the position vacated by the resigning MOESC contract therapist may, however, present a separate problem.

The authority of a school board to manage its staff and to reduce staff in the face of economic necessity is well-understood. Impey v. Board of Education, 142 N.J. 388 (1995); In re Maywood Board of Education, 168 N.J. Super. 45, 55 (App. Div. 1979). Here, of course, unlike with other discretionary services that the Board offers to its students, even if the economics of a reduction of these therapist positions could play a positive part in meeting the District's economic problems, the services they provided had to continue. As such, while the overall existence of an economic motivation for the significant reductions-in-staff the Board instituted is undisputed, the legality of the means employed by the Board to continue to provide these mandatory services is clearly in dispute.

Thus, if the petitioners establish that the Board's arrangements for continued therapeutic services after the RIF were and continue to be unlawful, in whole or in part, summary decision establishing that the Board improperly riffed these employees would lie. That would lead to a determination that the Board had to reestablish on its rolls the

riffed positions, and at least some, if not all, of the tenured employees would be entitled to restoration. Alternatively, if the Board's initial arrangement with the ESC was lawful, given its failure to adequately cover the District's needs through that arrangement, once the Board was aware of this shortfall and itself resorted to direct private contracting, in the absence of another lawful means of covering the deficit in services, the Board would have been required to reestablish sufficient positions to cover the deficit, and to offer the positions to these tenured petitioners in the respective specialties and in the order of their seniority.

Discussion

A motion for summary decision can only be granted where the affidavits, certifications, and other evidential materials produced by the parties presenting and opposing the motions demonstrate that there are no genuine disputes of material facts needed to allow the resolution of the legal issues pertinent to the case. The proofs must be considered in light of the applicable legal standards and burdens of proof and with the opponent of the motion given the benefit of all reasonable inferences arising from the evidence. Brill v. Guardian Life Ins. Co. Of America, 142 N.J. 520, 540 (1995). Here, each party believes that it is entitled to summary decision.

The petition filed in July 2016 challenged the legality of the Board's RIF of fifteen therapists. It sought a determination that the Board's actions to provide mandatory services previously performed by these therapists involved an illegal use of private contractors in the District's schools, illegal despite the Board's use of the MOESC arrangement as the means to secure these private providers. No amended petition has been filed since July 2016.

Fundamentally, the petitioners argue that the Board's arrangement with the MOESC was, as a matter of law, illegal, as it violated state statute and regulation. On the other hand, the Board contends it acted legally, employing a strategy that was well within the authority it and the MOESC each had under the law. With regard to the RIF itself and

the Board's arrangement with the MOESC, I **FIND** that the facts concerning the existence of a serious budget gap for the Board, of the RIF, and of the arrangement with the MOESC, are not in dispute. While the petition filed in July did not of course address anything that occurred subsequent to its filing, I also **FIND** that to the extent relevant to the determination of the legal issues cognizable here, the subsequent determination by the Board that additional resources were necessary to meet the need for speech/language services, the actions taken in October 2016 to recall three riffed employees and later, to replace one speech/language therapist through a contract with Kaleidoscope are not in issue.

Faced as it was with a significant financial dilemma, the Board might have first thought that it could abolish positions held by tenured and non-tenured personnel and directly contract for less costly private contractors as replacements. However, as it at least initially concedes,[4] it could not directly contract for outside personnel to perform speech/language therapy services, as N.J.A.C. 6A:14-5.1(c) 1.v. clearly prohibits public school districts from such contracting with private contractors for such services, with a caveat that such is prohibited "unless the public school district is unable to hire sufficient staff to provide the service." Presumably aware of this clear regulatory prohibition against its own ability to enter into such contracts, and apparently not of a mind in the spring of 2016 to contend that if push came to shove it could not find a means to hire sufficient numbers of speech therapists and thus could as of that time directly contracted with outside vendors, the Board instead attempted to achieve replacement of the riffed speech/ language therapists' mandatory services through the vehicle of an entity that did have the general legal authority to contract with private vendors. It cannot be disputed that on its face, N.J.S.A. 18A:6-63 b. provides such authority to the MOESC, since "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." While, as noted in Attorney General's Formal Opinion No. 1-1981,

[4]As will be noted, while this concession seems to relate at least to the Board's understanding of its choices in the spring of 2016 when it needed to furnish services provided by the newly-riffed therapists, at least at oral argument, it seems to be claiming that it could contract directly for such private services once its attempt to fully furnish necessary services through the vehicle of the MOESC proved inadequate.

initially this statute did not authorize such contracting with "private agencies", since the issuance of that opinion the statute has been amended and now provides ESCs with such authority. Thus, the Board argues its initial attempt to provide these services involved no breach of the limits of its own authority and a wholly legitimate process that vitiates any concern arising under the McKenna rationale. The statute's clear language authorizes the ESC to contract with both school districts and with private agencies, and the direct language of the statute must govern. As such, it is entitled to summary decision and the petitioners' motion should therefore be denied and their petition dismissed. However, the question arises as to whether the local Board could legally use the ESCs' acknowledged statutory contracting authority to obtain private contractors' services in its district schools for a specific set of mandated therapy services that it could not, in most instances, itself contract for under equally clear and unambiguous language in N.J.A.C. 6A:14-5.1(c) 1.v.

Notably, the second sentence of N.J.S.A. 18A:63 b. provides a limitation on the ESC's authority and a caution that, despite the clear general authorizing language, that authority must be understood and implemented in conformity with other provisions of law, including non-statutory provisions in the form of State Board rules and regulations. It cautions that "These contractual arrangements [that is, those authorized by the subpart's first sentence] 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." And N.J.A.C. 6A:14-5.1(c) 1.v. is a "rule and regulation of the State Board of Education." The question then is why would it be that, with only a limited exception, a local district that cannot obtain speech/language specialist services through private agencies to provide these services in the district's schools by its own contracting authority should be able to do so through the more general authority granted to the ESC. And, in addition to this basic question of statutory authority, the Board concedes, with a caveat explained below, that, even if the law would allow its action, it did not obtain approval from the county superintendent for the arrangement proposed by the contract.[5]

[5] The Board notes that State Monitor Richens was clearly aware of both the ESC arrangement and the subsequent direct Board private contract arrangement to supplement the inadequate resources produced by the ESC contract. Richens acknowledges this in his Certification. He never specifically says that he approved these, and the Board may be understood to see his lack of any stated objection as approval. The

It must be assumed that the State Board had reasons for generally prohibiting such private contractor arrangements for speech/language services for public school students, and in the absence of any indication in the amendment to the ESC's authority that specifically addresses such a defined area, the State Board's rule must be given precedence over the more general authority, as the means to achieve conformity between these legal standards. As such, I **CONCLUDE** that unless the Board could demonstrate its inability to hire "sufficient staff," that the arrangement with the MOESC was an invalid means for the Trenton Board to provide the services of the speech/language therapists for its students. However, as for the provision of occupational and physical therapy, it must be noted that the only limitation stated in N.J.A.C. 6A:14-5.1(c)iii with regard to the ability of a board to contract for these services relates to certain supervisory requirements and, therefore, I **CONCLUDE** that the Board's utilization of the MOESC to arrange for the provision of these therapies after July 1, 2016, did not violate that rule and was a lawful action by the Board in conformity with its authority, as well as that of the MOESC.

As noted, the petition does not address actions subsequent to July 2016. However, those events do provide useful information concerning the context of the RIF and the MOESC arrangement. When that arrangement failed to provide adequate speech/language specialist services to meet the District's needs, even eventually after the recall of three of the riffed speech therapists, the Board implemented another scheme, involving its own direct contracting with a private provider, to supplement the services obtained through the ESC under that unlawful arrangement. Again, unless the exception was established, that arrangement was also invalid. Thus, the picture presented is of a Board first utilizing a potentially unlawful "end run" arrangement with the ESC, in practical violation of the specific prohibition against the provision of the District contracting

---

regulation refers to the need for approval of ESC contracting arrangements as requiring approval from the county superintendent and does not mention a state monitor. It also does not provide that the county superintendent could approve an arrangement that otherwise violated existing statutes. No power to waive otherwise applicable statutes or regulations is mentioned regarding such an approval. Neither is it suggested that the state monitor had such power. If such authority did exist, it would seem that an approval involving any such waiver would be in writing, or at the very least given in a verbal statement at a Board meeting, and would not simply be implied by a lack of any expressed disapproval.

speech/language specialist services with private contractors, and then resorting to a direct contracting arrangement that again was potentially prohibited. The Board, by its own admission, found that in order to provide what it deemed sufficient speech/language services for its students, it needed ten therapists. During the 2016-2017 school year, this number was achieved first through the use of seven MOESC contractors and three later-recalled in-district staff, and then by six MOESC contractors, three in-district recalled staff and two part-time Kaleidoscope-provided private contractors. As of July 1, 2016, there were nine riffed speech/language therapists. Three were recalled, apparently in October 2016. Clearly, given the illegal nature of the MOESC arrangement, all nine should been recalled as of July 1. Indeed, since the arrangement for their replacement was illegal, their RIF was not a valid act on the Board's part and, in the absence of a lawful means of providing the mandatory services, they could not have their positions abolished.

This said, it is recognized that there is an exception to the prohibition against a Board directly contracting for speech/language specialist services with private providers. It may not do so "unless the public-school district is unable to hire sufficient staff to provide the service." This language does not identify the possible causes of the District's inability to hire sufficient staff. It could be that after a diligent search, the District could not achieve the hiring of sufficient qualified therapists. Or, perhaps, the inability spoken of could be due to serious financial reasons. Here, the Board has not suggested that it could not identify and hire sufficient staff, as it had such personnel on board prior to the RIF. Thus, the Board's defense to why its actions did not violate the law must rest on a claim that it could not hire sufficient staff due because it did not have the money to do so.

The Board points to the general principal that its acts are presumed to be lawful, and thus its RIF, based upon economic difficulties recognized in statute as permitting reductions in staff, including of tenured employees, must be presumed lawful. However, given that the State Board regulation provides only this limited exception for direct local Board private contracting for speech/language services where the Board is "unable to hire sufficient staff to provide the service," it seems that more than a mere identification of a general budget shortfall is needed before it can be concluded that the Board is so

limited in its options that it cannot hire, or, in this scenario presumably retain, sufficient speech/language therapy staff, and can therefore rely on the exception. At oral argument, Board counsel, attempting to justify why the Board could directly contract after the failure of the ESC contract to deliver adequate speech/language staffing, raised the claim that it was "impossible" for the District to otherwise meet its needs. This presumably means that it was economically impossible "to hire sufficient staff." And certainly, the Board's undisputed evidence does establish the existence of a budget shortfall that at least at this stage can be the implied basis for a claim of such inability to "hire." But the record does not contain any evidence that seeks to demonstrate that, faced with the budget gap and the mandatory duty to deliver speech/language therapy services, the Board could not have found a means to retain these therapists. Indeed, when it saw that the staffing provided through the MOESC arrangement was insufficient, it apparently found a way to recall three of the riffed therapists. And, as noted, the union has argued that the Board could have made other choices in how to meet the budget problem without having to RIF those providing mandated related services. Thus, while the details of the dispute over the budget possibilities and choices have not been spelled out in detail, the existence of a material dispute over the necessity of the RIF of these personnel is established.

The petitioners bear the ultimate burden of establishing the illegality of the reduction in force as it affected them. While the Board's freedom to manage it staffing needs is certainly well-understood, nevertheless, since the Board's fundamental defense to the petition has been based upon the legality of its arrangement with the MOESC, without specifically acknowledging that it must or that it could meet the "inability" exception, it is fair to allow the Board to seek to demonstrate that status, if it chooses to do so. Since the Board effectively relies upon an exception to the general prohibition of its contracting for private providers, it is the Board's burden to demonstrate that inability. If it does so, the petitioners will fail to meet their ultimate burden of proof; if the Board fails to establish that its actions qualify under the exception, the petitioners will meet their burden. As such, while the petitioners' motion for summary decision establishes that without qualifying under the exception, the Board's action was illegal, if the Board can

successfully show that it was "unable to hire sufficient staff" due to its economic situation, it may yet prevail.

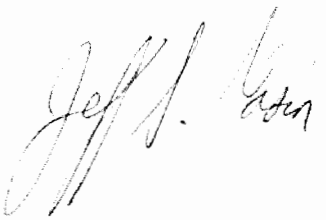
Finally, it must be noted that to the extent this order has determined certain applicable legal principles, the status of the several remaining petitioners going forward varies. The Education Association remains a viable petitioner, but the physical and occupational therapists' claims are extinguished by the determination that in the face of an undisputed financial crisis, the Board acted legally when it abolished their positions. As for the remaining non-tenured speech/language therapist, as the Board is largely unrestricted in its decision not to renew its association with the therapist, the only conceivable way in which Ms. Caruso might have any recourse against the Board would be if the Board were to fail to establish that it could not obtain speech/language therapy services and therefore failed to prove that it was entitled to use the exception permitting it to obtain private therapist through the MOESC arrangement. Nevertheless, if it failed to prove this, in such a scenario the right to fill the necessary positions would have been available for those with tenure, and not for an untenured employee with no tenure protections. As such, Ms. Caruso has no real claim for relief.

Given these considerations, as the case moves forward, the sole remaining viable petitioner is the Education Association itself. As such, the Board is entitled to summary decision regarding the claims of the remaining individual petitioners. The contested cases of petitioners Caruso, Lockhart, Kenyon, Mitra and Fekete are **DISMISSED**. The Association's continued claim will be severed from the other remaining petitioners' claim. In respect to its claim pertaining to the Board's conduct, vis-a-vis the tenured speech/language therapists, the cross-motions for summary decision must be **DENIED.**

The parties and judge have agreed that given the legal conclusions reached, the age of the matter and the expense and time needed for further proceedings, it would be in the best interests of the parties and the most efficient means of expeditiously resolving the entire case and the legal ramifications for similar parties going forward, for this order to be reviewed at this time by the Commissioner. Therefore, this order granting partial

summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make the final decision in this matter. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF EDUCATION** ,marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



July 31, 2020
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency:

Date Mailed to Parties:

mph

EXHIBITS:

On behalf of Petitioners—Attached To Brief:

Exhibit A	Formal opinion No. 1-1981, January 14, 1981
Exhibit B	Portion of Board minutes for June 14, 2017, with attachment
Exhibit C	Monmouth-Ocean Educational Services Commission Invitation to Bid and Contract Documents

On behalf of Respondent—Attached to Brief in Support of Motion for Summary Decision:

Exhibit A	Petition of Appeal
Exhibit B	Board meeting minutes, April 25, 2016
Exhibit C	Agreement for Provision of Educational Services, dated June 28, 2016

On behalf of Respondent—Attached to Brief in Opposition to Petitioners' Motion for Summary Decision and Reply to Petitioners' Opposition to Respondent's Motion for Summary Decision:

Exhibit A	Board meeting minutes for March 21, 2016
Exhibit B	Board meeting minutes for April 25, 2016
Exhibit C	Employee Salary Report for Human Resource Year 2015-2016

For Respondent:

Exhibit 1	Certification of Lester Richens, with attachments
Exhibit 2	Letter dated February 20, 2020, from Howard M. Nirenberg, Esq., with attached list (Exhibit A)

284-20SEC
SEC Dkt No. C09-19
OAL Dkt. No. EEC 10213-19
Agency Dkt. No. 4-6/20A

New Jersey Commissioner of Education

Final Decision

James J. Lynch,

Complainant,

v.

Michael Skowronski, East Greenwich Township Board of Education, Gloucester County,

Appellant.

This matter involves an appeal of the School Ethics Commission's (Commission) May 19, 2020 decision that appellant Michael Skowronski, a member of the East Greenwich Township Board of Education (Board), violated *N.J.S.A.* 18A:12-24.1(g) of the Code of Ethics for School Board Members (Code) when he sent an email to his fellow Board members that included confidential information and, due to the use of the "reply all" function, copied a member of the public on the email. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient, credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-1.1(a).

The complaint in this matter alleged that appellant violated *N.J.S.A.* 18A:12-24.1(a) and *N.J.S.A.* 18A:12-24.1(g) when he emailed confidential information to a parent of

students in the district, who was also employed by the Board as a teacher. The parent had made a complaint against Dr. James Lynch, who was the district's superintendent. The Board president emailed the parent and the members of the Board, expressing support for Dr. Lynch. Appellant replied to the email, raising issues for his fellow Board members to consider related to the handling of the parent's complaint; appellant used the "reply all" function, such that the parent also received the email.

The Commission dismissed the allegation that appellant violated *N.J.S.A.* 18A:12-24.1(a) and transmitted the remainder of the matter to the Office of Administrative Law (OAL). Following a hearing, the Administrative Law Judge (ALJ) concluded that Dr. Lynch failed to prove that appellant violated *N.J.S.A.* 18A:12-24.1(g). In its May 19, 2020, decision, the Commission adopted the ALJ's factual findings but rejected his legal conclusions. The Commission found that Appellant violated *N.J.S.A.* 18A:12-24.1(g) and recommended a penalty of reprimand.

In his appeal and exceptions, appellant argues that the Commission erroneously concluded that the information in the email was confidential. According to appellant, neither Dr. Lynch nor the Commission identified any authority making the disclosed information confidential. Appellant contends that nothing in the email disclosed anything about the Board's discussion of the parent's complaint during executive session, and, even if it had, that information was no longer confidential because the Board had previously disclosed it to the parent, thereby waiving any privilege. Furthermore, appellant argues that the email did not contain any opinion, analysis, or even comment on the parent's complaint. Appellant notes that the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.*, and its interpreting case law hold that discussions and deliberations are open to the public unless an exception applies – there is no

blanket confidentiality. Additionally, appellant asserts that a Board member is entitled to express an opinion disagreeing with the actions of the Board. Appellant disagrees that the email constituted a personnel discussion about Dr. Lynch, and he reiterates that personnel discussions are not under a blanket rule of confidentiality. Appellant also contends that the plain language of *N.J.S.A.* 18A:12-24.1(g) requires that the disclosure "needlessly injure individuals or the schools" and that no such injury was proven.

Upon review, the Commissioner concurs with the Commission's conclusion that the appellant violated *N.J.S.A.* 18A:12-24.1(g). While appellant focuses his argument on the fact that the information contained in the email did not derive from executive session, nothing in the statute or regulation requires that the information derive from executive session in order to be confidential.[1] The plain language of the regulation provides that a violation occurs when "information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices" is disclosed. *N.J.A.C.* 6A:28-6.4(a)(7).

In analyzing the confidentiality of the information contained in appellant's email, the Commissioner finds the case law surrounding the deliberative process privilege to be instructive. The deliberative process privilege may be invoked to protect information or documents from disclosure when "the information sought is part of the process leading to formulation of an agency's policy decision" and it has the "ability to reflect or to expose the deliberative aspects of that process." *Educ. Law Ctr. v. N.J. Dep't of Educ.*, 198 *N.J.* 274, 295 (2009). Appellant's email bears all the hallmarks of deliberative material. First, it is pre-

[1] The ALJ also incorrectly focused on the issue of closed session. Specifically, the ALJ found that appellant's statement that the Board should be nervous about safety, discrimination, and harassment complaints did not reference any discussions by the Board in closed session, and thus concluded that the information was not confidential. The ALJ did not consider other ways in which that information might be confidential.

decisional. *See id.* at 286. The Board had just received an email from a parent regarding a complaint against Dr. Lynch and, other than the pleasantry of thanking the parent for her email, the Board had not yet decided how to respond. Second, appellant's email is deliberative in nature. *See id.* at 295. Appellant argues that his email did not contain any opinion, analysis, or comment other than identifying the parent's complaints, but the Commissioner does not find this argument to be persuasive. Appellant expressed concern that mishandling the complaint could put the Board and its stakeholders at risk, recommended that the Board issue a Rice notice, and opined on the Board's fiduciary responsibilities. As the Commission correctly concluded, these types of tentative thoughts, suggestions, and questions are part and parcel of the Board's overall deliberative process.

Furthermore, disclosure of such material needlessly injures the schools.[2] The deliberative process privilege is intended to benefit the public by allowing for candor in internal deliberations, which improves the decision-making process. *Id.* at 286. The exposure of the Board's decision-making process negatively impacts that process. This factor alone is sufficient to demonstrate the requisite injury. Moreover, following her receipt of the email, the parent who had filed the complaint was privy to appellant's opinion that the Board had possible legal exposure, information that could have influenced her actions moving forward – another needless injury.

The Commissioner also concurs with the Commission that a reprimand is the appropriate penalty. In *Fleres v. Zhong*, (SEC Dkt. No. C17-18, May 2, 2019), the Commission

[2] The Commission's decision indicates that *N.J.A.C.* 6A:28-6.4(a)(7) does not require proof of a specific level of injury, but also concludes that the appellant's disclosure needlessly injured Dr. Lynch. As a point of clarification, the Commissioner notes that *N.J.S.A.* 18A:12-24.1(g) does require that the disclosure needlessly injure individuals or the schools. *See also Messner v. Gray*, 2016 *N.J. Super.* Unpub. LEXIS 703, *6 (App. Div. Mar. 31, 2016). However, as the Commissioner finds a needless injury to the schools, this statutory requirement has been satisfied.

censured a Board member who deliberately disclosed confidential information about a student. Here, the disclosure was inadvertent, and there is no evidence that the parent did anything with the information she received, nor did the disclosure result in any adverse consequences to Dr. Lynch or the Board. Accordingly, a reprimand is appropriate.

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

IT IS SO ORDERED.[3]

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

Date of Decision: December 15, 2020
Date of Mailing: December 15, 2020

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

285-20

New Jersey Commissioner of Education

Final Decision

L.R. and S.R., on behalf of minor child, U.R.,

Petitioners,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

Synopsis

Petitioners contended that the Board of Education of the Village of Ridgewood (Board) improperly failed to perform a harassment, intimidation, and bullying (HIB) investigation concerning an alleged May 9, 2019 incident which allegedly targeted U.R. while she was enrolled as a student in Ridgewood schools. The petitioners filed the within appeal on March 9, 2020. The Board filed a motion for summary decision, arguing that the petition is time-barred pursuant to *N.J.A.C.* 6A:3-1.2(i), which requires petitions to be filed no later than 90 days from the date of receipt of the action that is the subject of the case.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the case is ripe for summary decision; pursuant to *N.J.S.A.* 18A:37-15b(6)(d), after an initial investigation and preliminary determination of a HIB complaint, a parent or guardian may request a hearing before a school board, which must be heard within ten days of the request; in responding to an HIB complaint, a board of education must issue a written decision affirming, rejecting, or modifying a superintendent's decision, which the parents/guardians then have ninety days to appeal to the Commissioner of Education, *N.J.S.A.* 18A:37-15b(6)(e); here, the school principal advised petitioners by letter dated June 11, 2019 that a preliminary determination had been made regarding their complaint, and that no HIB conduct was found to have taken place; petitioners never requested a hearing before the Board, and then filed their March 9, 2020 appeal with the Commissioner based solely upon the principal's preliminary determination; the petition was filed almost nine months after that determination, and approximately six months after the period to appeal that determination had expired under *N.J.A.C.* 6A:3-1.3(i). The ALJ concluded that the petition was time-barred; accordingly, summary decision was granted in favor of the Board.

Upon review, the Commissioner concurred with the ALJ's determinations and adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

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

285-20

OAL Dkt. No. EDU 05502-20
Agency Dkt. No. 71-3/20

New Jersey Commissioner of Education

Final Decision

L.R. and S.R., on behalf of minor child, U.R.,

Petitioners,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

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

Upon review, the Commissioner concurs with the ALJ that the petition is time-barred pursuant to *N.J.A.C.* 6A:3-1.2(i), which requires petitions to be filed no later than 90 days from the date of receipt of the action that is the subject of the case.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

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

Date of Decision: December 15, 2020
Date of Mailing: December 15, 2020

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

289-20

New Jersey Commissioner of Education

Final Decision

Alicia Carsdale, Daniel Lee, Annemarie Mlinar, Christian Gonzalez, Valerie Rodriguez, Aaron Thayer, Karen Indyk, Peter Stanton, Mark Eastburn, Shannon Koch, Nancy Abascal, Johanna Hunsbedt, Paidge Hinton-Mason, Emily Spera, Kristin Hill, Amy Borgia, and the Princeton Regional Educational Association,

Petitioners,

v.

Board of Education of the Township of Princeton, Mercer County,

Respondent.

Synopsis

Petitioners, full-time tenured teachers, appealed the determination of the respondent Board to cease offering them the option to work an additional sixth teaching period each day in lieu of their scheduled duty period for the 2019-20 school year, they had done in some previous years. By this action, petitioners no longer received additional pensionable remuneration which was paid to them during the 2018-19 and previous school years in exchange for accepting the voluntary additional teaching period assignment. Petitioners asserted that this decision violated their tenure rights as it effectively resulted in an impermissible reduction in their compensation. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue in this case and the matter is ripe for summary decision; several petitioners had not worked the extra teaching assignment for the statutorily-defined minimum period of time to be eligible for tenure in that position; although the remaining petitioners had worked the required number of years to meet the statutory requirement, their claims were undermined by the undisputed fact that the extra teaching assignment is subject to the identified need of the district; the extra teaching assignments were temporary and conditional, and therefore, could not be used as the basis for tenured compensation; and the Board's decision to reduce the number of teaching hours based on need was in the nature of a reduction in force (RIF), which is within the discretion of the board. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioners' cross motion, and dismissed the petition.

Upon review, the Commissioner rejected the ALJ's conclusion that petitioners could not earn tenure in the sixth period teaching position, finding, *inter alia*, that: there is a clear statutory mandate that a certificated employee serving in a position for which a certificate is required, for the requisite period of time, will achieve tenure; therefore, certain named petitioners did achieve tenure in the positions at issue, while others did not; further, the ALJ correctly determined that the Board has the discretion to implement a RIF. Accordingly the Commissioner ordered that the Board: place petitioners who had earned tenure in the sixth period positions on a preferred eligibility list for rehiring in any sixth period teaching positions for which they are qualified; conduct a seniority analysis regarding all sixth period teaching positions for the 2019-2020 and 2020-2021 school years; and compensate the tenured petitioners in the amounts they would have received if it is found that non-tenured or less senior employees improperly filled those positions for which the tenured petitioners were qualified.

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

289-20

OAL Dkt. No. EDU 11500-19
Agency Dkt. No. 170-7/19

New Jersey Commissioner of Education

Final Decision

Alicia Carsdale, Daniel Lee, Annemarie Mlinar, Christian Gonzalez, Valerie Rodriguez, Aaron Thayer, Karen Indyk, Peter Stanton, Mark Eastburn, Shannon Koch, Nancy Abascal, Johanna Hunsbedt, Paidge Hinton-Mason, Emily Spera, Kristin Hill, Amy Borgia, and the Princeton Regional Educational Association,

Petitioners,

v.

Board of Education of the Township of Princeton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Board have been reviewed and considered.

Petitioners in this matter are full-time tenured high school teachers; the Princeton Regional Education Association (Association) represents the majority of Board employees, including the individual petitioners in this matter. The Collective Bargaining Agreement (CBA) between the Association and the Board provides that the daily teaching load in the high school shall not exceed five teaching periods and one duty period. However, in cases of identified need, the administration and the Association may agree to a sixth teaching period in lieu of a duty

period; the teachers who undertake the extra teaching assignment receive $10,000 in addition to their base salary, or a prorated amount if they teach a sixth period on a part-time basis. Petitioners had, in various years, agreed to teach a sixth period or a portion thereof, and received additional compensation for doing so. For the 2019-20 school year, the Board did not offer petitioners the option of teaching a sixth period. Petitioners appealed, arguing that the Board had reduced their compensation in violation of their tenure rights.

The Administrative Law Judge (ALJ) granted the Board's motion for summary decision. First, the ALJ concluded that several of the petitioners had not worked the extra teaching assignment for the statutorily-defined minimum period of time to be eligible for tenure in that position.[1] Regarding the remaining petitioners, who had worked the required number of years to meet the statutory requirement, the ALJ found that their claims were undermined by the undisputed fact that the extra teaching assignment is subject to the identified need of the district. The ALJ concluded that the extra teaching assignments were temporary and conditional, and therefore, could not be used as the basis for tenured compensation. Additionally, the ALJ found that the Board's decision to reduce the number of teaching hours based on need was in the nature of a reduction in force (RIF), which is within the discretion of the board.

In their exceptions, petitioners argue that the ALJ incorrectly found that they had received payment for extra work. According to petitioners, they received pensionable income for teaching regular classes during the regular school day, making that income compensation for purposes of the Tenure Act. Petitioners assert that teaching during a sixth period of the regular school day does not equate to a separately tenurable position; therefore, the ALJ erred in dismissing the claims of the petitioners who had not taught a sixth period for the statutorily-

[1] This conclusion applied to petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal.

mandated time period. Petitioners contend that the ALJ incorrectly found that the CBA controls the nature of the compensation, rather than the Tenure Act. Moreover, petitioners note that their tenure rights cannot be waived or bargained away. Petitioners assert that, if the analysis in the Initial Decision is extrapolated, it would permit districts to calculate all compensation on an assignment basis as long as it was codified in the CBA, eviscerating tenure law and the protections it affords. Petitioners cite to cases in which employees received stipends for work directly related to their regular duties, in which the Commissioner held that those stipends could not be eliminated because to do so would violate the employees' tenure rights. Petitioners also point to cases holding that, for purposes of the Tenure Act, compensation generally refers to annual income, rather than hourly income, such that reducing a teacher's hours implicates the Tenure Act. Petitioners argue that the Board's action should not be considered a reduction in force, because they still worked the same number of hours – a full school day. Finally, petitioners contend that if the Board's action does constitute a reduction in force, a seniority analysis would be necessary to determine who should continue teaching a sixth period.

In reply, the Board argues that petitioners are a party to the CBA, which clearly stated the parameters of the extra teaching assignment and which demonstrates that the sixth teaching period assignment was a voluntary and separate assignment and therefore not a part of the tenure position of full-time teaching staff. The Board cites to cases holding that temporary work is not covered by the Tenure Act. The Board notes that the CBA establishes the duties and work load of teaching staff during the school day – five teaching periods and one duty period – and contends that the addition of a sixth teaching period is an alteration in the terms and conditions of employment by providing for extra work beyond what is prescribed for a full-time teacher. Finally, the Board asserts its managerial prerogative to abolish positions as a reduction

in force and alleges a chilling effect on the ability of boards of education to offer extra duty work to their existing staff if the sixth teaching period position is held to be tenurable.

Upon review, the Commissioner disagrees with the ALJ's conclusion that petitioners could not obtain tenure in the sixth teaching period position. The Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, "should be liberally construed to achieve its beneficent ends." *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63, 74 (1982). The ALJ's conclusion that the sixth teaching period positions were not tenurable was based primarily on the finding that the terms of the CBA made the position temporary. However, the New Jersey Supreme Court has made clear that "the tenure provision of *N.J.S.A.* 18A:28-5 is a mandatory contractual term that may not be waived[2] or bargained away. . . Whether teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education." *Id.* at 76-77. "[A]ll teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure" unless a specific statutory exception applies. *Id.* at 81. While *N.J.S.A.* 18A:16-1.1 provides an exception for temporary employees, who are not entitled to tenure in the positions in which they are acting, "that exception is limited to employees hired to take the place of an absent teacher." *Id.* at 77; *see also Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan*, 221 *N.J.* 349, 360 (2015). There is no indication in the record that petitioners were acting as replacements for absent teachers. Accordingly, the exception provided in *N.J.S.A.* 18A:16-1.1 does not apply, and teachers who teach a sixth period are eligible for tenure in that position.

[2] The exception to this rule is when a tenured employee rejects an offer of reemployment following a RIF that abolished their position, which has been consistently held to be a waiver of tenure rights. *O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402 (1986).

This conclusion is consistent with the New Jersey Supreme Court's recent holding in *Melnyk v. Bd. of Educ. of the Delsea Reg'l High School Dist., Gloucester Cty.*, in which the Court cautioned against "the ability of labels to cloud an analysis." 241 *N.J.* 31, 33 (2020). In *Melnyk*, labeling a position as "extracurricular" and finding that the position was not tenurable based on that label resulted in "short-circuiting" the analysis and improperly ignoring the statutory criteria for obtaining tenure. *Id.* at 34. Here, the Initial Decision ended the analysis by labeling the sixth teaching period position "temporary," thereby disregarding the clear statutory mandate that a certificated employee serving in a position for which a certificate is required, for the requisite period of time, achieves tenure.

The position at issue in *Melnyk* was a teaching position in an alternative education program held after school hours. Finding that the program was "part of the delivery of constitutionally required educational services that comprise the system of a thorough and efficient education," the Court concluded that it was not comparable to traditional extracurricular activities in which teachers cannot obtain tenure unless the activities require a different instructional certificate than the one the teacher holds for their regular teaching duties. *Id.* at 43, 48. In *Melnyk*, the board of education conceded that the position would be tenure eligible if it was filled by a person who was not employed in the district's regular day program. Similarly, here, there can be no question that a teaching position during the regular school day would be tenure eligible if it were filled by a new hire, rather than by an existing teaching staff member. The Commissioner does not find the differences in the timing of the teaching duties – after school in *Melnyk*, during school here – to warrant a different outcome. Indeed, the fact that the position at issue in *Melnyk* occurred after school hours was the fact relied upon by the board of education to support its argument that the position was extracurricular and therefore not tenure-

eligible. The Court rejected that argument, and the Commissioner rejects it here as well. The critical factor in *Melnyk* was that the position was "curricular," and the sixth teaching periods fit even more clearly in that category than the after-school position in *Melnyk*. As in *Melnyk*, an "instructional and tenure-eligible position did not become extracurricular and tenure ineligible simply because petitioner already held tenure in another position." *Id.* at 34. The Court in *Melnyk* concluded that tenure eligibility "must therefore be analyzed purely on the basis of *Spiewak*'s dictates." *Id.* at 49-50. Following the Court's clear ruling in *Melnyk*, the Commissioner concludes that teaching staff members who teach a sixth period may obtain tenure in that position if they hold the required certificate and teach in that position for the requisite period of time.

The Commissioner does not find the Board's arguments regarding the potential chilling effect of this conclusion to be persuasive. Boards of education may continue to exercise their managerial prerogative to implement a RIF regarding extra teaching duty positions, provided that any teaching staff members tenured in those positions receive the procedural protections afforded to them by the Tenure Act. Therefore, boards of education will not, as the Board would have the Commissioner conclude, be required to pay teachers who had once performed extra teaching duty assignments the additional compensation paid for such positions even if those positions cease to exist. Nor, as the ALJ posited, would the Board be required to continue to pay the additional compensation to teaching staff members who accepted a sixth teaching period position for the requisite period of time and then later declined to continue in the position. The Commissioner has held, and the Court has confirmed, that the refusal of reemployment by a tenured employee constitutes a relinquishment of tenure and a waiver of rights to future employment. *O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402 (1986).

Turning to the analysis set forth by the Court in *Spiewak* and *Melnyk*, the Commissioner concurs with the ALJ's dismissal of the claims of those petitioners who did not serve in the sixth teaching period position for the requisite period of time pursuant to *N.J.S.A.* 18A:28-5(a)(1)-(3). The Court in *Melnyk* made clear that additional instructional duties are separately tenurable, and the Commissioner finds no reason to treat the sixth teaching period positions differently than the after-school position in *Melnyk*. Both positions involved teachers performing extra teaching duties – beyond their core responsibilities – for extra compensation. Because the sixth teaching period position is separately tenurable, petitioners must serve in that position for the statutorily-mandated time period to obtain tenure. Petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal did not meet this requirement.

As to the remaining petitioners, the Commissioner concurs with the ALJ that the Board had the discretion to implement a RIF. Pursuant to *N.J.S.A.* 18A:28-9, the Board may abolish positions for reasons of economy, reduction in the number of pupils, change in organization of the district, or for other good cause. However, following a RIF, employees must be placed on a preferred eligible list in order of seniority for reemployment whenever a vacancy occurs. *N.J.S.A.* 18A:28-12. The record is not clear whether the positions held by petitioners Carsdale, Lee, Thayer, Indyk, Koch, and Mlinar were completely abolished or whether they have been filled by non-tenured or less senior employees.

Accordingly, as to petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal, the Initial Decision of the OAL, as modified herein, is adopted as the final decision and their claims are hereby dismissed. The Board is ordered to place petitioners Carsdale, Lee, Thayer, Indyk, Koch, and Mlinar (the tenured

petitioners) on a preferred eligibility list for rehiring in any sixth teaching period positions for which they are qualified. The Board is further ordered to conduct a seniority analysis regarding all sixth period teaching positions for the 2019-2020 and 2020-2021 school years. If non-tenured employees, or employees with less seniority than the tenured petitioners, improperly filled sixth teaching period positions for which the tenured petitioners were qualified, the Board is directed to compensate the tenured petitioners in the amounts they would have received if they had filled the positions.

IT IS SO ORDERED.[3]

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

Date of Decision: December 21, 2020
Date of Mailing: December 24, 2020

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 11500-19
AGENCY DKT. NO. 170-7/19

ALICIA CARSDALE, DANIEL LEE, ANNEMARIE MLINAR, CHRISTIAN GONZALEZ, VALERIE RODRIGUEZ, AARON THAYER, KAREN INDYK, PETER STANTON, MARK EASTBURN, SHANNON KOCH, NANCY ABASCAL, JOHANNA HUNSBEDT, PAIGE HINTON MASON, EMILY SPERA, KRISTIN HILL, AMY BORGIA, AND THE PRINCETON REGIONAL EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PRINCETON, MERCER COUNTY,

Respondent.

Edward A. Cridge, Esq., for Petitioners (Mellk O'Neill, attorneys)

Brett E. J. Gorman, Esq., for Respondent (Parker McCay, P.A., attorneys)

Record Closed: October 16, 2020 Decided: November 4, 2020

BEFORE **DAVID M. FRITCH,** ALJ:

STATEMENT OF THE CASE

Petitioners, full-time tenured teachers, appeal the determination of their employer, Respondent, Princeton Public School Board of Education ("Board"), to not continue to offer Petitioners the option to work an additional sixth teaching period per day in lieu of their otherwise scheduled daily duty period for the 2019-20 school year in their annual contracts. In doing so, Petitioners no longer received the additional pensionable remuneration which was previously paid to them during the 2018-19 school year in exchange for accepting this voluntary additional teaching period assignment. Petitioners challenge this decision as violative of their tenure rights as an impermissible reduction in their compensation.

PROCEDURAL HISTORY

On July 16, 2020, Petitioners, through counsel, filed a verified petition with the Commissioner of Education seeking to enjoin the Board from not including the additional optional assignment and associated compensation in Petitioners' 2019-20 contracts. The matter was transmitted to the Office of Administrative Law ("OAL") as a contested matter in accordance with N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on August 19, 2019. On May 14, 2020, the undersigned held a telephone status conference with the parties wherein the parties indicated that they both wished to file cross-motions for summary decision and a briefing schedule was established with the agreement of the parties. Consistent with this briefing schedule, Respondent filed its motion for summary decision on July 1, 2020. On July 9, 2020, Petitioners filed their cross-motion for summary decision and their response to Respondent's motion. Respondent filed an answering brief in response to Petitioners' cross-motion and in further support of its motion on July 31, 2020. Oral argument was held via telephone conference on September 3, 2020. The record remained open to allow the parties to

amend the factual record with respect to the school year, or years, that Petitioners received the additional assignment and associated remuneration in question beyond the 2018-19 school year. Following receipt of this additional factual information in a joint statement of supplemental facts on October 16, 2020, the record on the cross-motions closed.

STATEMENT OF FACTS

Accompanying Petitioners' motion was a joint stipulation of facts executed by counsel for both parties. These stipulated facts were further augmented by the parties' filing of a supplemental joint stipulation of facts following oral argument on the motions. Accordingly, I **FIND** the following **FACTS** have been stipulated by the parties and are not contested:

1. Petitioners are certificated teaching staff members employed by the Board.

2. The Princeton Regional Education Association (Association), is the majority representative for certain employees of the Board and is the representative of the individual Petitioners in this matter.

3. The Association and the Board are parties to a collective bargaining agreement (CBA). Paragraph 8(B)(1) of that agreement provides:

> The daily teaching load in the high school shall not exceed five (5) hours per day of pupil contact, consisting of five (5) teaching periods and one (1) duty period. In case of identified need, the administration and the Association shall mutually agree to an assigned sixth teaching period in lieu of a duty period. Teachers assigned to a sixth period five days a week for the school year shall receive $10,000.00 in pensionable salary added to their base salary for that year or portion thereof. Teachers shall be offered the option of a sixth period with the right to decline. A refusal to accept a sixth period shall not result in a reduction of contract time. There shall be a limit of three teachers within a department teaching sixth periods. The high school day shall consist of seven (7) hours and one (1) minute.
>
> [Pet. Br. at Ex. 1.]

4. The Board has referenced paragraph 8(B)(1) of the CBA in assigning staff to a sixth period. (Pet. Br. at Ex. 2 and 3.)

5. Previously, teachers have received prorated remuneration for the sixth period coverage under the terms of the CBA, ¶ 8(B)(1), when they taught a sixth period on a less-than-full-time basis—i.e., teaching a sixth period every other day, or half-time. In such cases, the teacher would receive a prorated portion of the $10,000 provided for in the CBA, ¶ 8(B)(1).

6. Teachers who do not teach at the high school have also received additional remuneration based on the performance of additional teaching duties during the regular school day.

7. In the past, when Association members (teachers) were teaching a sixth period, full-time, this would be referred to in Board documents as a "0.2" or "1.2"—i.e., the teacher was handling 120 percent of their regular teaching load. Similarly, when a teacher was teaching a sixth period on a less-than-full-time basis, it would be referred to as a "0.1" or "1.1", i.e., the teacher was handling 110 percent of their regular teaching load.

8. In the past, where Association members (teachers) were working a "1.2" or "1.1" schedule during a certain school year have not been assigned that additional teaching duty during a subsequent school year, their overall remuneration was reduced in that subsequent school year to reflect the absence of the additional remuneration previously received for teaching that sixth teaching period. (See, e.g., Pet. Br. at Ex. 3.)

9. Prior to the commencement of the present matter, the Association has not challenged reductions in overall remuneration based upon a teacher's assignment, and subsequent non-assignment, to a "1.2" or "1.1" schedule.

10. The additional duties performed by Petitioners as reflected in a "1.1" or "1.2" contract designation are regular teaching duties performed during regular school hours.

11. Petitioner Alicia Carsdale's employment contract for the 2018-19 school year (Pet. Br. at Ex. A1) listed her status as "1.1," and her base salary as $79,809.

a. The additional "0.1" reflected Carsdale's performance of additional teaching duties during the school day.

b. Carsdale received the indicated base salary during the 2018-19 school year.

c. Carsdale also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 1.)

d. For the 2019-20 school year, Carsdale's employment contract listed her status as "1" and her base salary as $75,187. (Pet. Br. at Ex. A2.) Carsdale received this indicated base salary during the 2019-20 school year.

12. Petitioner Daniel Lee's employment contract for the 2018-19 school year (Pet. Br. at Ex. B1) listed his status as "1.1," and his base salary as $67,139.

a. The additional "0.1" reflected Lee's performance of additional teaching duties during the school day.

b. Lee received the indicated base salary during the 2018-19 school year.

c. Lee also performed these additional teaching duties and received additional remuneration for these additional duties during the 2015-16, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 2.)

d. For the 2019-20 school year, Lee's employment contract listed his status as "1" and his base salary as $63,130. (Pet. Br. at Ex. B2.) Lee received this indicated base salary during the 2019-20 school year.

13. Petitioner Christian Gonzalez's employment contract for the 2018-19 school year (Pet. Br. at Ex. C1) listed his status as "1.2," and his base salary as $73,090.

a. The additional "0.2" reflected Gonzalez's performance of additional teaching duties during the school day.

b. Gonzalez received the indicated base salary during the 2018-19 school year.

c. Gonzalez did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 3.)

d. For the 2019-20 school year, Gonzalez's employment contract listed his status as "1" and his base salary as $65,380. (Pet. Br. at Ex. C2.) Gonzalez received this indicated base salary during the 2019-20 school year.

14. Petitioner Aaron Thayer's employment contract for the 2018-19 school year (Pet. Br. at Ex. D1) listed his status as "1.2," and his base salary as $89,285.

a. The additional "0.2" reflected Thayer's performance of additional teaching duties during the school day.

b. Thayer received the indicated base salary during the 2018-19 school year.

c. Thayer also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 4.)

d. For the 2019-20 school year, Thayer's employment contract listed his status as "1" and his base salary as $82,639. (Pet. Br. at Ex. D2.) Thayer received this indicated base salary during the 2019-20 school year.

15. Petitioner Karen Indyk's employment contract for the 2018-19 school year (Pet. Br. at Ex. E1) listed her status as "1.1," and her base salary as $103,180.

a. The additional "0.1" reflected Indyk's performance of additional teaching duties during the school day.

b. Indyk received the indicated base salary during the 2018-19 school year.

c. Indyk also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 5.)

d. For the 2019-20 school year, Indyk's employment contract listed her status as "1" and her base salary as $94,550. (Pet. Br. at Ex. E2.) Indyk received this indicated base salary during the 2019-20 school year.

16. Petitioner Peter Stanton's employment contract for the 2018-19 school year (Pet. Br. at Ex. F1) listed his status as "1.2," and his base salary as $93,075.

a. The additional "0.2" reflected Stanton's performance of additional teaching duties during the school day.

b. Stanton received the indicated base salary during the 2018-19 school year.

c. Stanton did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 6.)

d. For the 2019-20 school year, Stanton's employment contract listed his status as "1" and his base salary as $86,730. (Pet. Br. at Ex. F2.) Stanton received this indicated base salary during the 2019-20 school year.

17. Petitioner Mark Eastburn's employment contract for the 2018-19 school year (Pet. Br. at Ex. G1) listed his status as "1.2," and his base salary as $109,822.

a. The additional "0.2" reflected Eastburn's performance of additional teaching duties during the school day.

b. Eastburn received the indicated base salary during the 2018-19 school year.

c. Eastburn did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17 school years. (See Joint Supp. Statement of Facts at ¶ 7.)

d. For the 2019-20 school year, Eastburn's employment contract listed his status as "1" and his base salary as $102,298. (Pet. Br. at Ex. G2.) Eastburn received this indicated base salary during the 2019-20 school year.

18. Petitioner Johanna Hunsbedt's employment contract for the 2018-19 school year (Pet. Br. at Ex. H1) listed her status as "1.2," and her base salary as $75,345.

a. The additional "0.2" reflected Hunsbedt's performance of additional teaching duties during the school day.

b. Hunsbedt received the indicated base salary during the 2018-19 school year.

c. Hunsbedt did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, or 2016-17 school years. (See Joint Supp. Statement of Facts at ¶ 8.) Hunsbedt did perform these additional teaching duties and receive additional remuneration for these additional duties during the 2017-18 school year. (Ibid.)

d. For the 2019-20 school year, Hunsbedt's employment contract listed her status as "1" and her base salary as $67,830. (Pet. Br. at Ex. H2.) Hunsbedt received this indicated base salary during the 2019-20 school year.

19. Petitioner Emily Spera's employment contract for the 2018-19 school year (Pet. Br. at Ex. I1) listed her status as "1.1," and her base salary as $63,839.

a. The additional "0.1" reflected Spera's performance of additional teaching duties during the school day.

b. Spera received the indicated base salary during the 2018-19 school year.

c. Spera did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 9.)

d. For the 2019-20 school year, Spera's employment contract listed her status as "1" and her base salary as $58,800. (Pet. Br. at Ex. I2.) Spera received this indicated base salary during the 2019-20 school year.

20. Petitioner Kristin Hill's employment contract for the 2018-19 school year (Pet. Br. at Ex. J1) listed her status as "1.1," and her base salary as $64,939.

a. The additional "0.1" reflected Hill's performance of additional teaching duties during the school day.

b. Hill received the indicated base salary during the 2018-19 school year.

c. Hill did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 10.)

d. For the 2019-20 school year, Hill's employment contract listed her status as "1" and her base salary as $59,950. (Pet. Br. at Ex. J2.) Hill received this indicated base salary during the 2019-20 school year.

21. Petitioner Paige Hinton-Mason's employment contract for the 2018-19 school year (Pet. Br. at Ex. K1) listed her status as "1.2," and her base salary as $117,870.

a. The additional "0.2" reflected Hinton-Mason's performance of additional teaching duties during the school day.

b. Hinton-Mason received the indicated base salary during the 2018-19 school year.

c. Hinton-Mason did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 11.)

d. For the 2019-20 school year, Hinton-Mason's employment contract listed her status as "1" and her base salary as $108,733. (Pet. Br. at Ex. K2.) Hinton-Mason received this indicated base salary during the 2019-20 school year.

22. Petitioner Shannon Koch's employment contract for the 2018-19 school year (Pet. Br. at Ex. L1) listed her status as "1.2," and her base salary as $119,786.

a. The additional "0.2" reflected Koch's performance of additional athletic training duties during her regular work hours.

b. Koch received the indicated base salary during the 2018-19 school year.

c. Koch also performed these additional teaching duties and received additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 12.)

d. For the 2019-20 school year, Koch's employment contract listed her status as "1" and her base salary as $102,298. (Pet. Br. at Ex. L2.) Koch received this indicated base salary during the 2019-20 school year.

23. Petitioner Valerie Rodriguez's employment contract for the 2018-19 school year (Pet. Br. at Ex. M1) listed her status as "1.2," and her base salary as $75,345.

a. The additional "0.2" reflected Rodriguez's performance of additional teaching duties during the school day.

b. Rodriguez received the indicated base salary during the 2018-19 school year.

c. Rodriguez did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 13.)

d. For the 2019-20 school year, Rodriguez's employment contract listed her status as "1" and her base salary as $67,830. (Pet. Br. at Ex. M2.) Rodriguez received this indicated base salary during the 2019-20 school year.

e. In January 2020, as a result of Rodriguez obtaining her master's degree, her salary was increased to $73,389. (Pet. Br. at Ex. M3.)

24. Petitioner Amy Borgia's employment contract for the 2018-19 school year (Pet. Br. at Ex. N1) listed her status as "1.1," and her base salary as $75,055.

a. The additional "0.1" reflected Borgia's performance of additional teaching duties during the school day.

b. Borgia received the indicated base salary during the 2018-19 school year.

c. Borgia did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 14.)

d. For the 2019-20 school year, Borgia's employment contract listed her status as "1" and her base salary as $70,738. (Pet. Br. at Ex. N2.) Borgia received this indicated base salary during the 2019-20 school year.

25. Petitioner Annemarie Mlinar's employment contract for the 2018-19 school year (Pet. Br. at Ex. O1) listed her status as "1.1," and her base salary as $69,399.

a. The additional "0.1" reflected Mlinar's performance of additional teaching duties during the school day.

b. On or about February 2019, Mlinar received her master's degree and received an amended contract for the 2018-19 school year (Pet. Br. at Ex. O2) where her base salary was raised to $75,055, prorated.

c. Mlinar received the indicated base salary during the 2018-19 school year.

d. Mlinar also performed these additional teaching duties and received additional remuneration for these additional duties during part of the 2014-15 school year and for the entirety of the 2015-16, 2016-17, and 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 15.)

e. For the 2019-20 school year, Mlinar's employment contract listed her status as "1" and her base salary as $70,738. (Pet. Br. at Ex. O3.) Mlinar received this indicated base salary during the 2019-20 school year.

26. Petitioner Nancy Abascal's employment contract for the 2018-19 school year (Pet. Br. at Ex. P1) listed her status as "1.0," and her base salary as $87,820.

a. On or about March 2019, Abascal was reassigned to the status of "1.1" and her salary was raised to $96,602.00. (Pet. Br. at Ex. P2.)

b. The additional "0.1" reflected Abascal's performance of additional teaching duties during the school day.

c. Abascal received the indicated base salary during the 2018-19 school year.

d. Abascal did not perform these additional teaching duties or receive additional remuneration for these additional duties during the 2014-15, 2015-16, 2016-17, or 2017-18 school years. (See Joint Supp. Statement of Facts at ¶ 16.)

e. For the 2019-20 school year, Abascal received an employment contract that erroneously listed her status as "1.1." (Pet. Br. at Ex. P3.) Abascal requested a correction of this status and received a revised contract for the 2019-20

school year which listed her status as "1" and her base salary as $91,575. (Pet. Br. at Ex. P4.) Abascal received this indicated base salary during the 2019-20 school year.

LEGAL DISCUSSION

N.J.A.C. 1:1-15.5 provides that summary decision should be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to summary judgment under New Jersey Court Rule 4:46-2(c). Though not required to do so, the OAL uses the standards for summary judgment, as set forth by the New Jersey Supreme Court, as our standards for summary decision. "[S]ince there are pronounced similarities in the exercise of judicial and 'quasi-judicial' powers, . . . court fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." City of Hackensack v. Winner, 82 N.J. 1, 29 (1980). It is recognized that the OAL performs many "quasi-judicial" or adjudicative functions and that, in doing so, "[j]udicial rules of procedure and practice are transferable to [the OAL] when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications." Matter of Tenure Hearing of Onorevole, 103 N.J. 548, 554-55 (1986).

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Id. at 533. The Brill Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. Id. When determining whether a genuine issue of material fact exists, "the court should be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. Id. This weighing differs from the weighing the judge would perform after a hearing in that "on a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." Id. at 536.

"When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). "If an adverse party does not so respond, a summary decision, if appropriate, shall be entered." Id. I **CONCLUDE** that, under the Brill standards, this matter is appropriate for summary disposition. The undisputed facts, as set forth by the parties in their cross-motions and joint submissions of stipulated facts, are further supported by tangible, undisputed evidence. Accordingly, as there are no disputed material facts, the matter is ripe to be determined for summary decision.

The purpose of teaching-staff tenure laws is to "aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). Thus, tenured teaching staff members "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:6-10.

Petitioners' claim is based on N.J.S.A. 18A:6-10, which holds that persons with tenure in the public school system cannot be dismissed or reduced in compensation "during good behavior and efficiency in the public school system of the state." (See Pet. Br. at 3-4.) Compensation is defined in N.J.S.A. 18A:6-10. (Id. at 4.) Petitioners argue that the additional remuneration they received in the 2018-19 school year for teaching a sixth teaching period is "remuneration in exchange for the performance of [their] core duty," namely teaching during the school day, and is "compensation" for the purposes of N.J.S.A. 18A:6-10. (Id. at 4.) As such, Petitioners contend, "the Board did not have the authority to reduce the Petitioner[s'] remuneration—in fact N.J.S.A. 18A:6-10 compensation" and they should be entitled to "have their salaries retroactively restored to their 2018-19 levels, together with all lawful interest, benefits, and emoluments as may otherwise be necessary to make them whole." (Id. at 7.)

Respondent avers that the remuneration for this additional teaching period was payment for an "extra duty assignment" which paid "additional compensation added to [Petitioners'] base salary on the basis of providing additional work beyond which is prescribed in the CBA for a full-time teaching staff member." (Resp. Br. at 6.) The offer of this additional sixth teaching period is "subject to an identified need" of the Board and the additional teaching period is offered with "a right to decline" which gives Petitioners "the opportunity to voluntarily accept or decline this extra duty and corresponding additional compensation." (Id. at 6.) Accordingly, Respondent contends that:

> None of the Petitioners named in this matter have been reduced in compensation from their base salary. Rather, Petitioners were offered the extra duty assignment at the time there was an identified need, and subsequently returned to their normal full-time duties, at their contractual full-time base salary when that need no longer existed, pursuant to the applicable provision of the CBA.
>
> [Id. at 6–7.]

Respondent argues that, under the undisputed facts of this matter, "Petitioners were never subject to a decrease in their base salary under the CBA, only a reduction of the extra period (and the corresponding compensation) that was no longer necessary or needed." (Id. at 7.)

The question, therefore, is whether Petitioners have tenure rights with respect to their otherwise voluntary assignment to teach a sixth daily teaching period. As Petitioners note (Pet. Br. at 4), "compensation" is defined in N.J.S.A. 18A:66-2, which defines compensation as:

> [T]he contracted salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the members retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year.

N.J.S.A. 18A:66-2(d)(1).

A tenured teaching staff member's contractual salary is the primary component of their "compensation," which, absent a reduction in force or tenure charges, cannot be reduced. N.J.S.A. 18A:6-10. See also Allen, et. al. v. Bd. of Educ. of the Twp. of Clark, Union County, EDU 1445-02, Final Decision, (April 30, 2004) http://lawlibrary.rutgers.edu/oal/search.html. In addition to salary, however, there are other payments which also constitute "compensation" such as longevity increments which increase a teacher's salary in consideration of long-term service and payments for additional education. Id. (citing Middletown Twp. Bd. of Educ., P.E.R.C. No. 99-72 (1998); Green Twp. Bd. of Educ., P.E.R.C. No. 99-73 (1999).) See also Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 34 (1995). This incremental remuneration, like salary, once awarded becomes a component of the teacher's tenure-protected salary. Id.

In contrast, however, other negotiable benefits paid to teachers are otherwise excluded from the scope of "compensation" for the purposes of tenure protection. Id. These may include early retirement inducement payments (Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 161 N.J. Super. 67 (App. Div. 1978), aff'd 79 N.J. 574 (1979)), lump-sum end of year payments to a department chair at the end of a school year (Bishop v. Bd. of Trustees, 4 N.J.A.R. 179 (1980)), "customary" overtime (McLean v. Glen Ridge Bd. of Educ., 1977 S.L.D. 311), and payments for extra-curricular assignments (Dignan v. Bd. of Educ. of the Rumson-Fair Haven Reg'l High School, 71 S.L.D. 336). The question, therefore, is whether Petitioners possess tenure rights with respect to their agreeing to work an additional daily teaching period in lieu of their daily "duty period" and the additional remuneration paid to them for that assignment.

Petitioners argue that the additional remuneration they received was not "for services connected to extracurricular activities such as coaching sports or the school yearbook. They received this remuneration for performing additional teaching duties, during the regular school day" and it was "incorporated into Petitioners' normal, pensionable salaries." (Resp. Br. at 7.) In support of their position, Petitioners cite to Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 241 N.J. 31 (2020). (Resp.

Br. at 6.) The teacher in Melnyk was assigned to staff a teaching position in an alternative education program designed to assist the employing school district meet their constitutionally-mandated educational services requirements. Melnyk, 241 N.J. at 43. The teacher in Melnyk provided teaching services in this program in addition to their regular teaching assignment and received additional hourly compensation for their services in this program for numerous years until the school district assigned another, non-tenured teacher to fulfil these duties for the upcoming school year. Id. at 37.

The Melnyk Court held that, because the teacher had worked in their alternative instructional position for the requisite period of time and held the required instructional certificate to teach in that position, she was entitled to tenure protections against removal or reduction in compensation associated with that position. Id. at 50. The Melnyk Court concluded that, because the teacher had acquired tenure rights to her position with the alternate education program outside of her separate tenure rights in her capacity in the school's regular day program, the teacher's position in this alternate education program was "separately tenure eligible and her compensation for it could not be reduced without compliance with the procedural protections of the Tenure Act." Ibid.

Petitioners' argument under Melnyk is that they acquired tenure in this assignment to teaching an additional period in lieu of their duty period each day and their additional compensation for this assignment is now part of their tenured compensation. Among the requirements for tenure in a position is that the teacher has "served the requisite period of time" in a position to obtain tenure. Spiewak v. Summit Board of Education, 90 N.J. 63, 74 (1982). Pursuant to N.J.S.A. 18A:28-5a, a teacher must serve in an employed position for "[t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year" or "the equivalent of more than three academic years within a period of four consecutive academic years" to obtain tenure in that position.

On the record initially presented in the parties' cross-motions, it was clear only that Petitioners agreed to accept the additional sixth teaching period during the 2018-19 school year but were not asked to continue in this additional sixth teaching period for the 2019-20 school year. Following oral argument, the parties were given the opportunity to

amend the factual record to determine if any of the named Petitioners were offered this additional teaching period and accepted that assignment and extra remuneration in any other school year. Based on the information provided in the parties' joint supplemental statement of facts, Petitioners Gonzalez (Joint Supp. Statement of Facts at ¶ 3), Stanton (id. at ¶ 6), Eastburn (id. at ¶ 7), Hunsbedt (id. at ¶ 8), Spera (id. at ¶ 9), Hill (id. at ¶ 10), Hinton-Mason (id. at ¶ 11), Rodriguez (id. at ¶ 13), Borgia (id. at ¶ 14), and Abscal (id. at ¶ 16) did not work this extra teaching assignment and receive this additional remuneration for three consecutive years or more than three academic years within the period of four academic years. I **CONCLUDE**, therefore, that it is uncontested on the record presented, that Petitioners Gonzalez, Stanton, Eastburn, Hunsbedt, Spera, Hill, Hinton-Mason, Rodriguez, Borgia, and Abscal have not worked in this position of teaching for a sixth daily teaching period for the statutorily defined minimum period of time to meet this requirements of N.J.S.A. 18A:28-5a(1)–(3) to be eligible for tenure in that position. (See Resp. Br. at 3 (noting that the Petitioners did not "serve in the position for longer than the statutorily mandated 4 years" to obtain tenure in the additional duty assignment).)

While Petitioners Carsdale (Joint Supp. Statement of Facts at ¶ 1), Lee (id. at ¶ 2), Thayer (id. at ¶ 4), Indyk (id. at ¶ 5), Koch (id. at ¶ 12), and Milnar (id. at ¶ 15) have demonstrated that they have worked the extra teaching period assignment the minimum number of years to meet the requirements of N.J.S.A. 18A:28-5a(1)–(3), their tenure claims are undermined by the undisputed fact that the assignment to teach in this sixth period is subject to the identified need of the District and offered, along with the additional remuneration, to teachers with a right for the teacher to decline the additional assignment. (Pet. Br. at Ex. 1 at ¶ 8(B)(1).) Unlike the teacher in Melnyk, who was removed from an additional teaching assignment (and the associated additional remuneration) and replaced in that assignment by a non-tenured teacher (see Melnyk, 241 N.J. at 620), the Petitioners in the present matter were relieved of their additional duty, and associated additional remuneration, in their 2019-20 contracts after the District determined that this additional need for teaching that additional period "no longer existed." (Resp. Br. at 7.)

A similar issue was previously addressed by the Commissioner in the matter McLean v. Bd. of Educ. of Glen Ridge, 1977 S.L.D. 311. In the McLean matter, the petitioner, a janitor, sought compensation for overtime duties which had been

"customarily" assigned to him on the basis that the money he previously earned through customary overtime assignments was part of his statutorily protected "compensation." Id. at 312–13. The Commissioner disagreed with this argument, finding that "compensation" has been defined to "include contracted salary but to exclude an entitlement to add thereto payment for 'extra work'." Id. at 313. Relying on Reed and Hills v. Trenton Board of Education, 1938 S.L.D. 437, the Commissioner in McClean held that the tenure act was not designed to address "a temporary increase [in salary] given for extra work done" because, to do so, would mean that "any temporary payments to teachers for temporary work could not be made without incurring the liability of permanent indebtedness and school boards would be tempted to put all extra services upon teachers without any extra compensation whatsoever." Id. at 313 (quoting Reed, 1938 S.L.D. at 441). The Commissioner in McClean declined to extend tenure protection to these extra payments because doing so would remove a "necessary flexibility" from the school boards. Id. at 314.

Here, as in McClean, the additional remuneration at issue was given to Petitioners for an extra assignment which was offered in cases of "identified need" by the District and extended to the teachers "with the right to decline." (Pet. Br. at Ex. 1.) The District identified a need for this additional period in the 2018-19 school year, and Petitioners agreed to perform this additional assignment and receive the agreed-upon additional remuneration. The District did not identify the need to continue these additional assignments in the 2019-20 school year, and the opportunity to continue working this additional teaching period and receive the additional remuneration was not extended to Petitioners for the 2019-20 school year.

Petitioners contend that they are salaried employees who are not paid "by the hour" or "by the class." (Pet. Br. at 4.) Regardless of whether they are assigned to a sixth daily teaching period, they are "still working the same number of hours in the school building, during the school day." (Id.) Petitioners argue that allowing the Board to withdraw this additional teaching period, and its associated remuneration, would eviscerate tenure protections by permitting compensation of teachers to rely on an "assignment" or "piece-work" basis which Districts could use to reduce compensation by reducing a teacher's work assignments. (Id.) Petitioners assert that the remuneration

previously received for this sixth teaching period, once granted, "cannot be reduced" because that additional money paid for that period is now part of their statutorily protected "compensation." (Id. at 7.)

Petitioners' argument, however, overlooks the temporary nature of the additional work performed. As the terms of the CBA clearly delineate, this additional teaching period is a voluntary assignment that is offered by the District upon the District finding an identified need for this extra work. (Pet. Br. at Ex. 1, ¶ 8(B)(1).) This additional assignment is a departure from the contractually defined responsibilities of a teacher in the District to handle a teaching load of "five (5) hours per day of pupil contact, consisting of five (5) teaching periods and one (1) duty period." (Pet. Br. at Ex. 1.) The conversion of the sixth period from a duty period to a teaching period, and a teacher's eligibility for the additional remuneration that accompanies that conversion, has two identified prerequisites—the District must identify the need for a sixth teaching period, and the teacher must agree to accept the assignment for that sixth teaching period. (Id.) Where it is mutually agreed upon that a sixth teaching period is needed and the teacher agrees to perform that duty, the teacher receives additional remuneration which is "added to their base salary for that year or portion thereof." (Ibid.) This additional language highlighting that the additional remuneration is added to a teacher's base salary only for the year or portion of the year they work the additional teaching period highlights the temporary and conditional nature of these assignments. As the Appellate Division has noted, such temporary and conditional assignments cannot be used to form the basis of tenured compensation, holding that:

> [W]here employment is offered and accepted on a temporary basis and its temporary nature is understood by both employer and employee to be one of its essential predicates, such employment cannot then be relied on by the employee as the basis of tenure.
>
> Spiewak v. Board of Education, 180 N.J. Super. 312, 318 (App.Div. 1981).

See also Point Pleasant Beach Teachers Assoc. v. Callam, 173 N.J. Super. 11, 17 (App.Div. 1980) (denying to extend tenure to teachers hired on a temporary "as needed" basis to provide remedial aid to children).

The CBA defines the daily teaching load as "five teaching periods and one duty period." (Pet. Br. at Ex. 1, ¶ 8(B)(1).) The conversion of the duty period to an additional teaching period is an optional additional assignment of teaching duties, which the teachers may decline without reduction in their contracted time. (Ibid.) In exchange for accepting this additional teaching assignment, Petitioners were given contractually agreed upon additional remuneration. (Ibid.) N.J.S.A. 18A:66-2(d)(1) explicitly excludes from tenured compensation "additional remuneration for performing temporary or extracurricular duties beyond the regular school day." See also Reed and Hills, 1938 S.L.D. at 441 ("The prohibition against reduction of salary [in the Tenure Act] applies to a permanent scheduled salary and not to a temporary increase given for extra work done"); McLean v. Bd. of Ed. of Glen Ridge, 1977 S.L.D. 311, 314 (additional payments for voluntary overtime not covered as tenure-protected compensation). Although Petitioners contend that the additional teaching period involved providing "additional teaching duties during the regular school day" (Resp. Br. at 7), it remains factually uncontested that the addition of a sixth daily teaching period to a teacher's schedule also requires the teacher to perform additional duties such as lesson preparation, review of student assignments, and grading of exams, which occur beyond the designated teaching period and, presumably, have to be conducted on time outside the defined regular school day. It is this additional work that accompanies the acceptance of the additional daily teaching period which justifies the District offering additional remuneration to teachers who voluntarily assume this additional workload when offered by the District based on the District's identified needs.

Further supporting the conclusion that the additional remuneration received by Petitioners is not tenure-protected compensation is that it remains factually undisputed that the offering of this additional teaching period, the associated remuneration, is subject to an "identified need" by the District for this additional work (Pet. Br. at Ex. 1 at ¶ 8(B)(1)), and the District no longer has a need for this additional work. (Resp. Br. at 7.) Respondent argues that, under these circumstances, "when that need ended, so did the

extra work and corresponding compensation for the employee." (Ibid.) See also Dingan v. Bd. of Ed. of Rumson Fair-Haven Reg. High Sch., 71 S.L.D. 336, 342 ("[t]he extra compensation ceases when the extra-classroom assignment is no longer performed"); Dallolio v. Bd. of Ed. of the City of Vineland, 1965 S.L.D. 18, 22 439 ("[W]hen the extra work is no longer performed the extra compensation for that purpose can no longer be claimed"). To accept Petitioners' argument on its face that, once a teacher accepts this sixth teaching period and the associated remuneration, their tenure-protected compensation is upwardly adjusted to include the additional payments for this additional voluntary work and that upwardly adjusted salary "cannot be reduced" because the additional money paid for that period is now part of their statutorily protected "compensation" (Id. at 7) would yield bizarre results. Such an interpretation would, presumably, give a teacher who previously accepted this additional teaching period in the 2018-19 school year but exercises their contractually protected option to refuse to teach that additional period in subsequent years (Pet. Br. at Ex. 1) the right to continue collecting the additional renumeration for that extra teaching period as part of their now-tenured compensation without continuing the accompanying obligation to perform the extra duties in subsequent school years. For the reasons stated above, I **CONCLUDE**, therefore, that this additional remuneration Petitioners received in the 2018-19 and other school years for this sixth teaching period is not tenure-protected compensation within the definition of N.J.S.A. 18A:66-2(d)(1).

Also weighing against Petitioners' claim in this matter is the statutory mandate that tenure laws cannot be used to limit the right of a board of education to reduce the number of teaching staff members or abolish positions for reasons of economy. N.J.S.A. 18A:28-9. The District's determination to reduce the number of teaching periods needed and to not extend the option for the additional period to Petitioners in their 2019-20 contracts amounts to a reduction of hours and associated compensation which remains within the rights of the District under N.J.S.A. 18A:28-9 regardless of tenure provisions. As the Appellate Division noted in Klinger v. Board of Education, 190 N.J. Super. 354, 357 (1982) (internal citations omitted):

> Whether of tenured or nontenured teachers, reduction in force is entirely within the authority of the board if done for reasons

> of economy. Reduction in hours of employment is considered a reduction in force.

See also Papovich v. Bd. of Ed. of Borough of Wharton, 1975 S.L.D. 737, 745 (reduction of a teacher's position from full-time employment to three days per week constitutes "a reduction of staff"). Here, the Board made its determination that the additional teaching period was no longer needed and exercised its discretion to eliminate the option for teaching that additional period. For this reason, I further **CONCLUDE** that the Board's action in this matter constitutes a reduction in staff and cannot be limited by the application of tenure laws. N.J.S.A. 19A:28-9.

CONCLUSION

In light of the above, I **CONCLUDE** that Respondent's motion for summary decision should be **GRANTED**, and Petitioners' cross-motion for summary decision should be **DISMISSED**.

ORDER

It is therefore **ORDERED** that Respondent's July 1, 2020, motion for summary decision is hereby **GRANTED**, and Petitioners' July 9, 2020, cross-motion for summary decision is hereby **DENIED** and Petitioners' petition to enjoin the Board from not including the additional optional assignment and associated compensation in Petitioners' 2019-20 school year contracts is **DISMISSED**.

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

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

Within thirteen (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.

November 4, 2020
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/dw

290-20

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Wood-Ridge, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Bogota, Bergen County; Joseph Zarra, Interim Executive County Superintendent; and L.B., on behalf of M.B.,

Respondents.

Synopsis

Petitioner, the Board of Education of the Borough of Wood-Ridge (Wood-Ridge), appealed the determination of the respondents, the Board of Education of the Borough of Bogota (Bogota) and Joseph Zarra, Interim Executive County Superintendent (Zarra), that L.B. and her minor child are homeless, and therefore Wood-Ridge is the district responsible for providing a free public education for M.B. Wood-Ridge contended that M.B. and L.B. were domiciled in Bogota as of December 2017, making Bogota the district responsible for the cost of M.B.'s education. Bogota filed a request for reimbursement in the amount of $29,375.95 for cost of M.B.'s education.

The ALJ found, *inter alia*, that: the inquiry here is which district – Wood-Ridge or Bogota – must bear the cost of M.B.'s education pursuant to *N.J.A.C.* 6A:17-2.8; L.B. established a permanent residence in Bogota when she moved in with her sister-in-law in December 2017; L.B.'s intent to make Bogota her domicile was evidenced by her actions in withdrawing M.B. from Wood-Ridge and transferring him to Bogota schools, planning to sign the lease on the property, cleaning and painting the home, and changing her driver's license to reflect the Bogota address; however, L.B. was forced to leave the Bogota house in February 2018 because of mold in the basement, which had sickened her son; a subsequent falling out with her sister-in-law made it impossible to move back to the home; L.B. subsequently lived in hotels or with friends until February 2019, when she signed a lease in Hackettstown. The ALJ concluded that, while a homeless child may be "deemed" domiciled after living in a district for one year under *N.J.S.A.* 18A:38-1(d), L.B.'s domicile was established by her intent at the time she moved into the Bogota house. Accordingly, the ALJ reversed Zarra's homelessness determination, denied Bogota's request for reimbursement of M.B.'s education costs, and determined that Bogota would remain financially responsible for the cost of M.B.'s education until L.B. established a new domicile outside the district.

Upon review, the Commissioner found the respondents' exceptions to be without merit and concurred with the ALJ that L.B. became domiciled in Bogota when the family moved in with L.B.'s sister-in-law in December 2017 and was no longer homeless; therefore, Bogota became the district responsible for the cost of M.B.'s education in December 2017. In making her determination, the Commissioner noted, *inter alia*, that when a child's dwelling becomes fixed, regular and adequate, domicile attaches immediately. Further, homelessness determinations require a fact-specific analysis that includes the intentions of the parents or guardians. *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014 at 3, *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

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

290-20

OAL Dkt. No. EDU 16570-18
Agency Dkt. No. 207-8/18

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Wood-Ridge, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Bogota, Bergen County; Joseph Zarra, Interim Executive County Superintendent; and L.B., on behalf of minor child, M.B.,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by respondent Bogota Board of Education (Bogota) and respondent Joseph Zarra, Interim Executive County Superintendent (Zarra), pursuant to *N.J.A.C.* 1:1-18.4, and the replies thereto filed by petitioner Wood-Ridge Board of Education (Wood-Ridge).

This matter involves a homelessness determination regarding L.B. and her minor child, M.B. L.B. was domiciled in Wood-Ridge with her mother until November 2016, when the home was sold following her mother's death. Thereafter, L.B. stayed with friends and at hotels until December 2017, when she moved into her sister-in-law's Section 8 home in Bogota. L.B. and M.B. each had their own room in the four-bedroom house, and they shared a private bathroom upstairs. L.B. cleaned and painted the home's interior prior to moving in and changed

her driver's license to reflect her new address. L.B. testified that her goal was to provide stability for her son and she hoped that it would be a "permanent, semi-permanent situation" so that he could finish 8th grade and have four consecutive years of high school. (Testimony of L.B., T37-38, 45).[1] L.B.'s sister-in-law advised that she would be added to the lease in January 2018. Accordingly, L.B. signed a Student Transfer Card to remove M.B. from Wood-Ridge and enrolled him in Bogota schools.[2]

A few weeks after moving in, L.B. learned that her sister-in-law was not upfront about the lease, and that the Section 8 landlord would not add L.B. to the lease until March 2018, when it was up for renewal. However, around February 2018, M.B. became sick from mold in the basement, causing the family to vacate the home so that the problem could be remediated. Due to disagreements with her sister-in-law, L.B. never returned to the Bogota home except to retrieve her belongings. The family again lived in hotels or with friends until February 2019, when L.B. signed a lease in Hackettstown.

The issue in this matter is whether the family established a domicile when they moved into the Bogota home in December 2017, or whether they remained homeless from the time they moved out of the Wood-Ridge home in November 2016 until they became domiciled in Hackettstown. The purpose of this inquiry is to determine which district must bear the cost of M.B.'s education, pursuant to *N.J.A.C.* 6A:17-2.8. If the family was homeless the whole time, Wood-Ridge would be responsible for the cost of M.B.'s education from 2016 until the family established a domicile in Hackettstown; but, if L.B. had in fact established a domicile in Bogota,

[1] This citation refers to a transcript of a hearing held before the OAL on February 4, 2020.

[2] M.B. attended an out-of-district placement in Ridgefield while enrolled at Wood-Ridge. He continued to attend that placement while enrolled at Bogota until March 2018, when Bogota transferred him to the Windsor Learning Academy.

then Bogota would take over responsibility for the cost of M.B.'s education beginning in December 2017.

Following Bogota's request for a homelessness determination, Zarra issued a letter on July 26, 2018 finding that "the family had not established permanent residence in Bogota" because they had not resided in any town for at least one year. (Zarra letter, July 26, 2018). Accordingly, "[a]s the family has not met the one-year threshold, financial responsibility is still attached to the last district of residence, Wood-Ridge." *Id.* Wood-Ridge appealed that determination and Bogota filed a counterclaim for $29,375.95 in education costs.

Following a hearing on the merits that included the testimony of L.B., Zarra, and a representative from each district, the Administrative Law Judge (ALJ) found that L.B. established a permanent residence in Bogota when she moved in with her sister-in-law because she intended to make the house her permanent home. Specifically, the ALJ explained that L.B. transferred M.B. to Bogota's schools, intended to sign the lease, cleaned and painted the home, and changed her driver's license to reflect the Bogota address. The ALJ further noted that but for the mold and subsequent falling out with her sister-in-law, L.B. intended to provide a fixed, permanent home for her son to graduate from high school in four years. While a homeless child may be "deemed" domiciled after living in a district for one year under *N.J.S.A.* 18A:38-1(d), the ALJ found that L.B.'s domicile was established by her intent at the time she moved into the Bogota home. Accordingly, the ALJ reversed Zarra's homelessness determination, denied Bogota's request for reimbursement of M.B.'s education costs, and determined that Bogota would remain financially responsible for the cost of M.B.'s education until a new domicile is established outside the district.

In its exceptions, Bogota argues that the ALJ erred in considering L.B.'s intent. According to Bogota, the ALJ quoted an outdated version of the regulation that defines domicile for student residency – *N.J.A.C.* 6A:22-3.1(a)(1) – when he said that a student's domicile is the school district where the student's parent or guardian has a permanent home, such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it." Bogota points out that *N.J.A.C.* 6A:22-3.1(a)(1) now provides that "a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the district," without any reference to intent. Moreover, Bogota contends that the ALJ failed to address case law governing homelessness, specifically *Board of Education of the Township of Egg Harbor v. Board of Education of the Mainland Regional High School District*, EDU 6680-09, Initial Decision (October 15, 2010), *adopted by* Commissioner's Decision No. 555-10, decided December 30, 2010, which Bogota contends stands for the proposition that traditional elements of domicile do not apply to homeless families, and they instead become domiciled after one year residing in a district. Citing *Egg Harbor,* Bogota explains that homeless families have limited choices in where to live, so their "actual intentions, as opposed to their viable choices, must be reconciled"; as such, determining tuition based solely on intent is "arbitrary and unworkable." *Id.* Finally, Bogota raises a slew of minor errors it contends the ALJ made, such as typographical mistakes, that demonstrate the ALJ misunderstands the facts and law at issue. Accordingly, Bogota requests that the Commissioner reject the Initial Decision, reinstate Zarra's homelessness determination, and order Wood-Ridge to reimburse Bogota for the cost of M.B.'s education in the amount of $29,375.95.

Similarly, in his exceptions, Zarra argues that the ALJ erred in determining that M.B. was no longer homeless when the family moved to the Bogota property for a matter of

weeks. Zarra also cites *Egg Harbor*, arguing that the ALJ incorrectly relied on L.B.'s intent to make the Bogota home her permanent residence because the intent of a homeless family is not dispositive in determining homelessness. Zarra contends that when L.B. moved in with her sister-in-law, M.B. was still homeless in accordance with *N.J.A.C.* 6A:17-2.2(a)(3) because they were staying with family, and despite L.B.'s intention to remain permanently, she only stayed there a period of weeks. Zarra maintains that as L.B. did not live at the Bogota residence for a year, she was not deemed domiciled in Bogota. As such, Zarra contends that his homelessness determination was correct and the ALJ erred in finding that financial responsibility for the cost of M.B.'s education switched to Bogota.

In reply, Wood-Ridge argues that the ALJ correctly found that it does not take a year to establish a domicile, and the one-year threshold only applies when a permanent residence has not been established. Wood-Ridge further contends that intent is the decisive factor in establishing domicile and the ALJ properly found that L.B. intended to make the Bogota residence her permanent home. While Bogota and Zarra rely on *Egg Harbor*, *supra*, Wood-Ridge maintains that it was only an Initial Decision rather than a Final Agency Decision, and nevertheless was superseded by the Commissioner in *State-Operated School District of the City of Camden v. C. Ann Volk, Executive County Superintendent, et al,* Commissioner's Decision No. 106-16, decided March 18, 2016, in which the Commissioner found that the intentions of the parents are relevant in homelessness determinations. Accordingly, Wood-Ridge urges the Commissioner to adopt the Initial Decision in its entirety.

Upon review, the Commissioner concurs with the ALJ's conclusions that L.B. became domiciled in Bogota when she moved in with her sister-in-law because she intended to make it her permanent home; her actions in connection with the move further demonstrate those

intentions; and the living arrangement was fixed, regular and adequate. Accordingly, Bogota became financially responsible for the cost of M.B.'s education from December 2017 until the family establishes a new domicile outside the district.

In matters such as this, the threshold inquiry is whether the child is considered homeless. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2 (emphasis added). When a child's dwelling becomes fixed, regular and adequate, domicile attaches immediately. *Egg Harbor, supra,* Commissioner's Decision No. 555-10 at 4.

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

Once it is determined whether a child is homeless, the question becomes which district is financially responsible for the child's education. Ordinarily, a student is eligible for a free public education in a school district if he or she is domiciled within the school district. *N.J.S.A.* 18A:38-1(a); *N.J.A.C.* 6A:22-3.1(a). A student's domicile is determined by the domicile of his or her parents. *N.J.A.C.* 6A:22-3.1(a)(1). When a child becomes homeless, the school district of residence – *i.e.*, the school district in which the child resided before becoming homeless – remains responsible for the cost of the child's education, including when the child is temporarily living and attending school in another school district. *N.J.A.C.* 6A:17-2.3; *N.J.S.A.* 18A:7B-12. However, when a homeless child lives in a school district for one year or longer – and a new domicile has not been established – the child is "deemed domiciled" in that district for the purposes of determining which district is responsible for the cost of the child's education. *N.J.S.A.* 18A:38-1(d); *N.J.A.C.* 6A:17-2.3(c).

Here, the Commissioner finds that L.B. became domiciled in the Bogota home upon moving in and was therefore no longer homeless. Not only did L.B. testify that she intended to make the Bogota home a "permanent, semi-permanent situation" so that M.B. could finish 8th grade and have four consecutive years of high school, but her actions also confirmed her intent to make the home her permanent residence. She cleaned and painted the home, switched her son's school district to Bogota, and changed the address on her driver's license to reflect her new address. She also intended to be added to the lease, as her sister-in-law told her that she would be added in January 2018. Additionally, the living arrangements support a finding that the home was a fixed, regular and adequate nighttime residence. The home consisted of four bedrooms, so L.B. and M.B. each had their own bedroom and shared a private bathroom. While they were residing in the home of a family member, it was not solely out of

necessity; L.B. made the decision to move into that home as a permanent residence to provide long-term stability for her son. Accordingly, as domicile attaches immediately when a child's dwelling becomes fixed, regular and adequate, the Bogota home became M.B.'s domicile in December 2017. The unfortunate events that occurred following that time, which ultimately resulted in the family becoming homeless again, do not change the fact that they had already established a domicile in the Bogota home. As such, Bogota became responsible for the cost of M.B.'s education beginning in December 2017.

The Commissioner does not find the exceptions filed by Bogota and Zarra to be persuasive. Bogota argues that *N.J.A.C.* 6A:22-3.1(a)(1) removed the reference to intent from the regulation that defines domicile for student residency matters, which demonstrates that intent is not a relevant consideration. While *N.J.A.C.* 6A:22-3.1(a)(1) previously provided that a student's domicile is the school district where the student's parent or guardian has a permanent home, such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it," it now states that "a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the district." The Commissioner notes that when the rule was amended in 2013, the Rule Proposal explained why the word "permanent home" was changed to "domicile" and why the definition of permanent home (indicating an intent to return and no present intent of moving from) was removed. 45 *N.J.R.* 1209(a) (May 20, 2013). "Domicile is a legal term of art that encompasses the term 'permanent home' and is more appropriate[.]" *Ibid.* The Rule Adoption further explained that "[t]he definition of 'domicile' does not need to be included in the chapter as it is a term of art and is well defined in case law." 45 *N.J.R.* 2551(a) (December 16, 2013). As the term "domicile" is widely known to rely on an individual's intent, it is relevant in the student residency context as

well. Moreover, the Commissioner has previously found that the intentions of the parents are also relevant in conducting a homelessness determination. *M. O'K., supra,* at 3; *see also Volk, supra*, Commissioner's Decision No. 106-16 (remanding a homelessness matter because a "comprehensive, fact-specific examination of the family's circumstances" is required to determine whether the child is homeless).

The Commissioner further disagrees with Bogota and Zarra that a "one-year rule" replaces the traditional elements of domicile for homeless students. *N.J.S.A.* 18A:38-1(d) provides: "Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section." (emphasis added). Accordingly, while a homeless child may be deemed domiciled in a district after residing in that school district temporarily for one year or longer, the family may establish domicile prior to one year. As such, the "one-year rule" will only deem a homeless child to be domiciled within a school district if he or she has not already established a domicile.

Finally, the Commissioner disagrees with Bogota and Zarra that the Initial Decision in *Egg Harbor, supra*, is controlling. The Initial Decision notes that in analyzing the circumstances of homeless families, "their actual intentions, as opposed to their viable choices, must be reconciled," and, as homeless families may live in places for short times, tuition cannot be allocated solely on intent. *Id.* However, the Commissioner's Decision makes no reference to any limitation on intent in a homelessness determination, and instead states that "domicile attaches immediately if a student's dwelling is found to be fixed, regular and adequate." *Egg Harbor, supra,* Commissioner's Decision No. 555-10, at 4. Furthermore,

subsequent to *Egg Harbor,* the Commissioner has made clear that homelessness determinations require a fact-specific analysis that includes the intentions of the parents or guardians. *M. O'K., supra*; *Volk, supra,* Commissioner's Decision No. 106-16; *State-Operated School District of the City of Camden v. C. Ann Volk, Executive County Superintendent, et al,* Commissioner's Decision No. 172-17R, decided June 20, 2017; *J.G., on behalf of minor children, T.G. and C.G. v. Board of Education of the Township of Edison, et al*, Commissioner's Decision No. 125-20, decided June 15, 2020.

Accordingly, the Initial Decision of the OAL is adopted. Bogota is directed to assume the financial responsibility for M.B.'s education from December 2017 until M.B. is domiciled outside of Bogota. Bogota's counterclaim for reimbursement of M.B.'s education costs is dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 21, 2020
Date of Mailing: December 24, 2020

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 16570-18
AGENCY REF. NO. 201-8/18

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, JOSEPH ZARRA, INTERIM EXECUTIVE COUNTY SUPERINTENDENT and L.B. o/b/o M.B.,

Respondents.

Daniel L. Roberts, Esq., for petitioner (Kenney, Gross, Kovats & Parton, attorneys)

Alyssa K. Weinstein, Esq., for respondent Borough of Bogota (Scarinci Hollenbeck, attorneys)

Michael Czarnecki, Deputy Attorney General, for respondent Joseph Zarra, Executive County Superintendent (Gurbir S. Grewal, Attorney General for New Jersey, attorneys)

L.B., on behalf of **M.B.**, appearing Pro Se.

Record Closed: May 27, 2020 Decided: August 5, 2020

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

STATEMENT OF THE CASE

Petitioner the Borough of Wood-Ridge Board of Education (Wood-Ridge or petitioner) claims that respondent, Borough of Bogota Board of Education (Bogota or respondent) was responsible for providing a free public education to M.B., the child of L.B. beginning December 5, 2017. Wood-Ridge claims M.B. and L.B. were domiciled in Bogota as of that date.

Respondents Bogota, Joseph Zarra, the Interim Executive County Superintendent of Schools, (County Superintendent/Zarra) who made the decision that Wood-Ridge is responsible for M.B.'s public education, and L.B., the mother of M.B. all claim that because L.B. and M.B. never lived in Bogota at a permanent address for more than 12 months before attending public school in Bogota, that Wood-Ridge, where M.B. was educated since 2009, and where they last had a fixed addressed, remained responsible for M.B.'s public education, even after they moved to Bogota. Accordingly, they seek reimbursement of $29,275.95 plus interest plus an order compelling petitioner to assume financial responsibility for a December 2019 out of district School invoice for retroactive tuition for M.B. and for any additional tuition charged by any entity providing education to M.B. during M.B.'s and L.B.'s alleged homelessness.

Because of the reasons that follow, I have determined that the Bogota Board of Education is the financially responsible district, and reverse the Superintendent's decision, and order that all of M.B.'s public education costs as of December 5, 2017 is Bogota's.

PROCEDURAL HISTORY

For approximately a year prior to December 5, 2017, L.B. and M.B. had moved from place to place, including at least twice residing outside Wood-Ridge, after L.B.'s mother house in Wood-Ridge was sold in November 2016. M.B. had been publicly educated in Wood-Ridge since 2009. However, on December 5, 2017, L.B. signed a student Transfer Card (J-6) stating that M.B.'s last day at Wood-Ridge elementary school was December 5, 2017. On December 12, 2017, Bogota Public Schools registered M.B. as a student of the Bogota School system. Student Registration Form (J-9). L.B. signed the form which contained her new address in Bogota. The form noted that also living at the home in Bogota with M.B.'s aunt. Attached to the form was L.B.'s driver's license showing L.B.'s address to be the same as the address as described on the Student Registration Form.

On June 1, 2018, Jill Connolly, the Supervisor of Pupil Education for Bogota wrote a letter to Superintendent Zarra "to determine the district of origin" of M.B. (J-12). The letter noted that although L.B. reported that she resided in Bogota with her sister, at her sister's house and that she was cosigning the lease, Ms. Connolly was not satisfied that M.B. and L.B. were not still homeless. Ms. Connolly's letter informed the Superintendent that it was her understanding that the last "permanent address" of L.B. and M.B. was a house in Wood-Ridge which was sold in November 2016, after L.B.'s mother died. The letter further stated that L.B. and M.B. had to vacate their home leased by her sister in March 2018 after the discovery of mold. However, L.B. informed Ms. Connolly that although temporarily displaced from their Bogota home, she intended to move back once the mold was remediated or move to another home in Bogota. However, a month later L.B. reported to Ms. Connolly that she had not located another residence in Bogota, that she was not returning to the Bogota home belonging to her sister because of a family conflict and was temporarily staying at a motel in Whippany.

On July 26, 2018, County Superintendent Zarra wrote a letter (J-18) to the Bogota Superintendent of Public Schools that he determined M.B. was a "homeless child", pursuant to N.J.A.C. 6A-17-2.2. in that he lacked a "fixed regular and adequate nighttime residence" pursuant to said regulation and to N.J.S.A. 18A-78.12, because since November 2016, when they had their last permanent residence in Bogota, M.B. and L.B. had not lived in any other district for the "required "12 months or more" (citing N.J.S.A. 18A-38-1(d).) Accordingly, in his determination, Wood-Ridge remained financially responsible for M.B.'s public education.

On August 9, 2018, Damian Kennedy Superintendent of Schools for Bogota wrote a letter (J-19) to his counterpart Superintendent Cipriano of Wood-Ridge informing him of Superintendent Zarra's determination, and attaching Superintendent Zarra's letter and further advised that although Wood-Ridge was appealing that decision, Wood- Ridge was responsible for monies expended by Bogota as of that date for M.B.'s public education, in the amount of $29,375.95. and that Wood-Ridge remains financially responsible for M.B.'s continued placement and program. This appeal ensued by an Amended Petition of Appeal by Wood-Ridge, filed on or about September 1, 2018.

FACTUAL FINDINGS AND DISCUSSION

At the hearing, Wood-Ridge offered testimony of Silvia Ragueso, the Director of Student special Services and L.B., the mother of M.B. Bogota offered the testimony of County Executive Superintendent Zarra, and Jill Connolly, the supervisor of People Personal Services for the Bogota BOE.

Preliminarily, all of the facts as recounted in the Procedural history were either not contested or are not disputed. Further, based upon a review of the testimony and the documentary evidence presented, and having an opportunity to observe the demeanor of the witnesses and assess their credibility, I find the following additional **FACTS** to have been established as set forth below.

M.B. and his mother L.B. had been unsettled in any one domicile for approximately a year commencing when L.B.'s mother's home was sold in November 2016, following L.B.'s mother's death. At times, the mother and child stayed in some places outside the district, such as North Arlington and Hackensack, while M.B. continued to attend Wood-Ridge, and while L.B. continued to have contact with Wood-Ridge schools, including advising them of her whereabouts. In early December 2017, Ms. Ragueso learned of a bus location transfer pending for M.B. Ms. Ragueso contacted L.B. by phone and L.B. advised Ms. Ragueso that she and M.B. were moving to her sister or sister in law's[1] house in Bogota. Although L.B. was questioned if she had a lease, L.N. advised Ms. Ragueso that she would be living with her sister who had lived in this four-bedroom home for several years, and that L.B. would be added to the lease the following month, in January 2019. She also provided Ms. Ragueso a copy of her current driver's license which used her sister's address in Bogota as L.B.'s address. Ms. Ragueso testified that L.B. was excited that she had found a stable home environment for her and M.B. after a period of effective homelessness. She detailed the new living conditions where she and L.B. would have their own bedrooms, and bathroom, that she would pay rent to her sister until she was added to the lease, and that she also intended to help her sister, who had some disabilities, with needed transportation at times. Following this interaction with Ms. Ragueso, L.B. signed the aforementioned Student Transfer Card, containing the new Bogota address. As memorialized in a letter Ms. Ragueso wrote to County Executive Superintendent Zarra, L.B. told Ms. Ragueso that "she was excited to be back on her feet again and to finally have a permanent place to live..." She felt she had done her due diligence in making sure the new address with her sister was not a temporary arrangement but intended to be permanent. However, once L.B. signed M.B. out the school district of Wood Ridge, she never asked L.B. to provide a copy of the lease as it was not required nor their procedure.

---

[1] As with many relations, it appears L.B. referred to her relative in Bogota, at times as her sister, when in fact she was her sister in law. She also described her sister in law as M.B.'s "aunt." For brevity, this relative is referred to herein as "sister" to L.B. or as M.B.'s aunt.

L.B. testified that she had decided to live with her sister when her sister asked her to move there in November 2017. L.B.'s sister had a four-bedroom home in Bogotá that was Section 8 qualified and L.B.'s moving there would help her keep her Section 8 status. At the same time, the move to Bogota would provide L.B. with an affordable rent and, in her words "stability for my son." In addition to rent, she had also agreed to help her sister with her disabilities, by example providing transportation for doctor's appointments. L.B. arranged for her mail to be sent to the house in Bogota. Further, she paid for several improvements to the home before moving in such as some "updates" cleaning and "painting all of it." In directly responding to the question posed by Wood-Ridge "So when you moved in Bogota how long did you intend to stay there?" L.B replied that when she moved, she "hoped" it would be "like a permanent-semi permanent situation at least to get [her son] into high school." [2]

Additionally, L.B. responded that her sworn to answers to Interrogatories were "the truth." One interrogatory had asked "(F)or how long did you plan to stay at that [Bogota] address?" L.B. replied "Two years max originally, and then till he [M.B.] finished and we were stable to have four consecutive years of high school."

L.B. then recounted a number of reasons why, although her intentions were to originally to permanently reside with her sister in Bogota, the living arrangements soon deteriorated. For one, her sister wasn't as forthcoming as she should have been when she claimed that L.N. could co-sign the lease as early as January. L.B. soon learned that the landlord's and the Section 8 approval would not come until March. Further, in March, M.B. became ill and it was determined this was owing to mold in the house's basement which had to be remediated. Nevertheless, and although some of these problems began just weeks after moving in, L.S. was asked directly, "But after you had moved in before you stayed there for weeks and it was your intention to remain there correct?" Her reply was "Yeah Yeah."

---

[2] M.B. was in the 8th grade when they moved to Bogota.

Under cross-examination, L.B. at times appeared to equivocate by modifying the description of her "intent" by adding or substituting the word "hope" for "intent" saying, for example it was always her "hope" the move would be permanent. Her problem was that after she moved in "I didn't have anything in hand saying that it was going to be what it is [meaning as negotiated with her sister]. So I was always careful of the fact of saying I'm hopeful form and I was pushing for it , but...."

In any event, although she initially waited for the mold remediation to move back in with her sister, they began to fight and at some point, the sister locked her and M.B. out the house, so she and M.B. never returned there except to move out their property.

L.B. kept M.B. in the Bogota school until his June 8th grade graduation, although by this time she had moved in temporarily with a friend in Hackensack, as she had a year before. L.B.'s testimony heaped praise upon Bogota's BOE. She testified they were "Very gracious, Very professional". They were honest with me as far as you know, like what they needed and I was honest with them back saying I have it until a certain time, but they put the child first and the child's needs first and they took him in regardless and they did a reval and re-placed him, So they went far and beyond for my son". She contrasted this from what can only be called somewhat cold treatment she received from Wood-Ridge of whom she said: "I was notified by Ridgefield (an out of district placement Wood-Ridge had previously paid for) through Wood-Ridge early in December that M. could not attend [XX] school . He could not go back to his—removed...They hadn't even had it official through me yet and I had that phone just saying he couldn't come back and he never got his property back from the [XX] school either." I find that L.B.'s opinion of the Bogota BOE and the Wood-Ridge BOE may account for her equivocation in appearing to deflect the use of the word intent by attempting to distinguish her intent from what she said her "hope" was.

On redirect however, L.B. was asked:

> Q' When you moved into the house in Bogota did you ever have any knowledge that [your sister] had any issues with her lease at that time?.

Her answer, in pertinent part was:

> A (W)ell no. .Actually when she asked me to in she told me that she would have to contact the landlord and have me added to her lease, okay she didn't give me any inclination there was a problem".

To elaborate, L.B. explained that the problem with the lease "came to light" subsequent to moving in. The questioning continued

> Q : And when you had initially moved in, it is fair to say you had intended to stay there at least two years.
> A: Yeah. I was hoping.

Later to the Court's questioning about L.B.'s intent, she stated:

> A: I started the end of November going in there cleaning and painting and making it ready for us to move in, so I cleaned the entire house
>
> Q : Because you intended to reside there [?]
> A: Because we intended to yes, yes because this was going to be the home we were going to make...So we intended to stay there, you know that was the plan.

Bogota called fellow respondent Joseph Zarra to establish the basis for his determination that M.S. became homeless in November 2016 and had remained homeless even after relocating with his mother to Bogota. He stated.

> A: [C]ommon sense would indicate that a child that has been moved from home to home with no permanent address and many times living with someone under the same roof is not – it is not their home. And in this case if I may, the child moved many times in a period...I believe it was nineteen months.
>
> Q: Do you consider the physical nature of the home?
> A: No we don't have the investigative ability to go in and determine that
>
> Q: Do you consider whether the home is fixed, regular and adequate?
> A: We do not

Superintendent Zarra continued:

> Q: How does one establish domicile, in your understanding?
> A: In our interpretation domicile is a home where a child resides that is permanent, and we didn't see that.
>
> Q: So, it is fair to say that if a child moves from town to town, they wouldn't be considered domiciled there until they spent one continuous year there?
> A: I think it's fair to say that, yes.
>
> Q: Could a person intentionally move from on town to another to establish domicile there?
> A: We would have no idea.
>
> Q: So today, you don't know if that person's is relevant to establishing domicile?
> A: Intention to my knowledge does not come into it.

Mr. Zarra also stated it is not their policy to get statements or information from the parents when making a determination of homelessness but instead he relies exclusively on letters provide to him by the districts. While Superintendent Zarra stated that homeless means a "child or youth who lacks a fixed regular and adequate nighttime residence," he also insisted they never consider factors such as the living arrangements at the house like whether the child has a separate bedroom and other specifics of the living arrangements. Yet somewhat inconsistently, he testified he did consider that L.B. was supposed to be added to the lease.

When questioned about whether this so called one-year time requirement was uniformly enforced by all school districts, Superintendent Zarra explained.

> A: (T) hat really varies from school district to school district. There are some school districts that are sticklers and until the family establishes permanent residence, they really won't entertain registering the child. Other school districts if evidence is presented that for example they're going to close on the house and they have a letter from the realtor, letter from the seller or the attorney, they'll allow each child to

> register. So again, it really is up to each individual school district how they handle that.
>
> Q Okay, So the fact that the child has not resided in that district for twelve months or more is not a uniform rule to give guidance to the district as to whether or not that child is entitled to a free education in that district?
> A: I don't believe so.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom.; Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

The domicile of an unemancipated child is that of his parent, custodian or guardian. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001); P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

A student's "domicile" is where the student's parent or guardian has a permanent home in the school district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J 238, 250 (1955); In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051,

119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999). Put another way, the Appellate Division has long held that a person's domicile is "the place where [a person] has his [or her} true fixed permanent home and principle establishment and to which whenever he [or she] is absent he [or she] has an intention of returning," and from which he {or she] has no intention of moving. D.L., 366 N.J. Super at 273 (quoting T.B.W. ex rel A.W. v Bd. of Educ. Of Bellville, EDU 5959-96 (April 20, 1998) http://njlaw.rutgers.edu/collections/oal/). Intent is the decisive factor in establishing domicile. A person's intent converts a residence from a mere place in which a person lives to a domicile. State v Benny, 20 NJ at 251.

Here, however, it is argued by all the respondents that regardless of their intent, L.B. and M.B. remained "homeless" throughout December 2017 and the remainder of the 2018 school year because they failed to spend one continuous year in Bogota (or anywhere else) during that time. That misreads the wording and intent of the applicable law.

Petitioner correctly cites the applicable statutes and regulations, where there is a condition of homelessness the last district of residence shall pay another school district the tuition costs. Pursuant to N.J.S.A. 18A: 38-19, however such payments are made by the former district of permanent residence when a homeless child is enrolled in a district other than where the child last resided until the parent establishes a permanent residence or is deemed domiciled in another jurisdiction pursuant to N.J.S.A. 18A:38-1.d. At that time, the school district of residence shall no longer pay tuition to the school district of enrollment. N.J.A.C. 6A: 172.8 (emphasis supplied).

Thus, the school district of residence is responsible to pay for the homeless child until that child either becomes domiciled at a location ***or*** are "deemed domiciled at a location under N.J.S.A. 18A:38-1 (d)" (emphasis supplied) because they spent one continuous year there. Clearly the statute provides that domiciles may be recognized as existing well before one year and do not require any specific length of time, but rather can be established based on the intent of the persons seeking to establish a domicile.

Here, the Bogota BOE and Superintendent Zarra erred in ignoring all the clear evidence that L.B. intended to make her sister's house in Bogota her and M.B.'s domicile and did in fact do so when she moved there in December 2017. She had every intention in making this her permanent home, just as she told the Wood-Ridge School representative when she signed M.B. out of the school and had him enroll in Bogota one week after the move. Prior to moving in that December L.B cleaned, painted and fixed up the four-bedroom house to get it ready as a permanent home for her and her son and to live with her sister in a house she intended to co-lease. She changed her driver's license to reflect her new address. She made an agreement with her sister how to divide costs and intended to co-sign the lease as soon as the landlord presented it. The fact that L.B. wanted to co-sign the lease as early as January 2018 but the landlord advised that he needed Section 8 approval and would add her to the lease in March of 2018 did not change L.B.'s intent when she decided to move to that address in Bogota. Further, she did not leave the address on her own volition. It is undisputed that even when she and her son left the house probably in March 2018 while mold was being remediated, she testified she intended to return there. It is only when she began fighting with her sister and got locked out in April 2018 did she give up on the house and became homeless again.

Respondent would have us completely ignore the intention (or "hope") of L.B. to establish, when she moved in to move in with her sister to have a permanent place for at least until her son could graduate from high school in four years. Despite a few somewhat modest complaints, L.B. did not abandon the domicile until she was locked out four months after by her sister. Superintendent Zarra testified "intention" has nothing to do creating a domicile. Conversely, he conceded that whether a child stays one year or more at a certain residence provides "no guidance" to the district in the determination of whether that district has to provide that child with a free public education, and that the duration of the stay at a residence provides no uniform guidance to the districts. I cannot agree on either count. Whether the rules are not enforced uniformly y the districts does not change the "deemed" section of the applicable section, and The Executive Superintendent's disregard for the intention to create a domicile was clearly a misreading of the statute and its intent.

Clearly the preponderance of the evidence shows that when L.B. moved to her sister's four bedroom home in Bogota, was the place she found and determined to be, after a period of about a year of homelessness, a "fixed permanent home and principle establishment and to which whenever she was absent (e.g. like when she became absent in about March 2018 because of the mold) she had the intention of returning to and from which he she had no intention of moving. A domicile may be acquired upon the "concurrence, even for a moment of physical presence at a dwelling place with the intention of making it a permanent abode." Lyon v Glaser, 60 N.J. 259,264 (1972). Further as a matter of law, the "deemed domiciled" provision of N.J.S.A. 18A:38-1(d) was misread or misinterpreted by the Respondents to impose a 12 month minimum as a *sine qua non* requirement to establish the domicile of a previously homeless child. As evidenced by the clear wording and intent of the statute, the 12- month requirement simply deems the domicile to have been created without further proof being needed. Here, petitioners showed by a preponderance of the evidence the further proof of that intent to create the domicile in Bogota.

CONCLUSION

Based on the letter of determination by Superintendent Zarra, Bogota has charged Wood-Ridge with the cost Bogota expended for educational costs of M.B. from the time he registered with their school district in December 2017 until his graduation in June 2018, in the amount of $29,375.95, and requests an order that Wood-Ridge continues to pay the cost of M.B.'s public education until L.B. and M.B. establish a new domicile. However, as shown, Bogota's demand must be denied as it was based on an arbitrary and capricious finding which ignored the fact that L.B. and M.B. clearly established a new domicile in Bogota commencing in December 2017. Consequently, the Superintendent's decision is **REVERSED**, and Bogota's demands for payment and other relief are **DENIED**. Further, Bogota continues to be financially responsible for M.B.'s public education costs until such time as their new domicile is established outside the district.

ORDER

Based upon the foregoing, it is **ORDERED** that the decision by the County Executive Superintendent of Schools that M.B. and L.B. did not establish a domicile in Bogota and remained homeless is **REVERSED**, and the claims by Bogota for reimbursement for the costs of M.B.'s public education between December 2017 and June 2018, and for the demand for prospective relief ordering Wood-Ridge to pay the financial costs of M.B.'s public education until such time as they establish another domicile is **DENIED.** It is further ordered that Bogota continues to be financially responsible for M.B.'s public education until such time that L.B. an M.B. establish a domicile outside of Bogota.

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

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

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

August 5, 2020

Ernest M. Bongiovanni

DATE **ERNEST M. BONGIOVANNI**

Date Received at Agency: 8/5/20

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Petitioners

Sylvia Ragueso

L.B.

For Respondents

Joseph Zarra

Jill Connolly

LIST OF JOINT EXHIBITS IN EVIDENCE

J-1 through J-5 NOT IN EVIDENCE

J-6 Student Transfer Card and Verification Form, dated December 7, 2017

J-7 Emails between Jill Connolly and Silvia Ragueso, dated December 7, 2017

J-8 Emails between Jill Connolly and Silvia Ragueso, dated December 8, 2017

J-9 Bogota Public Schools Student Registration Form, dated December 12, 2017

J-10 Bogota Public Schools McKinney-Vento Student Residence Form-

J-11 Email between Jill Connolly and Silvia Ragueso, attaching release of records form, dated December 12, 2017

J-12 Letter from Jill Connolly to Joseph Zarra, dated June 1, 2018

J-13 Letter from Joseph Zarra to Vincent Varcadipane, dated June 22, 2018

J-14 Letter from Joseph Zarra to Nicholas Cipriano, dated June 22, 2018

J-15 Letter from Jill Connolly to Joseph Zarra, dated June 28, 2018

J-16 Email from Victoria Bauman to Irene Ardizzone attaching correspondence from Nicholas Cipriano and Silvia Ragueso, dated June 28, 2018

J-17 NOT IN EVIDENCE

J-18 Letter from Joseph Zarra to Damien Kennedy, dated July 26, 2018

J-19 Letter from Damien Kennedy to Nicholas Cipriano, dated August 9, 2018

J-20 Wood-Ridge Board of Education Amended Verified Petition of Appeal, dated September 4, 2018

J-21 Bogota Board of Education Answer with Affirmative Defense and Counterclaim, dated September 25, 2018

J-22 NJDOE (Joseph Zarra) Answer to Amended Verified Petition of Appeal with Affirmative Defenses, dated October 9, 2018

J-23 Wood-Ridge Board of Education Answer to Counterclaim, dated October 10, 2018

J-24 L.B. responses to Joint Interrogatories, dated July 8, 2019

J-25 L.B. responses to Zarra's Interrogatories and Requests for Admissions, undated

J-26 NOT IN EVIDENCE

J-27 L.B. Lease agreement commencing February 15, 2019

J-28 L.B' s NJMVC change of address

J-29 Bogota BOE record of payments to Ridgefield BOE, -March/April 2018

J-30 Bogota BOE records of payments to D.B. for home instruction- April 2018

J-31 Bogota BOE records of payment for out of District tuition

J-32 Correspondence from [X] School to Bogota BOE

291-20

New Jersey Commissioner of Education

Final Decision

Jared Fowler,

Petitioner,

v.

Board of Education of the Passaic Valley Regional High School District, Passaic County,

Respondent.

Synopsis

Petitioner – employed by the school district as the Assistant Principal of Humanities – appealed the determination of the respondent Board to withhold his salary increment for the 2019-20 school year as consequence for his failure to provide administrative oversight of the 2019 yearbook. Petitioner contended that the Board's action in withholding his increment was arbitrary, capricious and unreasonable, arguing, *inter alia*, that it was not his job responsibility as Assistant Principal to edit and/or supervise the yearbook. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:29-14, a board of education may withhold a teacher's increment for inefficiency or other good cause; in the spring of the 2018–19 school year, the Board became aware of inappropriate written content in the 2019 yearbook which sparked controversy and became a "public relations nightmare" for the school district; in his role as Assistant Principal of Humanities, the petitioner oversees the English department, which includes an elective Editing and Publishing course that creates and reviews yearbook content; it is undisputed that the 2019 yearbook contained inappropriate writing that caused controversy among parents and other members of the public; the inappropriate content was either missed or ignored by district staff who directly oversaw the yearbook; in responding to the resulting controversy, the Board held the two teachers in the Editing and Publishing course accountable, as well as those administrators whom the Board deemed to have failed to provide administrative oversight, leadership and supervision of the yearbook project, including the petitioner. The ALJ concluded that the Board's decision to withhold petitioner's salary increment was not arbitrary, capricious or unreasonable. Accordingly, summary decision was granted in favor of the Board, and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions in this matter and adopted the Initial Decision as the final decision for the reasons thoroughly expressed therein. The petition was dismissed.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 14706-19
AGENCY DKT. 259-9/19

JARED FOWLER,
Petitioner,
v.
PASSAIC VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, PASSAIC COUNTY,
Respondent.

Robert M. Schwartz, Esq., and **John Farinella**, Esq., for petitioner (Schwartz Law Group, attorneys)

Raymond B. Reddin, Esq., for respondent (Reddin Masri, attorneys)

Record Closed: October 20, 2020 Decided: November 9, 2020

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Assistant Principal Jared Fowler (Fowler or petitioner), appeals the determination of respondent, Board of Education of the Passaic Valley Regional High

School District, Passaic County (Board or respondent), to withhold his salary increase, alleging that the Board's action was arbitrary, capricious and unreasonable.

PROCEDURAL HISTORY

Petitioner filed a Petition of Appeal with the Commissioner of Education on or around September 24, 2019, and the Commissioner transmitted the matter to the Office of Administrative Law, where it was filed as a contested case on October 17, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On or around September 4, 2020, the parties filed cross-motions for summary decision. Respondent filed an opposition to petitioner's motion on September 16, 2020, and petitioner filed an opposition to respondent's motion on September 18, 2020. The record closed following oral argument on October 20, 2020.

FACTUAL DISCUSSION

The parties jointly filed a Stipulation of Facts containing the following, that I **FIND** as **FACT:**

1. Petitioner currently serves in the position of Assistant Principal of Humanities. Petitioner holds an administrative certificate with both the principal and supervisor endorsements.

2. Petitioner has been employed by the respondent since the commencement of the 2008–2009 school term. He began his employment with the respondent as a teacher of English in 2008–2009 school term. Upon the commencement of the 2015–2016 school term, petitioner was promoted to the position of Supervisor of Curriculum.

3. Petitioner served as the Supervisor of Curriculum for the 2015–2016 school term.

4. Since July 1, 2016, petitioner has served in the capacity of Assistant Principal of Humanities.

5. Petitioner is not part of any collective bargaining unit nor salary guide.

6. The Board establishes the salaries of the administrators. Petitioner's salary increases have occurred annually subject to the approval of the Board.

7. As Assistant Principal, petitioner has worked under the job description entitled "Assistant Principal of Humanities" which was adopted by the respondent on or about April 26, 2016.

8. The Assistant Principal of Humanities' job description sets forth the performance responsibilities for which petitioner was held accountable.[1]

9. The respondent has historically assigned teacher advisors to the Yearbook Club, a stipend position which assists with the Yearbook activities and which falls under Student Activities unit.

10. The Yearbook content is created and reviewed in the class entitled Editing and Publishing, which is in the English Department and falls under Humanities. The Editing and Publishing class is an official elective course which issues a grade and edits the content of the Yearbook, falling under the auspices of approved student activities at Passaic Valley Regional High School. The two teachers assigned to the Yearbook Club are paid a stipend.

11. The Yearbook Club handles extra-curricular activity outside of classroom hours, such as fundraising, and does not establish or review the content of the Yearbook.

12. There is no individual assigned as the Supervisor of Humanities. The position is vacant. The petitioner in his role as Assistant Principal supervises the Humanities and English departments, wherein the Editing and Publishing course falls.

[1] The job description was attached as an exhibit to the Stipulation of Facts, and is incorporated herein.

13. During the 2018–2019 school term, the teachers of the Editing and Publishing course were Lori Demsey and Leanne Weiss. Ms. Weiss reported to the petitioner. Ms. Demsey reported to the Supervisor of STEM.

14. During the 2018–2019 school term, the yearbook advisor stipend positions were also given to Lori Demsey and Leanne Weiss. This was their first year as advisors to the yearbook.

15. Both Ms. Demsey and Ms. Weiss, as teachers of the Editing and Publishing class, were also assigned to be yearbook advisors by the Superintendent, Dr. JoAnn Cardillo. Their appointment as yearbook advisors had been approved by the Board of Education.

16. Both Ms. Demsey and Ms. Weiss received the payment of a stipend to be the yearbook advisors.[2]

17. In their capacity as yearbook advisors during the 2018–2019 school term, Ms. Demsey and Ms. Weiss reported to Joseph Benvenuti, the Student Activities Coordinator.[3]

18. The job description for the Student Activities Coordinator title provides under "performance responsibilities" that he is to "oversee club operations" and that he is to "develop standard operating procedures" for clubs "when necessary."

19. During the 2018–2019 school term, petitioner was never explicitly asked or assigned to review and/or have oversight responsibilities as to the contents of the yearbook or any of its activities.

---

[2] Their job description for the yearbook advisors was attached as an exhibit to the Stipulation of Facts and is incorporated herein.

[3] The job description for the Student Activities Coordinator was attached as an exhibit to the Stipulation of Facts, and is incorporated herein.

20. Petitioner, in his capacity as Assistant Principal, did not supervise the Student Activities Coordinator either during the 2018–2019 school term, or in any prior years.

21. In the spring of the 2018–2019 school term, the respondent became aware of a writing in the 2019 yearbook which was deemed inappropriate. The writing was as follows:

> Nickname: DaBomb, Bombza
> Ambition: To get past TSA without getting stopped
> Secret Ambition: To Be a Pilot
> I would thank Allah, but I know the FBI is watching

22. This sparked controversy among some parents and members of the public.

23. As a result of the controversy, by way of a letter dated June 25, 2019, respondent, through its then Superintendent, Dr. JoAnn Cardillo, informed the petitioner that, at its meeting of June 25, 2019, the respondent voted to "withhold" his "salary increase for the 2019–2020 school term." The reason was for the increment withholding was "failure to provide administrative oversight of the functions of the 2019 yearbook."

24. The Student Activities Coordinator who had oversight responsibilities for the yearbook activities did not receive an increment withholding.

25. The Student Activities Coordinator received a letter of reprimand that was placed in his personnel file regarding his role in the incident. The two teachers, Ms. Weiss and Ms. Demsey, received an increment withholding and remained on their current step on the salary guide. The Principal and Assistant Principal both had their salary increases rescinded for lack of supervision and oversight. Lastly, the Board passed a public reprimand against the Superintendent for lack of supervision and oversight. As the principal retired in or about October 2019, petitioner is the only remaining administrator to have had his increment withheld which he has appealed through this action.

26. Petitioner received an effective evaluation at the conclusion of the 2018–2019 school term. The evaluation was conducted by the Principal and was completed prior to the yearbook incident.[4]

I also **FIND** the following **FACTS**, as they are undisputed:

Petitioner's salary as an administrator is set by the Board, and any salary increase is not subject to any collective bargaining agreement or salary guide, but subject to the Board's consideration and approval. The petitioner has no right to an automatic salary increase every year, despite the fact that he received salary increases annually in the past, and this year.

LEGAL ANALYSIS AND CONCLUSION

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

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful

[4] Petitioner's evaluations as Assistant Principal were attached as exhibits to the Stipulation of Facts, and incorporated herein.

frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, at 540, (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L .Ed. 2d at 214.

Following the Brill standard, and after considering the Stipulation of Facts, attached joint exhibits, and briefs, I **CONCLUDE** that there are no genuine issues of material fact that require a plenary hearing and that this matter is ripe for summary decision.

Petitioner essentially makes two arguments in support of his motion for summary decision. First, petitioner argues that the Board's action to withhold his salary increase was arbitrary and capricious because it was not his job responsibility as Assistant Principal to edit and/or supervise the yearbook. Petitioner asserts that it was the Yearbook Advisors and Student Activities Coordinator who made the editing error here, and the responsibility of advising and supervising the Yearbook, and of supervising the Coordinator of Student Activities was outside the scope of petitioner's job responsibilities. Therefore, petitioner argues that no inefficiency or other good cause exists upon which the Board could impose such a disciplinary consequence against him. Petitioner also argues that the fact that he supervised the work in the classroom associated with the teaching assignments of the Yearbook Advisors does not demonstrate a lack of "administrative oversight." Moreover, petitioner points out that he received an effective evaluation from the building principal for the 2018–2019 school year, and asserts that he and the Principal were only "targeted" because of their administrative positions and not because of how they performed their job duties.

Second, petitioner argues that the Board "acted inconsistently" disciplining him with an increment withholding while only reprimanding the Student Activities Coordinator who "had the responsibility of supervising the editing and the publication of the yearbook."

The Board argues that petitioner fails to acknowledge his responsibility to provide supervision and oversight to the Editing and Publishing course that is responsible for editing the yearbook. The Board disputes petitioner's assertion that the Student Activities Coordinator should be held responsible because the Yearbook Club, which the Student Activities Coordinator supervises, is involved in editing and publishing the yearbook. In its reply, the Board points out that the petitioner's statements concerning the Student Activities Coordinator and Yearbook Club contradict paragraphs 9 and 10 of the Stipulated Facts, and that the Yearbook Club only handles extra-curricular activity outside of classroom hours, such as fundraising and does not establish or review the content of the Yearbook. (Stipulation of Facts, ¶ 10.) The Board maintains that it is the Editing and Publishing Course that has complete control over the Yearbook content while the Yearbook club has none. Because petitioner supervises the English department that controls the Editing and Publishing Course, the Board determined that petitioner failed to properly perform his supervisory duties.

The Board argues that it has the authority and the discretion to impose a monetary sanction in the form of withholding a merit-based raise on an Administrator pursuant to N.J.S.A. 18A:29-14, and that its actions here were neither arbitrary, without good cause, nor an abuse of discretion with improper motives. N.J.S.A. 18A:29-14, which addresses a board's withholding of a teaching staff member's increment provides in part:

> 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 . . . ."

Burden of Proof

Petitioner asserts that it is the Board who has the burden of proof in this matter because the action taken against petitioner was disciplinary and not based on performance, and had this matter gone through arbitration, the Board would have had to demonstrate just cause for denying the increment. Petitioner's argument, which is unsupported by any caselaw, is misplaced. The Board withheld a salary increase for Fowler's "failure to provide administrative oversight" of the Yearbook—i.e., failure to adequately perform his supervisory duties. Petitioner's classification of this matter as "disciplinary," is irrelevant to determining who has the burden of proof, and it is also immaterial that the burden of proof may have been different had Fowler been part of a collective bargaining unit or had this matter been handled in arbitration. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960), which was cited by the Board, holds that "[w]hen challenging an increment withholding, the teacher has the burden of proof to show that the board of education acted arbitrarily without rational basis or was induced by improper motives." Kopera also holds that "[i]n the absence of clear and convincing proof that a board of education acted unreasonably or in a cursory manner in withholding an increment, the Commissioner will not substitute his judgment for the board of education's judgment." Id. at 296. I **CONCLUDE** that it is the petitioner who carries the burden to prove to establish that the Board lacked good cause to withhold Fowler's salary increase, and that its decision was arbitrary and capricious or induced by improper motives.

The Board maintains that there was no improper motive and the action taken against Fowler was not unreasonable. Six staff members were sanctioned for this incident, including Fowler, and the Board's managerial prerogative to take this action has a presumption of correctness. According to the Board, the incident with the Yearbook had a tremendous negative public relations impact on the Board, and the Yearbook's content is created and reviewed in the Editing and Publishing class, whose teachers Fowler supervises. The teachers of that class, who also happen to be the "Yearbook Advisors," were sanctioned, as was the Principal who supervises the petitioner, and the Superintendent even received a verbal reprimand of no confidence due to this incident.

Here, while Fowler may not have been expressly assigned to review the content of the Yearbook, he is not completely disconnected from this mishap. He had oversight of the class responsible for creating and reviewing the content of the Yearbook, and of at least one of its teachers. It is undisputed that the 2019 Yearbook contained inappropriate writing that caused controversy among parents and other members of the public, and the Board was faced with having to respond to this controversy. This inappropriate and controversial writing was either missed or ignored, and the Board chose to act not only by holding the two teachers in the Editing and Publishing course accountable, but also those administrators who in their estimation failed to provide administrative oversight, leadership and supervision which resulted in "a public relations nightmare." Fowler was one of these individuals who in his administrative capacity could have done something to prevent this mishap. While Fowler may consider the Board's response as harsh or unfair, it acted rationally and within its authority. I **CONCLUDE** that the evidence does not support petitioner's assertion that the Board's decision to withhold petitioner's salary increase was an arbitrary, capricious or unreasonable one; and that the Board had good cause to withhold Fowler's salary increase. I also **CONCLUDE** that summary decision must be granted in favor of the Board, and that the petition should be dismissed.

ORDER

It is hereby **ORDERED** that the motion for summary decision filed by the Board of Education of the Passaic Valley Regional High School Board of Education is **GRANTED**, and the motion for summary decision filed by the petitioner is **DENIED**. It is further **ORDERED** that the petition be and hereby is **DISMISSED**.

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

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

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

November 9, 2020
DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

Brief and reply brief

For Respondent:

Brief and reply brief

291-20

OAL Dkt. No. EDU 14706-19
Agency Dkt. No. 259-9/19

New Jersey Commissioner of Education

Decision

Jared Fowler,

Petitioner,

v.

Board of Education of the Passaic Valley Regional High School District, Passaic County,

Respondent.

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

Petitioner challenges the Board's decision to withhold his increment for the 2019-20 school year after an incident involving inappropriate written content which appeared in the school yearbook. Petitioner, the Assistant Principal of Humanities, oversees the English department, which includes an elective Editing and Publishing course that creates and reviews yearbook content. The yearbook club handles extracurricular activities outside of school hours but does not edit the content of the yearbook. The yearbook advisors report to the Student Activities Coordinator, who oversees club operations.

The Administrative Law Judge (ALJ) found that the Board decision to withhold petitioner's increment was not arbitrary, capricious or unreasonable. Petitioner had oversight over the class responsible for creating and reviewing the yearbook content, and it is undisputed that the 2019 yearbook contained inappropriate content that caused controversy and a "public

relations nightmare." As such, the ALJ found the Board had good cause to withhold petitioner's salary increase.

Upon review, the Commissioner agrees with the ALJ – for the reasons thoroughly expressed in the Initial Decision – that the Board was not arbitrary, capricious or unreasonable its decision to withhold petitioner's salary increment for the 2019-20 school year. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

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

Date of Decision: December 24, 2020
Date of Mailing: December 28, 2020

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

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 28, 2020

VIA E-MAIL ONLY
Christy and Stephen Horwell
P.O. Box 324
Alloway, New Jersey 08001

William Morlok, Esq.
Parker McCay
900 Midlantic Drive
Suite 300
Mount Laurel, New Jersey 08054

Re: *C.H. and S.H., on behalf of minor children, C.H, S.H. and S.H. v. Board of Education of the Township of Alloway, Salem County, OAL Dkt. No. EDU 03608-20, Agency Dkt. No. 30-1/18.*

Dear Parties:

I have reviewed the papers filed in connection with the petitioners' request for interlocutory review of Administrative Law Judge Jeffrey Wilson's Order denying the petitioners' motion to compel discover. Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, respondent's request for interlocutory review is hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Dr. Angelica Allen-McMillan, Ed.D.
Acting Commissioner

292-20L

c: Jeffrey Wilson, Administrative Law Judge
Clerk, Office of Administrative Law

293-20L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 29, 2020

VIA EMAIL ONLY
John C. Whipple, Esq.
Whipple Azzarello, LLC
161 Madison Avenue
Suite 325
Morristown, New Jersey 07960

James Smith
360 Black Oak Ridge Road
Wayne, New Jersey 07470

Re: *James Smith v. Emmanuel Capers*, Agency Dkt. No. 3-3/30A, Commissioner Decision No. 246-20.

Dear Parties:

I have reviewed the materials filed in connection with appellant Emmanuel Capers' Motion to Stay the October 23, 2020 decision suspending appellant for six months as a school official found to have violated the School Ethics Act, pending appeal.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that appellant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

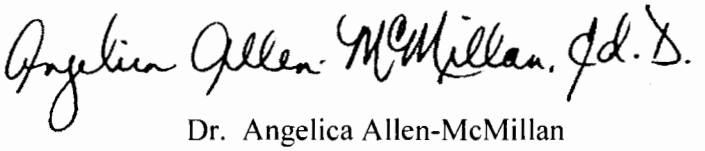
Upon review of the parties' submissions, I find that appellant has failed to meet the standard required for a stay of the October 23, 2020 decision. Most notably, appellant has failed to establish a likelihood of success on the merits. In his papers, appellant argues that the Interim Commissioner's decision was arbitrary, capricious, and unreasonable because the record does not contain substantial evidence to support the conclusion, the Administrative Law Judge

reached a different conclusion than the School Ethics Commission and the Interim Commissioner, and the penalty assessed was unduly harsh.

In the October 23, 2020 decision, the Interim Commissioner determined appellant had not met his burden of demonstrating that the decision of the School Ethics Commission finding that he had violated the School Ethics Act was arbitrary, capricious, or unreasonable. As was stated in the decision, appellant's actions in accepting a trip from a potential vendor were unrelated to his duties as a board member, had the potential to compromise the board, and constituted use of the schools to obtain a benefit for himself. Furthermore, as stated in the October 23, 2020 decision, the six-month suspension was consistent with penalties assessed against board members in other cases engaging in a similar level of misconduct. In his motion papers, appellant generally reiterated the arguments previously made before the Interim Commissioner, which were fully considered before the October 23, 2020 decision was issued. As a result, appellant has failed to demonstrate a likelihood of success on the merits.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, appellant's request for a stay of the October 23, 2020 decision is hereby DENIED.[1]

Sincerely,



Dr. Angelica Allen-McMillan
Acting Commissioner

c: School Ethics Commission

293-20L

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

294-20

New Jersey Commissioner of Education

Final Decision

Parsippany-Troy Hills Education Association,

Petitioner,

v.

Board of Education of the Parsippany-Troy Hills School District, Morris County,

Respondent.

Synopsis

The Parsippany-Troy Hills Education Association (Association) represents Gregory Dalakian and Michael Iapicca – the Marching Band Directors (Directors) in the respondent school district's two high schools – in this matter. The Association contended that the Board violated *N.J.S.A.* 18A:25-3, which protects teaching staff members from being obliged to report to school on a public holiday, when it required the Marching Band directors to participate in the township's 2019 Memorial Day Parade. The school district's marching bands have participated in this annual parade since at least 1993. In 2019, both Directors attempted to withdraw from the parade, but were informed by administration that they were required to participate and risked a disciplinary memorandum if they failed to do so. The Directors and their respective marching bands ultimately participated in the parade, and the Association filed a Petition for Declaratory Ruling, which was declined by the Commissioner, but transmitted to the OAL as a petition of appeal. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue in this case, and the matter is ripe for summary decision; *N.J.S.A.* 18A:25-3 was not intended to allow staff members to decline to perform functions that are integral to an extracurricular duty, which by definition include obligations that take place outside normal school hours; the Directors knew when they accepted their assignments that the Memorial Day parade was an annual event for the marching bands; and student members of the marching bands were in fact advised in the band handbook that failure to participate in the parade would have negative consequences. The ALJ concluded that the Board acted within its authority to require the Directors to participate in the parade, and such requirement did not violate *N.J.S.A.* 18A:25-3. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and granted the Board's motion for summary decision. In so doing, the Commissioner noted, *inter alia*, that the plain language of *N.J.S.A.* 18A:25-3 protects teaching staff members from having to perform their regular duties on a school day; however, there is nothing in the statute that allows individuals who have accepted stipends to supervise extracurricular activities to decline to perform duties that fall on a public holiday that is not a school day. Accordingly, the Board's motion for summary decision was granted and the petition was dismissed.

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

294-20
OAL Dkt. No. EDU 14555-19
Agency Dkt. No. 220-8/19

New Jersey Commissioner of Education

Final Decision

Parsippany-Troy Hills Education Association,

Petitioner,

v.

Board of Education of the Parsippany-Troy Hills School District, Morris County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioner represents Gregory Dalakian and Michael Iapicca, who are employed by the Board as the Marching Band Directors (Directors) in the district's two high schools. Since at least 1993, the bands have participated in the township's annual Memorial Day Parade. In 2019, the Directors attempted to withdraw from the parade, but the district's administration informed the Directors that they were required to participate and would receive a disciplinary memorandum if they failed to do so. Both bands and both Directors ultimately participated in the parade. Petitioner filed a Petition for Declaratory Ruling, arguing that the Board's action contravened *N.J.S.A.* 18A:25-3, which protects teaching staff members from being obliged to

[1] The Board did not file a reply to petitioner's exceptions. The Board filed exceptions of its own, which were not timely pursuant to *N.J.A.C.* 1:1-18.4 and were therefore not considered by the Commissioner.

report to school on a public holiday. The Commissioner declined the request and transmitted the matter to the OAL to proceed as a petition of appeal.

The ALJ found that *N.J.S.A.* 18A:25-3 was not intended to allow staff members to decline to perform functions that are integral to an extracurricular duty. The ALJ noted that extracurricular duties, by their definition, include obligations that take place outside normal school hours and that the Directors undertook the band assignment knowing that the bands participated in the parade every year. In fact, participation in the parade was so critical to the program that students were advised in the band handbook that their failure to participate would have negative repercussions. The ALJ reviewed the cases cited by petitioner and found them unpersuasive, as they all pertained to staff being forced to attend school on a public holiday to teach or attend an in-service training related to their teaching duties. The ALJ concluded that the Board was within its authority to insist that the Directors fulfill their obligation to participate in the parade and that, in doing so, the Board did not contravene the requirements of *N.J.S.A.* 18A:25-3.[2] Accordingly, the ALJ granted the Board's motion for summary decision.

In its exceptions, petitioner argues that the plain language of the statute protects a teaching staff member's right to observe public holidays, and that the ALJ inappropriately read an exception into the statute where none exists. Petitioner contends that the Directors' band duties are part and parcel of their employment as teaching staff members, and thus they could not be required to perform those duties on a public holiday. According to petitioner, it was legal error for the ALJ to make a distinction for extracurricular duties. Petitioner urges the Commissioner to reject the ALJ's conclusion that the statute only applies when a public holiday

[2] The ALJ also granted the Board's motion to amend its answer to include the defenses of laches and waiver. The ALJ further found that neither doctrine barred petitioner's claims. The Commissioner concurs with these conclusions for the reasons outlined in the Initial Decision.

falls on a school day. Petitioner contends that whether participation in the parade is a part of the Directors' stipend is a genuine issue of material fact that should have precluded the entry of summary decision. Moreover, petitioner asserts that even if that fact were found to be true, the statute provides that any term of any contract in violation of the statute is null and void.

Upon review, the Commissioner concurs with the ALJ that this matter may be decided on a summary basis. A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29 (1995).

While petitioner argues that there is a genuine issue of material fact regarding whether participation in the parade is a part of their stipend, the Commissioner does not find this argument persuasive. The joint stipulation of material facts indicates that the bands have participated in the parade since at least 1993, establishing a historical precedent and suggesting that this activity is integral to the band director position. Moreover, the job description for Marching Band Director specifically includes among its responsibilities: "[p]repare students for presentation at activities such as . . . parades" and "[p]rovide supervision for students during rehearsals, performances, and competitions." Exhibit J-2 to Joint Stipulation of Facts. Finally, the band handbook indicates that student participation in the parade is mandatory and, as the ALJ noted, it is unclear how the students could be required to participate if the Directors – whose job description clearly includes supervising students during performances – were not also required to

participate. Accordingly, the Commissioner finds that there are no genuine issues of material fact, and that summary decision is appropriate.

Next, the Commissioner concurs with the ALJ's conclusion that the Board's action did not contravene the requirements of *N.J.S.A.* 18A:25-3. The statute provides that "[n]o teaching staff member shall be required to perform his duties" on a public holiday. The construction of this provision demonstrates that the duties that cannot be required are those of a teaching staff member – duties that are separate and distinct from the duties of those employees who supervise extracurricular activities. Dalakian and Iapicca were not asked to perform the duties required of them as teaching staff members under the Collective Bargaining Agreement between petitioner and the Board, which consist of 25 to 30 periods per week, occurring within a seven-hour work day, 184 days per year. Instead, they were asked to perform the duties associated with their extracurricular positions, and no prohibition on performing such duties on a public holiday is included in the statute.[3] Furthermore, *N.J.S.A.* 18A:25-3 provides that a board of education may not reduce a teaching staff member's salary "by reason of the fact that such a public holiday happens to be a school day." As the ALJ properly concluded, the plain language of the entirety of the statute protects teaching staff members from having to perform their regular duties on a school day. There is nothing in the statute that allows individuals who have accepted stipends to supervise extracurricular activities to decline to perform duties that fall on a public holiday that is not a school day. Petitioner's arguments to the contrary are reiterations of arguments made as part of its motion for summary decision, and the Commissioner finds that they were appropriately rejected by the ALJ, for all the reasons thoroughly outlined in the Initial Decision.

[3] For similar reasons, petitioner's argument that any contract requiring them to perform their duties on a public holiday is void is unavailing. *N.J.S.A.* 18A:25-3 pertains to contracts for teaching staff members, such as the Collective Bargaining Agreement, rather than contracts for extracurricular positions.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelina Allen McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 28, 2020
Date of Mailing: December 29, 2020

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

295-20

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	DOE DOCKET NO. 185-8/20
between	
BOARD OF EDUCATION OF THE PRINCETON PUBLIC SCHOOLS,	
Petitioner,	**CONSENT AWARD**
-and-	
ANGEL FUENTES PESQUERA,	
Respondent	

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE OF CONSENT AWARD: December 21, 2020

APPEARANCES:

For the Petitioner:

Vittorio S. LaPira, Esq., FOGARTY & HARA

For the Respondent:

Arnold M. Melk, Esq., MELK O'NEILL

WHEREAS, following the preferring of tenure charges by Petitioner to the Commissioner of Education the undersigned was designated as Arbitrator by the DOE Bureau of Controversies and Disputes on September 10, 2020; and

WHEREAS, counsel subsequently agreed to hold the arbitration proceedings in abeyance, pending the receipt of the related and redacted file in the DCF matter, with an extension of the original 45 day period granted by the DOE until December 8, 2020; and

WHEREAS, following the propounding of interrogatories, motion practice and an exchange of documents, opening arguments by counsel were received on December 8, 2020; and

WHEREAS, a settlement offer was later proffered by Respondent and ultimately accepted and adopted by Petitioner Princeton Board of Education at its December 15, 2020 regularly scheduled meeting; therefore

BE IT RESOLVED, that the attached SETTLEMENT AGREEMENT, the terms of which are incorporated by reference herein, and as memorialized by the December 16, 2020 correspondence from Business Administrator/Board Secretary Matt Bouldin, is accepted in full and final resolution of the instant tenure charges which have now been mooted, with a recommendation made to the DOE that the same be adopted, as it complies with the *Cardonick* criteria set forth at N.J.A.C. 6A:3-5.6a, et seq.

Dated: December 21, 2020
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQUIRE
ARBITRATOR

STATE OF NEW JERSEY
SS)
COUNTY OF HUDSON

ON THIS 21ST DAY OF DECEMBER, 2020, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

ANGELICA SANTOMAURO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 7/29/2024

In the Matter of the Tenure Hearing of Ángel Fuentes-Pesquera

PRINCETON BOARD OF EDUCATION	
- and -	
ÁNGEL FUENTES-PESQUERA	**Settlement Agreement**

This Settlement Agreement is made and entered into this 15th day of December, 2020, by and between the Princeton Board of Education, with offices located at 25 Valley Road, Princeton, New Jersey, 07652 ("Board") and Ángel Fuentes-Pesquera, ("Fuentes"), who resides at 114 Lawrence Street, New Brunswick, New Jersey 08901.

WITNESSETH:

WHEREAS, the Board has employed Fuentes as a teacher since the 2012-2013 school year; and

WHEREAS, certain employment issues have arisen between the Board and Fuentes, resulting in the Board certifying tenure charges against Fuentes and filing them with the New Jersey Commissioner of Education in August 2020;

WHEREAS, the parties have determined it is in their mutual interests to conclude the employment relationship; and

WHEREAS, Fuentes has indicated a willingness to resign from all employment with the Board effective at the close of business on June 30, 2021, upon satisfaction of certain terms and conditions to be stipulated in this Settlement Agreement ("Agreement"); and

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promise, and in exchange for the consideration more particularly set forth below, it is hereby agreed:

1. **Continued Suspension from Employment.** Fuentes shall remain suspended from employment through the close of business on June 30, 2021 and shall not have any professional responsibilities as a staff member during his suspension. Fuentes agrees that during the period of his suspension, he shall not be present on any of the Board's campuses without the express written consent of the Superintendent.

2. **Resignation.** In return for full compliance with this Agreement and subject to formal Board approval and ratification of the Agreement, Fuentes agrees to sign an irrevocable letter of resignation from all employment with the Board, to be effective at the close of business on June 30, 2021, which shall be in the form attached hereto as Exhibit 1. The Board shall, by Resolution, accept Fuentes's resignation at its next regularly scheduled meeting on December 15, 2020. Said resignation is effective only upon the full terms and conditions of the Agreement being accepted by Resolution of the Board, and is only then binding upon the parties and irrevocable and is not subject to modification or rescission. Fuentes agrees that, upon the execution of this Agreement and as a result of his resignation, he shall forfeit all tenure and seniority rights he has to any position with the Board.

3. Settlement Terms. In consideration for Fuentes's resignation as set forth in Paragraph 2 of this Agreement and the waiver and release as set forth in Paragraph 7 of this Agreement, the Board, by and through this Agreement, shall reinstate Fuentes to active pay status on the payroll effective January 1, 2021, and shall pay Fuentes from that date forward through the close of business on June 30, 2021, consistent with his annual salary, prorated for the partial year of service. Fuentes shall receive such salary payments biweekly in accordance with the payment schedule for teaching staff members, including all reductions for mandatory taxes, pension, health benefit payment, and/or any other deductions required by his employment with the Board. It is expressly understood that any personal leave, sick leave, pay for accumulated sick and personal leave and any other financial remuneration to which Fuentes is otherwise entitled under the Collective Negotiations Agreement shall be subsumed during his suspension, and he shall not be entitled to the cash equivalent. No further leaves shall accrue during his suspension. Fuentes shall not be entitled to any other financial remuneration except as specifically set forth in this Paragraph.

4. Medical Insurance. Effective January 1, 2021, Fuentes shall receive either health benefits, or any applicable health care waiver, available to any other employee on an annual basis pursuant to the parties' applicable collective negotiations agreement (subject to all appropriate required contributions toward the annual premium costs) through the close of business on June 30, 2021. Nothing contained within this Agreement shall alter Fuentes's rights to continuation of health insurance through federal law—i.e., the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA")—upon separation from employment with the Board as of the date that coincides with the date that Fuentes no longer receives health insurance as provided by the Board.

5. No Admission. This Agreement is the compromise of disputed claims and shall never be treated as an admission of liability or wrongdoing by either party for any purpose. All parties shall bear their own attorneys' fees and costs for the entirety of any matter or matters related to the subject matter of this Agreement, except that nothing in this Agreement or the documents referenced herein shall preclude either party from seeking attorneys' fees and costs in an action to enforce performance of any term of this Agreement should there be a default in performance.

6. Mooting of Tenure Charges. The parties acknowledge and agree that this Agreement moots the matter captioned *In the Matter of the Tenure Charges of Angel-Fuentes Pesquera, Princeton Public Schools Board of Education, Mercer County,* New Jersey Department of Education Agency Dkt. No.185-8/20. Upon the Board's approval of this Agreement, the parties shall mutually submit this Agreement to statutorily appointed arbitrator Michael J. Pecklers, Esq., for approval pursuant to N.J.A.C. 6A:3-5.6. Mr. Pesquera acknowledges that he has been provided with the notification required by N.J.A.C. 6A:3-5.6(a)(6).

7. Mutual Releases. Fuentes hereby knowingly and voluntarily releases, waives, acquits, disclaims, and forever discharges the Board (including its members, officers, employees, administrators, agents, and servants), from any and all claims of which he knows or could have known, and from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies, or any other proceedings with any administrative agency or any court or any other forum, under any federal, state, or local laws or regulations, including but not limited to claims arising under the Americans with Disabilities Act, the Fair Labor Standards Act, the Employee

Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967 as amended, and including the Older Workers Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, New Jersey Wage and Hours law, New Jersey Statutes Title 18A, Education, and/or any other federal, state, or local employment, human rights, civil rights, wage hour, tenure, pension, or labor law, rule, statute, regulation, constitution, or ordinance, and/or public policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract, collective negotiations agreement or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, constructive discharge, common-law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, or any action similar thereto against the Board including any claim for attorneys' fees, that he, his heirs, executors, administrators, successors, and assigns now have, ever had, or may hereafter have of which he now knows or could have known based upon any conduct arising out of his employment with the Board. Specifically exempted from this Release are any claims for health insurance continuation coverage under and pursuant to COBRA, the New Jersey Workers Compensation Act, any claim to unemployment benefits to which a party may be entitled and any claim to statutory indemnity from the Board pursuant to N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1. This paragraph is not intended and shall not preclude Fuentes from instituting proceedings seeking to enforce the terms of this

Agreement should there be a default in performance. The Board and its individual members, officers, employees, administrators, agents, servants and representatives, hereby similarly release and waive any and all claims and rights which the Board may have against Fuentes for claims resulting from anything which are known or could be known to the Board at the present time.

8. No Interference. Each party shall be free from interference, direct or indirect, by the other and neither shall disparage the other party, nor shall they discuss with, disclose to, or communicate with anyone the terms of this Agreement, except their attorneys or accountants who shall hold such communication as confidential, or as may be required by law. The Board shall be required to adopt a public resolution approving this Agreement and each of the documents which are incorporated by reference in said Agreement.

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

10. Full Understanding. The parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion, or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions and understand them clearly; that the provisions

embodied in this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised or which could have been raised in any litigation.

11. Opportunity to Consult with Counsel. Both parties acknowledge that they have consulted with an attorney of their own choosing prior to signing this Agreement and that they sign this Agreement as their own voluntary act and deed and fully understand the duties and obligations enumerated herein.

12. Severability. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any federal or state law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

13. Materiality, Modifications, and/or Waivers. All terms of this Agreement are deemed to be material. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable only if made in writing and executed with the same formality as this Agreement. The failure of any party to insist upon the strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature or of a continuation of an existing default.

14. Knowing and Voluntary Acknowledgement. Fuentes specifically agrees and acknowledges that: (a) Fuentes has read this Agreement in its entirety and understands all of its terms; (b) Fuentes has been advised of and has availed himself of his right to consult with his attorneys prior to executing this Agreement; (c) Fuentes knowingly, freely, and voluntarily assents to all of its terms and conditions including, without limitation, the release

language set forth herein; (d) Fuentes is executing this Agreement, including the release, in exchange for good and valuable consideration in addition to anything of value to which he is otherwise entitled; and that (e) Fuentes is not waiving or releasing any rights or claims that may arise after his execution of this Agreement.

15. Notice of Time to Consider Agreement. Fuentes has been advised that, prior to waiving claims he may have under the Age Discrimination in Employment Act, he may take up to twenty-one calendar days to consider this Agreement before signing. In the event this Agreement is signed prior to the expiration of twenty-one days, Fuentes acknowledges that he has voluntarily and knowingly agreed to waive any entitlement to take twenty-one days to consider this Agreement for the purpose of expediting the settlement and that he has had a reasonable period of time within which to consider the Agreement.

16. Notice of Time for Revocation; Effective Date. Fuentes understands that he may revoke this Agreement during the seven calendar days following the day he executes this Agreement. Revocation may be made by delivering a written notice of revocation by mail or hand delivery to: Princeton Board of Education, Attn: Beth Behrend, Board President, 25 Valley Road, Princeton, New Jersey 08540. This Agreement shall become effective on the day after the seven-day Revocation Period has expired ("Effective Date"), unless timely notice of Fuentes's revocation has been delivered to the Board.

17. Governing Law. This Agreement shall be subject to the laws of the State of New Jersey, without regard to its choice-of-law principles.

18. Ratification. This Agreement is subject to ratification by the Board and is without prejudice to any party if the terms are not agreed upon. It shall become effective only upon the ratification by and approval of the Board.

19. Section Headings. Section headings are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement.

20. Counterparts. This Agreement may be signed in counterparts which, taken together, shall constitute but a single document when executed by all parties. This Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

IN WITNESS WHEREOF, the parties set their hands and seals to this Agreement effective on the day and year first written above.

Princeton Board of Education

Beth Behrend
Beth Behrend (Dec 16, 2020 14:36 EST)

Beth Behrend
Board President

Dated: Dec 16, 2020

Witness:

Matthew Bouldin
Business Administrator/
Board Secretary

Dated: Dec 16, 2020

Ángel Fuentes-Pesquera

Ángel Fuentes-Pesquera

Ángel Fuentes-Pesquera

Dated: 12-15-2020

Witness:

Dated: 12-15-2020

Exhibit 1

Mr. Ángel Fuentes-Pesquera
114 Lawrence Street
New Brunswick, New Jersey 08901

December ___, 2020

Ms. Beth Behrend
President
Princeton Board of Education
25 Valley Road
Princeton, New Jersey, 08540

Re: Letter of Resignation

Dear Ms. Behrend:

I hereby submit my irrevocable resignation from all employment with the Princeton Board of Education effective at the close of business on June 30, 2021, subject to the terms of the Settlement Agreement executed simultaneously herewith and which are incorporated herein by reference.

Sincerely,

Angel R. Fuentes-Pesquera

Ángel Fuentes-Pesquera

[58-Hoorn...18.DOCX /2]

AFP Settlement Agreement (Princeton BOE)

Final Audit Report 2020-12-16

Created:	2020-12-16
By:	Vittorio LaPira (vlapira@fogartyandhara.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAgpJQydnu5I3sOqmbuYOKaDonsAbx4uVS

"AFP Settlement Agreement (Princeton BOE)" History

Document created by Vittorio LaPira (vlapira@fogartyandhara.com)
2020-12-16 - 7:28:04 PM GMT- IP address: 72.76.102.34

Document emailed to Beth Behrend (bethbehrend@princetonk12.org) for signature
2020-12-16 - 7:28:56 PM GMT

Email viewed by Beth Behrend (bethbehrend@princetonk12.org)
2020-12-16 - 7:35:39 PM GMT- IP address: 96.248.74.205

Document e-signed by Beth Behrend (bethbehrend@princetonk12.org)
Signature Date: 2020-12-16 - 7:36:15 PM GMT - Time Source: server- IP address: 96.248.74.205

Document emailed to matthew bouldin (matthewbouldin@princetonk12.org) for signature
2020-12-16 - 7:36:17 PM GMT

Document e-signed by matthew bouldin (matthewbouldin@princetonk12.org)
Signature Date: 2020-12-16 - 7:47:24 PM GMT - Time Source: server- IP address: 69.136.103.21

Agreement completed.
2020-12-16 - 7:47:24 PM GMT